

**JUDICIAL COUNCIL OF CALIFORNIA
ADMINISTRATIVE OFFICE OF THE COURTS**

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Report

TO: Members of the Judicial Council

FROM: Advisory Committee on Civil Jury Instructions
Hon. H. Walter Croskey, Chair
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DATE: July 24, 2007

SUBJECT: Civil Jury Instructions: Approve Publication of Revisions (Cal. Rules of Court, rule 2.1050) (Action Required)

Issue Statement

The Advisory Committee on Civil Jury Instructions has drafted and approved new and revised *California Civil Jury Instructions (CACI)*. *CACI* was first published in September 2003.

Recommendation

The advisory committee recommends that the Judicial Council, effective August 31, 2007, approve for publication under rule 2.1050 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the revisions will be officially published in a new supplement to the 2007 edition of *CACI*.

A table of contents and the text of the proposed revisions to the civil jury instructions are attached.

Rationale for Recommendation

The Advisory Committee on Civil Jury Instructions is charged with maintaining and updating the *CACI* instructions. The council approved the committee's last update at its April 2007 meeting.

The advisory committee drafted and edited the revisions in this proposal and circulated them for public comment. The official publisher (LexisNexis Matthew Bender) is preparing to publish print, HotDocs document assembly, and online versions of the new and revised instructions once they are approved by the council.

The following eight instructions and verdict forms are revised for this release: 2505, VF-2504, 3940, 3942, 3943, 3945, 3947, and 3949. Additionally, a new series of 16 instructions for use in unlawful detainer actions is included.¹

Punitive Damages

The advisory committee has revised the six punitive damages instructions in response to the February 20, 2007 decision of the United States Supreme Court in *Philip Morris USA v. Williams* (2007) 549 U.S. ___ [127 S.Ct. 1057]. In this case, the Court severely limited a jury's discretion to consider harm to nonparties in determining the amount of punitive damages to be awarded, and it emphasized the importance of providing proper limiting jury instructions on the point.²

The committee determined that the issue was of such importance that it should be brought to the council as soon as possible.³ On May 24, the full committee approved the revisions, which were then posted for public comment.⁴

The committee made only two minor, nonsubstantive changes in response to the public comments, as indicated in the accompanying chart. Many of the comments received addressed issues that were not raised by *Philip Morris v. Williams*. Some of these issues may have merit, but do not require urgency. The committee will address these issues in its next meeting cycle.

Of the comments pertinent to *Philip Morris v. Williams*, the principal suggestion was to include language that would expressly clarify how harm to nonparties may be considered

¹ At its October 20, 2006 meeting, the Judicial Council delegated to its Rules and Projects Committee (RUPRO) the final authority to approve nonsubstantive technical changes to jury instructions and corrections and minor substantive changes unlikely to create controversy. The council also gave RUPRO the authority to delegate to the jury instructions advisory committees the authority to review and approve nonsubstantive grammatical and typographical corrections and other similar changes to the jury instructions, which RUPRO has done.

Under the implementing guidelines that RUPRO approved on December 14, 2006, RUPRO has the final authority to approve (among other things) additional cases and statutes in the Sources and Authority section and additions or changes to the Directions for Use. RUPRO has already given final approval to five instructions that have only these changes.

² The six instructions revised all include the standards to guide the jury in considering punitive damages. The same change was made to all six instructions.

³ The committee received several inquiries from courts and counsel regarding its response to the *Philip Morris* case and when it would have revisions with final approval.

⁴ On May 23, 2007, the California Supreme Court transferred *Bullock v. Philip Morris USA Inc.* (S143850) to the Court of Appeal, Second Appellate District, Division Three, with directions to vacate its decision and to reconsider the cause in light of the U.S. Supreme Court's decision in *Phillip Morris USA v. Williams*. (*Bullock v. Philip Morris USA, Inc.* 2007 Cal. LEXIS 5301.) As the committee chair Justice H. Walter Croskey is a member of this panel, he recused himself from any further activity involving the public comments to the proposed revisions to these instructions.

in determining the reprehensibility of the defendant's conduct. The committee had considered this idea at some length. The committee's conclusion was that because the United States Supreme Court did not approve or suggest any particular language for this purpose, it would be best to not attempt such an addition. The current instructions permit consideration of a defendant's (1) disregard of the health and safety of others and (2) pattern or practice. The committee believes that this language leaves sufficient room for the plaintiff to present harm to others for the limited purpose of proving reprehensibility.

Unlawful Detainer

The advisory committee also proposes the adoption of a new series of instructions for use in unlawful detainer actions. The committee first approved the proposed new series at its May 2006 meeting and circulated it for public comment in December 2006. The committee received many comments from attorneys representing both landlords and tenants and from organizations advocating for tenants' rights. The committee made numerous revisions as indicated in the accompanying chart.

At its May 24 meeting, the committee approved the new series and also determined that the views of the many commentators had been fully considered and that no further public comment period was required.

Fair Employment and Housing Act (FEHA)

The committee also proposes council approval of revisions to the FEHA instruction and verdict form on retaliation (CACI Nos. 2505 and VF-2504). At its February 2007 meeting, the committee had approved revisions to numerous FEHA instructions, which were then circulated for public comment in March. Based on several comments received, the committee determined that only three of the instructions were ready for adoption. The Judicial Council approved those three instructions at its April 27 meeting. At its May 24 meeting, the committee approved modifications to the instruction and verdict form on retaliation and also determined that the views of the commentators had been fully considered and that no further public comment period was required. Five additional FEHA instructions have been deferred to the next regular cycle for full reconsideration.

Alternative Actions Considered

Rule 10.58 of the California Rules of Court requires the advisory committee to update, amend, and add topics to *CACI* on a regular basis and to submit its recommendations to the council for approval. The proposed new and revised instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative action.

Comments From Interested Parties

As noted above, all instructions and verdict forms included in this release were circulated for public comment. The committee received a number of comments, evaluated them,

and made changes to the instructions based on the recommendations. A chart summarizing the comments and the committee's responses is attached at pages 5–42.

Implementation Requirements and Costs

Implementation costs will be minimal. Under the publication agreement, LexisNexis Matthew Bender as the official publisher will publish the new and revised instructions in a supplement to the 2007 edition and make it available in print to all judicial officers free of charge. Lexis's HotDocs document assembly software will also be updated to include the new and revised instructions. The AOC will register the copyright in this work. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC will provide a broad public license for their use and reproduction. With respect to commercial publishers, the AOC will continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters.

Attachments

Judicial Council of California Civil Jury Instructions (CACI07-02)

Instruction	Commentator	Summary of Comments	Committee Response
<p>2505 Retaliation (Fair Employment and Housing Act (FEHA))</p>	<p>California Employment Lawyers Association (CELA) by Jeffrey Winikow on behalf of organization</p>	<p>Suggested Modification: Retaliation cases based upon a pattern of conduct differ from cases based on a discrete event such as discharge or demotion. Just as there are separate instructions for harassment claims and discrimination, the committee should consider crafting separate instructions for the two types of retaliation claims.</p> <p>If there is going to be a single instruction, CELA suggests moving element 4 to below element 2, and putting an “or” between the two choices. Juries should be instructed on element 2 in a discharge/demotion case, but instructed on element 4 in cases based on a pattern of retaliatory conduct.”</p> <p>“CELA also has some suggestions to modify and/or simplify the language, so that the pertinent part of the instruction would read:</p> <p>2. That [Name of Defendant] [discharged/demoted] [Name of Plaintiff]; or That [Name of Defendant’s] retaliatory conduct, taken as a whole, materially and adversely affected the terms and conditions of [Name of Plaintiff’s] employment;”</p> <p>In the Directions for Use, parties are apparently being required to set forth specifically all adverse employment actions alleged. When a case is based</p>	<p>The committee does not think separate instructions are necessary, but it made some modifications to make it clearer what language should be used in a non discharge/demotion case (see response to comment immediately below).</p> <p>The committee agreed with the comment and made what was element 4 a second option for element 2.</p> <p>The committee agreed to revise the language as requested by the commentator, but with minor changes.</p> <p>The committee modified element 2 and the Directions for Use to reflect that specification of all adverse employment actions is not</p>

Judicial Council of California Civil Jury Instructions (CACI07-02)

Instruction	Commentator	Summary of Comments	Committee Response
		<p>on a pattern of retaliatory activity comprised of a dozen or more separate acts, listing each act separately not only detracts from the type of “totality of circumstances” approach to retaliation law developed under <i>Yanowitz v. L’Oreal USA, Inc.</i> (2005) 36 Cal.4th 1028. CELA suggests that in cases not involving discharge or demotion, element 2 should refer only to a pattern of retaliation without specifying each and every act that contributed to the retaliatory working environment.</p> <p>Given that the legal standards in a retaliation case are governed by <i>Yanowitz</i>, supra, including a citation to <i>Thomas v. Dep’t of Corrections</i> (2000), 77 Cal.App.4th 507 increases the chance that a trial court will give erroneous instructions. Indeed, <i>Yanowitz</i> overruled <i>Thomas</i> on the very point articulated in the “Sources and Authorities.” Juries and courts should not, as <i>Thomas</i> suggests, analyze each retaliatory act in isolation, but must critically examine a pattern of activity under a totality of circumstances microscope.</p>	<p>required.</p> <p>The committee believes the citation to <i>Thomas</i> should be retained. <i>Yanowitz</i> does not overrule <i>Thomas</i>. The two cases create a contrast on their facts: conduct that is sufficient (<i>Yanowitz</i>) and conduct that is insufficient (<i>Thomas</i>).</p>
2505 Retaliation (Fair Employment and Housing Act (FEHA))	Philip Edward Kay, Attorney at Law, San Francisco	The committee has proposed an additional element (4) based on <i>Yanowitz v. L’Oreal USA, Inc.</i> (2005) 36 Cal 4th 1028, which actually broadened the ability of plaintiffs to bring claims for retaliatory conduct short of “ultimate employment actions.” Appropriately viewed, this provision protects an employee against unlawful discrimination as to not	The committee made former element 4 a second option for element 2 and added “taken as a whole” to that option. It believes this is sufficient to address the <i>Yanowitz</i> standards.

Judicial Council of California Civil Jury Instructions (CACI07-02)

Instruction	Commentator	Summary of Comments	Committee Response
		only to ultimate employment actions such as termination or demotion, but also to any action that ise reasonably likely to adversely affect job performance or opportunity for advancement. By culling the language (out-of-context) from <i>Yanowitz</i> , the proposed change will greatly increase the burden on plaintiffs, which is clearly not the intent of the <i>Yanowitz</i> decision.”	

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Instruction	Commentator	Summary of Comments	Committee Response
3940, 3942, 3943, 3945, 3947, 3949 (Punitive Damages instructions)	Orange County Bar Association, by Joseph L. Chairez, President, on behalf of organization	Agree	No response required
3940, 3942, 3943, 3945, 3947, 3949 (Punitive Damages instructions)	Hon. Alan S. Rosenfield, Judge of the Superior Court, Los Angeles County	Agree	No response required
3940, 3942, 3943, 3945, 3947, 3949 (Punitive Damages instructions)	Superior Court of California, Los Angeles County, by Janet Garcia, Court Manager Planning and Research Unit on behalf of court	Agree	No response required
3940, 3942, 3943, 3945, 3947, 3949 (Punitive Damages instructions)	Superior Court of California, San Diego County, by Mike Roddy, Court Executive Officer, on behalf of court	Agree	No response required
3940, 3942, 3943, 3945, 3947, 3949 (Punitive Damages instructions)	Elizabeth J. Cabraser Lieff, Cabraser, Heimann & Bernstein, San Francisco	The proposed addition to the current April 2007 instructions to the effect that: “Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/it] alleged misconduct on persons other than [name of plaintiff],” will likely be argued by counsel, and believed by juries to	The committee believes that the additional language is compelled by <i>Philip Morris v. Williams</i> (2007) 549 U.S. __ [127 S.Ct. 1057]

Judicial Council of California Civil Jury Instructions (CACI07-02)

Instruction	Commentator	Summary of Comments	Committee Response
		<p>remove evidence of actual harm to nonparties from the jury’s consideration under reprehensibility. Since frequently the harm to others, i.e., repeated actions, is the best evidence of reprehensibility when it has occurred prior to the injury for which punitive damages are sought, the revised instruction as proposed runs the risk of confusing juries as to the evidence they may consider.</p> <p>The current proposed revisions to the CACI instructions arguably remove the consideration of harm to others from the reprehensibility prong, because they do not expressly state that a jury could consider harm to others as it relates to reprehensibility. Therefore, in order to avoid confusion by judges, jury, and counsel, the instruction should expressly explain when a jury can appropriately consider harm to others. As such, we propose that the revisions to subsection (b) be as follows:</p> <p>“You may consider the extent of harms suffered by others in determining what the reasonable relationship is between [name of defendant]’s punishable misconduct and the harm caused to [name of plaintiff]. However, punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff].”</p>	<p>This is one of three comments that propose specific language to state a rule for when “harm to others” may be considered (for reprehensibility) and when it cannot (to punish) (see also comments of Robert S. Peck and State Bar Committee on the Administration of Justice).</p> <p>The committee considered this idea at some length. It decided that <i>Philip Morris v. Williams</i> requires that the jury be instructed on when harm to others cannot be considered, but not necessarily on when it can. The committee believes that (a)(2), on disregard of health or safety of others, and (a)(4), on pattern and practice, give adequate room for the plaintiff to argue harm to others as an element of reprehensibility. The committee feels that</p>

Judicial Council of California Civil Jury Instructions (CACI07-02)

Instruction	Commentator	Summary of Comments	Committee Response
		<p>“As an alternative, the committee could include in subsection (a) the following text:</p> <p>“Evidence of actual harm to persons other than [name of plaintiff] can help to show that the conduct that [allegedly] harmed [name of plaintiff] also posed a substantial risk of harm to the general public, and so was particularly reprehensible.” This text is taken from <i>Williams</i>. Doing so would ensure that no juror mistakenly believed that prior acts and injuries could not be considered as repeated actions as they relate to reprehensibility.</p>	<p>language such as that proposed by the commentator would be more confusing than helpful to the jury.</p> <p>The committee considered this approach at some length, but decided that (a)(2), on disregard of health or safety of others, and (a)(4), on pattern and practice, give adequate room for the plaintiff to argue harm to others as an element of reprehensibility.</p>
3940, 3942, 3943, 3945, 3947, 3949 (Punitive Damages instructions)	California Employment Lawyers Association (CELA), by Jeffrey Winikow on behalf of organization	<p>Under the proposed punitive damages instructions, the notion of potential harm remains as part of the bracketed instructions, yet, the advisory committee seeks to remove the Directions for Use comments concerning this aspect of the punitive damage scheme. CELA urges the committee to retain these comments in order to ensure that juries are properly instructed on this point.</p> <p>CELA suggests that the committee strike out the sentence in (c) about jurors not assessing punishment above that which is otherwise appropriate because of wealth, leaving that as an</p>	<p>The option to include “potential harm” is expressed elsewhere in the Directions for Use. The committee moved the reference to <i>Sierra Club Found. v. Graham</i> (1999) 72 Cal. App. 4th 1135 to the Sources and Authority.</p> <p>The committee did not make any changes. It believes that subsection (c) is a clear and accurate statement of the law as expressed in <i>State Farm v. Campbell</i>.</p>

Judicial Council of California Civil Jury Instructions (*CACI07-02*)

Instruction	Commentator	Summary of Comments	Committee Response
		<p>issue for the courts to review on post-trial motion. In the alternative, the instructions could merely provide the following:</p> <p>“You may not award grossly excessive punitive damages simply because [Defendant] has substantial resources.”</p> <p>The ultimate responsibility for ensuring that juror awards comport with principles of constitutional due process belongs with the courts. Yet, in an effort to achieve prophylactic compliance with some of the Supreme Court cases, the <i>CACI</i> instructions seek to inform jurors that jurors can consider wealth, but should not somehow assess punishment any differently because of that wealth. This can only have one intended effect: to keep jurors from assessing meaningful punitive awards against ultra-wealthy defendants.</p>	

Judicial Council of California Civil Jury Instructions (CACI07-02)

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3940, 3942, 3943, 3945, 3947, 3949 (Punitive Damages instructions)	Harvey Frey, Santa Monica, Director, Health Administration Responsibility Project, Inc.	<p>It is unreasonable to tell jurors that “there is no fixed standard for determining the amount of punitive damages,” when the U.S. Supreme Court has imposed drastic restrictions (i.e. “rarely more than single digit factor”).</p> <p>Juries might decide on an amount they feel the plaintiff should be awarded, and then allocate it to various categories of damages, only to find that some of what they wanted to give will be disallowed, based on rules they weren't informed of. We see this when juries are not informed of MICRA caps, and find their awards slashed by the court. I believe it is unjust and dishonest to “hide the ball” from the jury in this way.</p> <p>The Supreme Court guidelines should be included in the instructions.</p>	<p>The committee has changed “no fixed standard” to “no fixed formula.”</p> <p>The committee believes that the instructions fully set forth the Supreme Court guidelines.</p>
3940, 3942, 3943, 3945, 3947, 3949 (Punitive Damages instructions)	Robert S. Peck, Center for Constitutional Litigation, Washington D.C., Counsel for Mayola Williams before the United States Supreme Court	<p>In this particularly difficult and still unsettled area of law, it is especially challenging to assure that jury instructions reflect the various subtle nuances contained in the most recent appellate decisions. At the same time, it is easy to craft distinctions that reflect those caveats and limitations that the case law demands but, in the process, neglect some more basic information that a jury should have.</p> <p>The current draft does a reasonable job of balancing both those needs. Still, it</p>	<p>Only the changes compelled by <i>Philip Morris v. Williams</i> have been considered at this time. The committee will consider this comment in its next cycle.</p>

Judicial Council of California Civil Jury Instructions (CACI07-02)

Instruction	Commentator	Summary of Comments	Committee Response
		<p>overemphasizes the limitations on punitive damages without fully conveying its permissible uses. The instructions quite properly reflect the punishment and deterrence purposes that punitive damages are designed to serve, but do not explain why the factors that determine the scale of reprehensibility is important and that reprehensibility predominates over the reasonable relationship issue as a guidepost. The proposed instructions appear to treat them as equal considerations, which they are not.</p> <p>Factor (a)(4) departs from the Supreme Court’s language in <i>State Farm v. Campbell</i> (2005) 538 U.S. 408 by using the term “pattern or practice” instead of “repeated actions.” The two terms do not seem coextensive. A “pattern or practice” is misbehavior that takes place over a longer period of time and more consistency in the misconduct than does “repeated actions.” Thus, “repeated actions” conveys to a jury that a detestable action that occurs more than once is more reprehensible than one that is merely an isolated incident.</p> <p>It is not apparent from the language of the instruction that the reprehensibility factors should assist the jury in assessing the reprehensibility of the misconduct and not be treated as separate criteria that must be met. The nonexclusive use of the factors in determining the scale of</p>	<p>Only the changes compelled by <i>Philip Morris v. Williams</i> have been considered at this time. The committee will consider this comment in its next cycle.</p> <p>The committee did not make the suggested change. The language “you may consider, among other factors” adequately expresses the role of the factors.</p>

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Instruction	Commentator	Summary of Comments	Committee Response
		<p>reprehensibility needs to be made explicit.</p> <p>The jury should be instructed that the “reasonable relationship” that they should consider concerns the proportionality of the punitive damages to the offense. Even then, the U.S. Supreme Court has advised, that a larger award may be merited when the compensatory damages awarded are small, (<i>State Farm, supra</i>, 538 U.S. at 425) if the monetary value of the harm is difficult to determine, when the injury is hard to detect, and when the defendant is a recidivist who has engaged in repeated misconduct of the sort that injured the plaintiff (<i>Id.</i> at p. 423).</p> <p>Other courts have added the following factors, which you may want to consider: if the misconduct is lucrative or potentially so [<i>Mathias v. Accor Economy Lodging, Inc.</i> (7th Cr. 2003) 347 F.3d 672, 676]; if wealth enables the defendant to mount an extremely aggressive defense so as to make litigating against it very costly [<i>id.</i> at 677]; and if the misconduct is extremely reprehensible. [<i>Williams v. ConAgra Poultry Co.</i> (8th Cir. 2004) 378 F.3d 790, 799].</p> <p>An instruction that advised the jury on the proper and improper use of harm to other based on <i>Philip Morris v. Williams</i> might look like this:</p>	<p>Only the changes compelled by <i>Philip Morris v. Williams</i> have been considered at this time. The committee will consider this comment in its next cycle.</p> <p>As a general rule, the committee does not include points supported only by federal appellate court cases other than those of the Ninth Circuit.</p> <p>See response to comment of Elizabeth Cabraser on this point.</p>

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Instruction	Commentator	Summary of Comments	Committee Response
		<p>“To the extent that evidence you heard has convinced you that the defendant engaged in misconduct that warrants punitive damages and that misconduct harmed others who are not parties to this litigation, you may consider that harm only for some purposes and not others. You are permitted to consider the extent of harm suffered by others to determine whether the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public. Where there was such a substantial risk of harm to others, that conduct is more reprehensible than conduct that harmed only a single plaintiff. That does not mean that conduct resulting in no harm to others may not also pose a grave risk to the public. As a jury, you must determine whether there was a greater risk. Keep in mind that the more reprehensible the misconduct the higher the punitive damage award should be, in order to reflect the gravity of the offence.</p> <p>“However, I must caution you not to use punitive damages to punish for the impact of the misconduct on others. Such other people may bring their own lawsuits and there may be defenses to those lawsuits that do not exist in this one. This plaintiff should not be awarded damages that reflect the harms people who are not in this lawsuit may have suffered. This means that you may not multiply the harm visited upon this plaintiff by the number of presumed other victims.</p>	

Judicial Council of California Civil Jury Instructions (CACI07-02)

Instruction	Commentator	Summary of Comments	Committee Response
		<p>defendant’s course of misconduct is relevant to the degree of reprehensibility: Neither the fourth reprehensibility factor stated in <i>State Farm</i>, whether the conduct involved repeated actions or was an isolated incident, nor the fourth factor, whether the defendant’s conduct involved a pattern or practice, fully expresses the rule from <i>Johnson</i>. “Pattern or practice” seems to capture what <i>Johnson</i> intended by “frequency” or “scale.” What is missing from the instruction, however, is some reference to profitability.</p> <p>CAJ recommends modifying item 4 in (a) as follows:</p> <p>“4. Whether [<i>name of defendant</i>]’s conduct involved a pattern or practice, and the <u>profitability of that conduct to [<i>name of defendant</i>]</u>; and”</p> <p>CAJ discussed the possibility of adding a separate item for profitability alone, but concluded that “frequency and profitability” or “scale and profitability” were repeatedly expressed together in <i>Johnson</i>, and therefore should be expressed together in item 4 in a similar manner.</p> <p>CAJ recommends creating a new (b) that reads as follows (and relettering current (b) and (c) as (c) and (d)).</p> <p>“[(b) You may consider any harm caused to</p>	<p>See response, above, to comment of Elizabeth Cabraser on this point. See also proposed instruction on harm to others by Robert S. Peck, above.</p>

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Instruction	Commentator	Summary of Comments	Committee Response
		<p>persons other than <i>[name of plaintiff]</i> in determining whether <i>[name of defendant]</i>'s conduct showed <i>[name of defendant]</i>'s indifference to or reckless disregard of the health or safety of others for purposes of determining how reprehensible <i>[name of defendant]</i>'s conduct was, but you may not award punitive damages to punish <i>[name of defendant]</i> directly for alleged harms caused to others.]"</p> <p>The proposed revision adds language to (b) following the statement of the “reasonable relationship” requirement. CAJ does not believe this caution belongs there. The need for the caution arises directly from the jury’s consideration of harm to others with respect to reprehensibility in connection with (a)(2), and does not directly relate to a reasonable relationship between the actual or potential harm and the amount of punitive damages. The jury would better understand the latter requirement if the instruction explained more clearly, and in one place, that harm caused to others can be considered for purposes of reprehensibility but cannot be considered for purposes of imposing punishment. Otherwise, there is a danger that the jury will not understand the relationship between (a)(2) and the no-punishment-for-harm-to-others rule, and that one may cancel the other out, in the jury’s mind.</p>	

Judicial Council of California Civil Jury Instructions (CACI07-02)

Instruction	Commentator	Summary of Comments	Committee Response
4300 Introductory Instruction	East Bay Tenants Bar Association	<p>Proposed alternative language:</p> <p>“This case is called an action for ‘unlawful detainer.’ The Plaintiff has filed the case against the Defendant claiming that the Defendant is unlawfully remaining in the apartment and/or home in which the Defendant lives. The Plaintiff is seeking an order of this court permitting him to evict the Defendant from his or her home.</p> <p>In these instructions, the Plaintiff may be referred to as the ‘landlord’ and the Defendant may be referred to as ‘tenant.’ The tenant’s living quarters, apartment or home may be referred to as the ‘premises.’ ”</p>	<p>The committee agreed to make some changes similar to those proposed by this commentator in response to commentator Jorge Aguilar, below. The committee included the first sentence proposed here. Since CACI uses party names instead of party status words, the second proposed paragraph has not been added.</p>
4300 Introductory Instruction	Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization	<p>The proposed instruction fails to include any language that reflects what is at stake in an unlawful detainer action; that is the recovery of the possession of real property, or in other words, an eviction. The purpose of an unlawful detainer with its special summary proceedings ‘is to recover possession of the premises for the landlord. (<i>Briggs v. Electronic Memories & Magnetics Corp.</i>, (1976) 53 CalApp3d 906; see also <i>Baugh v. Consumer Associates, Ltd.</i> (1966) 241 CalApp2d 672, 674 [remedy of unlawful detainer is a summary proceeding to determine the right to possession of real property].)</p>	<p>The committee agreed with the comment and added some additional background language.</p>

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Instruction	Commentator	Summary of Comments	Committee Response
		<p>While the instruction states that the plaintiff claims that the defendant “no longer has a right to occupy the property,” that is distinct from what is sought: an eviction order to recover possession. The language proposed in this instruction shifts the responsibility from the plaintiff who is pursuing a specific remedy to the tenant who is implied to have lost the right to occupy the premises. The instruction as written clearly benefits the landlord/plaintiff who would prefer to minimize the magnitude of the relief that he or she is seeking.</p>	<p>The committee does not think that the language favors the landlord.</p>
<p>4301 Expiration of Fixed-Term Tenancy— Essential Factual Elements</p>	<p>Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization</p> <p>East Bay Tenants Bar Association</p>	<p>There is no unlawful detainer if a fixed term has not expired. Although element 2 requires a date, in order to eliminate any confusion, the element should also include that the date expired before filing the lawsuit.</p>	<p>The committee sees no possibility for confusion. If the landlord files the action before the term expires, there is little likelihood the case will get to the jury.</p>
<p>4301 Expiration of Fixed-Term Tenancy— Essential Factual Elements</p>	<p>Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization</p> <p>East Bay Tenants Bar Association</p> <p>Eviction Defense</p>	<p>After a lease for a fixed term expires, the parties are presumed to have renewed the lease if the landlord accepts the rent. (Civ. Code § 1945.) Element 3 should require that the landlord not accept rent after the fixed term expired.</p>	<p>The tenant bears the burden of proof on waiver by acceptance of rent, so it cannot be an element of the landlord’s cause of action (see proposed CACI No. 4324).</p>

Judicial Council of California Civil Jury Instructions (CACI07-02)

Instruction	Commentator	Summary of Comments	Committee Response
	Center, Oakland, by Jorge Aguilar II on behalf of organization		
4301, 4302, 4304, 4306	Richard L. Spix, Attorney at Law, Santa Ana	The prima facie instructions do not include any caveat that they are subject to defenses of the tenant.	The committee added language to proposed CACI No. 4300 stating that the tenant is asserting defenses.
4302 Termination for Failure to Pay Rent— Essential Factual Elements	Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization	<p>Plaintiff must allege and prove that the tenant is in default of payment of rent. (Code Civ. Proc. § 1161(2).) Code Civ. Proc. § 1166(a)(4) requires the complaint to state the amount of rent in default.</p> <p>”The instruction should be modified as follows:</p> <p>[Insert new element 2a.] “2a. That [name of defendant] was required to pay [insert amount of rent] per [insert period for payment of rent: e.g. “month.”]</p> <p>[Edit element 3] “3. That [amount of rent due in notice] was the lawful amount of rent due through [time period for the rent due] and that [name of defendant] did not pay this amount when due.”</p> <p>The proposed modifications require the amount of rent that was required by the lease/agreement and the specific amount alleged to be due.</p> <p>Plaintiff is required to serve the notice as provided by Code Civ. Proc., § 1162. In the</p>	<p>The committee agreed and added elements regarding the amount the tenant was required to pay, and that the amount stated in the notice was no more than the amount due, without using the term “lawful amount.”</p> <p>The committee did not make these changes. Proposed CACI No. 4303 requires the</p>

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Instruction	Commentator	Summary of Comments	Committee Response
		<p>complaint, plaintiff must state specifically the method used to serve the defendant. (Code Civ. Proc. §1162.)</p> <p>“Edit element 4] “4. That [name of plaintiff] properly gave [name of defendant] three-days written notice to pay the rent or vacate the property [or that [name of defendant] actually received this notice] on [state date of alleged service of the notice as verified in the complaint.]”</p> <p>[Edit element 5] “5. That [name of defendant] did not pay [or attempt to pay] the rent owed within three days after the date the notice was allegedly served as verified in the complaint.”</p>	<p>specific manner of service used. The curing of insufficient service based on actual receipt does not require the jury to find a particular date on which the notice was received. It is not the date of actual service that starts the three-day period but the date of actual receipt.</p>
4302 Termination for Failure to Pay Rent— Essential Factual Elements	Lawrence Jensen, Attorney at Law, San Jose	Element 4 is not accurate in providing for an option for actual receipt, which is irrelevant unless the tenant admits receipt under <i>Lehr v. Crosby</i> 123 Cal.App.3d Supp 1, 6 n.3.	The committee did not change element 4. <i>Lehr v. Crosby</i> does not require that the tenant admit receipt. It only suggests that evidence of actual receipt is sufficient.
4302 Termination for Failure to Pay Rent— Essential Factual Elements	Todd B. Rothbard, Attorney at Law, San Jose	<p>The instructions should provide for valid service based on actual receipt (rule of <i>Lehr v. Crosby</i>) as set forth in regard to Nos. 4303, 4305, and 4307.</p> <p>Instead of “pay the rent when due” in element 3</p>	<p>The committee does not believe that this language is needed in CACI No. 4302. This instruction presents the elements of termination for nonpayment. Proposed CACI No. 4303 is the instruction on sufficiency and validity of service for nonpayment and includes the <i>Lehr</i> rule.</p> <p>The committee agreed that “amount due”</p>

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Instruction	Commentator	Summary of Comments	Committee Response
		and “pay the rent owed” in element 5, it should be “amount due.” The amount in the three-day notice can include interest and late charges. (See <i>Canal Randolph v. Wilkoski</i> (1978) 78 Cal.App.3d 477, 492.)	should be used in proposed CACI No. 4303 (on the three-day notice), but not in proposed CACI No. 4302. The statutory language for an unlawful detainer in Code Civ. Proc., § 1161(2) is “rent” and for three-day notice it is “amount which is due.” <i>Canal Randolph</i> , cited by the commentator, holds that interest may be included in the three-day notice.
4302 Termination for Failure to Pay Rent— Essential Factual Elements	Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization East Bay Tenants Bar Association	The instruction assumes that the proper amount of rent is set out by the landlord in the notice and jumps to the issue of whether the tenant has paid the rent. The instructions should clarify that the plaintiff must first prove the amount of rent owed before a jury can be asked if the defendant paid the amount.	The committee agreed and added elements regarding the amount the tenant was required to pay, and that the amount stated in the notice was no more than the amount due.
4302, 4304	Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization East Bay Tenants Bar Association	The notice element is deficient because the phrase “properly gave defendant three-days written notice” can be read to require that the notice be free from defects. If the notice is defective on its face, it is irrelevant whether the defendant actually received it. This sentence should be amended to make clear that defective service and not defective content is the focus of this element.	The committee did not make this change. It did not think that the language is misleading. “Properly gave” means that the notice was given as required by law, as clarified in proposed CACI No. 4303.
4302, 4304, 4306	Lawrence Jensen, Attorney at Law, San Jose Todd B. Rothbard, Attorney at law, San Jose	Element 5: courts do not recognize <i>Davidson v. Quinn</i> , so “receipt” should not be an option.	The committee did not make this change. While <i>Davidson</i> is old and from the superior court appellate department, until it is expressly rejected or overruled in a citable opinion, the committee does not believe it can be ignored, even if some courts do not follow it.

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Instruction	Commentator	Summary of Comments	Committee Response
4303 Sufficiency and Service of Notice of Termination for Failure to Pay Rent	Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization	The instruction should state that only rent may be requested in the three-day notice. (Cal.Civ.Proc. §1161(2).) Other alleged debts or amounts may not be incorporated into the demand if it is not rent.	The committee did not make this change. Code Civ. Proc., § 1162(2) uses “the amount which is due.” <i>Canal Randolph v. Wilkoski</i> (1978) 8 Cal.App.3d 477, 492 holds that interest may be included in the three-day notice.
4303 Sufficiency and Service of Notice of Termination for Failure to Pay Rent	Legal Services of Northern California, by John Gianola, Managing Attorney	The instruction should clearly state that an estimated rent notice can only be used in commercial tenancies, and that there is a presumption that a reasonable estimate is no more than 20 percent above or below the actual rent owed. The instruction should also include the additional notice requirements for estimated rent notices. The instruction would be clearer if it were broken into two instructions, one for residential and one for commercial.	The committee added language addressing the 20 percent presumption that arises if an estimated amount due is used in a commercial lease. It did not see a need to have separate instructions for residential and commercial properties.
4303, 4304, 4305, 4307	Richard L. Spix, Attorney at Law, Santa Ana Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization	Strict compliance with the three-day notice requirements, including the exact amount of rent due, are omitted from the instruction, leaving the landlord free to argue substantial compliance.	The committee did not make this change. The notice does not have to state “the exact amount.” The committee thinks that the language that the notice must state “no more than” the amount of rent due is the proper standard.

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Instruction	Commentator	Summary of Comments	Committee Response
4303, 4304, 4305, 4307	Richard L. Spix, Attorney at Law, Santa Ana Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization	The instruction should say that the notice expired before the lawsuit was filed in order to prevent a conflict when the notice is extended by operation of law.	The committee did not make this change because it concluded that a premature filing case would not get to the jury. If the tenant can show that the action was filed before the expiration of the notice period, then the complaint is defective and is subject to dismissal.

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Instruction	Commentator	Summary of Comments	Committee Response
4303, 4305, 4307	East Bay Tenants Bar Association	<p>Unlawful detainers are summary proceedings, and as such, <i>strict compliance</i> on the part of the landlord is required. None of the instructions include strict compliance as an element. We would suggest the following instruction be added:</p> <p>“Because the plaintiff in this proceeding is seeking an order removing the defendant from his home, the law requires that the plaintiff strictly comply with all legal requirements before he can prevail. The plaintiff must establish, by a preponderance of the evidence, that he has strictly complied with the law before he is entitled to a judgment in this case.”</p> <p>Element 3 should state that the three-day notice expired before the date that the lawsuit was filed. Because a three-day notice might not expire after three days (due to weekends and holidays), Element 3 should focus on the expiration of the three-day notice. Otherwise, a jury could find that a plaintiff satisfied element 3 yet the lawsuit could still be filed prematurely.</p>	<p>The committee did not add this instruction. “Strict compliance” is not a jury matter; it is a general legal standard. The instructions should set forth with specificity the things that must be done. The jury finds whether the landlord has done them or not. The proposed instructions do not suggest that partial compliance is sufficient.</p> <p>The committee did not make this change. If the action is filed before the three-day period has expired, the case will be dismissed. The landlord will have to wait and file again.</p>
4303, 4305, 4307	Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization	The instructions combine two essential elements of plaintiff’s case that should be separated. The sufficiency of the notice has its own requirements under the law. Service is an entirely different element and is governed by an entirely different statute: Code Civ. Proc.,	The committee did not make this change. It believes that a single instruction can include both elements.

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Instruction	Commentator	Summary of Comments	Committee Response
		<p>§1162. Two separate instructions would be better. They may be labeled “Sufficiency of Notice of Termination for Failure to Pay Rent” and “Service of Notice of Termination for Failure to Pay Rent.”</p> <p>The instructions should include language concerning the well-established strict requirements for compliance in unlawful detainers. (<i>Lamanna v. Vognar</i> (1993) 17 Cal.App.4th Supp. 4, 6, citing <i>Kwok v. Bergren</i> (1982) 130 Cal.App.3d 596, 600.) A notice is only valid if the lessor strictly complies with the statutorily mandated notice requirements. (<i>Bevill v. Zoura</i> (1994) 27 Cal.App.4th 694, 697.)</p> <p>The “sufficiency of service” instructions should include the date of the alleged service. The time period allowed for payment of rent given a three-day notice is an “act provided by law.” (<i>Lamanna v. Vognar</i> (1993) 17 Cal.App.4th Supp. 4, 7.). It is not clear, from the case law concerning receipt of notice what the effect would be of the receipt of the notice several days after the alleged date of service. It would appear that the acknowledgment of the receipt of the notice on the date the notice was allegedly served would cure or waive any defect in the service. However, receipt on an entirely different date that could confuse or</p>	<p>See response to similar comment regarding strict compliance from East Bay Tenants Bar Association, above.</p> <p>The committee did not make this change. It believes that under <i>Lehr v. Crosby</i>, if service was defective, the tenant has three days to pay from the date of actual receipt of the notice. The jury must implicitly find (1) the date of service if service was proper; or (2) the date of actual receipt if it was not. But there is no need to reference these dates in the instructions.</p>

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Instruction	Commentator	Summary of Comments	Committee Response
		<p>change the dates for payment on the three-day notice directly conflicts with the strict-compliance standards and the statutory service requirement of Code Civ. Proc., § 1162. Conflicting dates would not provide the tenant with a specific period to pay on the notice. Given the effect of the expiration of the notice, with the forfeiture of the agreement, termination of the tenancy and damages accruing, it is imperative that a certain date for payment be provided. This problem is a major and recurring issue in the practice of landlord-tenant law.</p> <p>Strict requirements apply to the service of the notice as well as the content itself. (See <i>Liebovich v. Shahrokhkhany</i>, (1997) 56 Cal.App.4th 511.) The service instruction should make this requirement clear.</p>	<p>The committee did not make this change. It believes that all the requirements are currently set forth in the instructions.</p>
4303, 4305, 4307	Lawrence Jensen, Attorney at Law, San Jose	Strongly objects to element 4; landlords using substituted service or constructive service do not have to prove actual receipt.	The committee did not change element 4. Nothing in it mentions actual receipt. The commentator may be referring to the penultimate paragraph and the optional language in the last paragraph, which make actual receipt an alternative to sufficient service. He prefers “admitted receiving” instead of “actually received,” but <i>Lehr</i> goes beyond admitting receipt. The landlord has the option of proving actual receipt if service is defective. The committee thinks that the Directions for Use make it clear when the

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Instruction	Commentator	Summary of Comments	Committee Response
		<p>Add “if known or ascertainable by plaintiff” to element 4 regarding plaintiff’s home or place of work.</p> <p>The language “the notice was provided to him/her by leaving it with” or “by posting it on” suggests that the defendant must have actually received the notice.</p>	<p>optional language is to be included.</p> <p>The committee did not add the requested language. This is a statutory condition allowing for service by posting and mail. It will have been met or not met. There is no need to include it in the jury instruction.</p> <p>The committee agreed and revised this language.</p>
4303, 4305, 4307	Todd B. Rothbard, Attorney at Law, San Jose	Provided alternative language for the penultimate paragraph on actual receipt.	The committee agreed in part and added the language that actual receipt must have been at least three days before the date of filing.
4303, 4305, 4307	State Bar of California, Litigation Section, by Paul A. Renne on behalf of organization	<p>Add <i>[or]</i> between the options in element 4.</p> <p>Paragraph 4 in all three instructions should conform; 4303 and 4305 should match 4307.</p>	<p>The committee did not make the addition. It thinks that “Select one of the following manners of service” is adequate to make the point.</p> <p>The committee did not make the change. There is an additional manner of service authorized for proposed CACI No. 4307 cases that is not available in proposed CACI Nos. 4303 and 4305 cases.</p>
4303, 4305, 4307	Western Center on Law and Poverty by Deanna R. Kitamura on behalf of	A Notice of Termination must demand possession. Therefore, at the end of element 2, a phrase should be added that the notice included a demand for possession.	The committee did not make the addition. It thinks that the language in element 1, that the notice stated that the tenant must pay within three days or vacate, adequately states

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Instruction	Commentator	Summary of Comments	Committee Response
	<p>organization</p> <p>East Bay Tenants Bar Association</p>		<p>a demand for possession.</p>
<p>4303, 4305, 4307</p>	<p>Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization</p>	<p>In the last sentence, the phrase “did not give defendant proper written notice” could be interpreted to mean that the notice (as opposed to the service of the notice) is defective. If the notice contains a defect, whether the tenant actually received it or not is irrelevant. The instructions should be rewritten to clarify that the defendant still has the right of occupancy if (1) the landlord did not properly serve the notice or (2) the notice was not legally sufficient.</p>	<p>The committee agreed that actual receipt should cure defective service but not a legally insufficient notice, and it revised the language slightly.</p>
<p>4304 Termination for Violation of Terms of Lease/Agreement— Essential Factual Elements</p>	<p>Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization</p>	<p>This instruction should include alternative language that addresses eviction-control jurisdictions that have specific requirements for breach of covenant evictions. It should also include alternative provisions for federally subsidized housing, which has specific requirements for cause that includes material violations of the rental agreement.</p>	<p>The committee did not think it feasible to include local and federal requirements in the text of the instruction; there would simply be too many possibilities. It did, however, add the point in the Directions for Use.</p>
<p>4304 Termination for Violation of Terms of Lease/Agreement— Essential Factual Elements</p>	<p>Legal Services of Northern California, by John Gianola, Managing Attorney</p>	<p>Service of a three-day notice to quit can only be for waste, nuisance, or illegal activity. The instruction does not make it clear that a three-day notice to quit can only be given for a noncurable breach.</p> <p>The instruction would be clearer if it were broken into two instructions, one for cases</p>	<p>The committee agreed and added further explanation for element 6 in the Directions for Use.</p> <p>The committee did not make this change. It thinks that the additions to the Directions for</p>

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Instruction	Commentator	Summary of Comments	Committee Response
		based on three-day notice to perform covenant or quit and one for cases based on three day notice to quit.	Use provide sufficient clarity.
4304 Termination for Violation of Terms of Lease/Agreement— Essential Factual Elements	Richard L. Spix, Attorney at Law, Santa Ana East Bay Tenants Bar Association	The instruction should require that the breach be contained in a written lease/rental agreement. It should also require reasonable specificity of any breach to comply with due process.	The committee did not make these changes. The commentators did not provide any authority that oral conditions cannot be enforced and that reasonable specificity is required.
4304 Termination for Violation of Terms of Lease/Agreement— Essential Factual Elements	Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization	Code Civ. Proc., § 1161(3) requires the landlord to serve a three-day notice on any subtenant in occupancy even if the subtenant is the defendant. Therefore, the notice element should include a bracketed reference to service on any subtenants.	The committee agreed and made this revision.
4305 Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement	Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization	There should be alternative language/sections for cause jurisdictions and eviction ordinances that have specific requirements. Federally subsidized housing also has its own requirements including specificity of the allegations in the notice and often requirements for grievance hearings.	The committee added the same reference to local and federal law in the Directions for Use that was added in <i>CACI</i> No. 4304 (above).
4306 Termination of Month-to-Month Tenancy—Essential Factual Elements	Central California Legal Services,. By Michael Kanz, General Counsel Legal Services of Northern California, by John Gianola, Managing Attorney	A 90-day notice requirement and grounds must be included for federally subsidized residential tenancy.	The committee agreed and added a sentence to the Directions for Use to clarify that the instruction is not to be used in a section 8 tenancy.
4306	Eviction Defense	This instruction should include a section that	It was not clear to the committee what the

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Instruction	Commentator	Summary of Comments	Committee Response
Termination of Month-to-Month Tenancy—Essential Factual Elements	Center, Oakland, by Jorge Aguilar II on behalf of organization	provides for any statement in good faith as to the grounds for terminating the tenancy if the tenant alleges retaliation. (See Code Civ. Proc., §1942.5(e).)	commentator is requesting with regard to <i>CACI</i> No. 4306. Retaliation as a defense is addressed in <i>CACI</i> Nos. 4321 and 4322.
4307 Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy	Litigation Section of the State Bar of California, by Paul A. Renne on behalf of organization	The word “written” should be inserted in the various paragraphs in which notice occurs. This will avoid any possibility that the jury might think the notice requirement may be made other than in writing as required by statute.	The committee agreed and added “written” to element 1. That conformed <i>CACI</i> No. 4307 to 4303 and 4305, which already included “written.”
4320 Affirmative Defense—Implied Warranty of Habitability	Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization	<p>The first line should be modified as follows:</p> <p>“[Name of defendant] alleges that the rent should be reduced, either partially or completely, because [name of plaintiff] has not maintained the property in a habitable condition during the period that the rent is alleged to not have been paid.”</p> <p>It is imperative that the instruction include language that tracks Civ. Code, § 1941 and makes it clear to the jury that the responsibility to maintain the property in a habitable condition is the landlord’s.</p> <p>The final sentence of the proposed instruction concerning the continued occupancy by the defendant is improper as written. There is an implication that continued occupancy in an</p>	<p>The committee preferred the original proposed language.</p> <p>The committee did not make this change because it thought it preferable to state the instruction in plain English. The statute’s substance is adequately contained in the instruction.</p> <p>The committee modified this sentence slightly.</p>

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Instruction	Commentator	Summary of Comments	Committee Response
		<p>uninhabitable unit could mean that the property is habitable. This is contrary to the court’s holding in <i>Knight v. Hallsthammar</i> (1981) 29 Cal. 3d 46. The Supreme Court stated clearly that the tenant’s knowledge of the conditions does not determine the duty of the landlord to maintain the premises habitable. (at p. 54). A tenant cannot waive his right to habitable living conditions by continuing to live at the premises. The instruction should make it clear that the landlord has a duty to maintain the premises regardless of whether the tenant continued to live there.</p>	
<p>4320 Affirmative Defense—Implied Warranty of Habitability</p>	<p>Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization Richard L. Spix, Attorney at Law, Santa Ana</p>	<p>The second portion of the instruction concerning Civ. Code, § 1941.2 should be separated into its own instruction. This section is distinct from the affirmative defense of a breach in implied warranty of habitability and should be requested as an instruction separately by plaintiff if applicable.</p>	<p>The committee did not make this change because . It did not believe that separation would make things clearer. First there is the requirement that the landlord breach a habitability standard. Then there are the factors that might negate the legal effect of the breach. This section is optional; it is not read unless it is relevant to the evidence.</p>
<p>4320 Affirmative Defense—Implied Warranty of Habitability</p>	<p>Jim McBride, Attorney at Law, Hayward</p>	<p>The “tenantable” characteristics in Civ. Code, § 1941.1 are not habitability standards, which are found in Code Civ. Proc., § 1174(c)</p> <p>Code Civ. Proc., § 1174.2(c) links habitability to building and housing code violations that substantially impact health and safety. The commentator submitted an instruction of his own on this point.</p>	<p>The committee did not understand the comment. Code Civ. Proc., § 1174(c) does not concern habitability.</p> <p>The committee will consider whether there should be a separate instruction on the presumption of nonhabitability of Civ. Code, § 1942.3, on the effect of housing and building code violations; to in a future cycle.</p>

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Instruction	Commentator	Summary of Comments	Committee Response
		<p>The commentator submitted an instruction of his own that requires the tenant to give the landlord notice of condition affecting habitability and gives landlord a reasonable time to make repairs.</p>	<p>The committee did not include an instruction on these points. The second point was decided adversely to the commentator's position in <i>Knight v. Hallsthammar</i> (1981) 29 Cal.App.3d 46, 59. The first point was noted but not decided (fn.6). <i>Hinson v. Delis</i> (1972) 26 Cal.App.3d 62, 70, cited by the commentator in support of his instruction, was disapproved.</p>
<p>4320 Affirmative Defense—Implied Warranty of Habitability</p>	<p>Todd B. Rothbard, Attorney at law, San Jose</p>	<p>The instruction should perhaps conclude with “Simply because the premises fail in one way or another to meet all of the requirements does not mean that there has been a breach of the implied warranty of habitability. For such a breach, the failure must be “substantial.” which means that it must be of sufficient magnitude to cause the premises to fail to meet bare living requirements.”</p>	<p>The committee agreed in principle that a reference to substantiality was needed, but adopted a single sentence rather than the commentator's paragraph.</p>
<p>4320 Affirmative Defense—Implied Warranty of Habitability</p>	<p>Richard L. Spix, Attorney at Law, Santa Ana Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization Eviction Defense Center, Oakland, by</p>	<p>The bracketed insert instructions at the end of the Civ. Code, § 1941.1 elements “<i>(Insert other applicable standards relating to habitability.)</i>” should expressly refer to H&S Code, § 17920.3 and also to reasonable security measures.</p>	<p>The committee thinks that attempting to list all the various additional sources of habitability standards in the instruction itself would not be helpful. However, additional sources were added by reference in the Directions for Use.</p>

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Instruction	Commentator	Summary of Comments	Committee Response
	<p>Jorge Aguilar II on behalf of organization</p> <p>East Bay Tenants Bar Association</p>		
<p>4320 Affirmative Defense—Implied Warranty of Habitability</p>	<p>Richard L. Spix, Attorney at Law, Santa Ana</p> <p>Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization</p> <p>Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization</p> <p>East Bay Tenants Bar Association</p> <p>Todd B. Rothbard Attorney at Law San Jose CA</p>	<p>The instruction fails to accurately include the contribution/interference causation requirement.</p>	<p>The committee agreed and moved this requirement so it is clear that it is applicable to all the factors.</p>
<p>4320 Affirmative Defense—Implied Warranty of Habitability</p>	<p>State Bar of California Litigation Section, by Paul A. Renne on behalf of organization</p>	<p>In Civ. Code, § 1941.2 (tenant’s obligations), change “has done” to “has contributed to the condition by doing.”</p> <p>Some of the Civ. Code, § 1941.1 factors are</p>	<p>The committee addressed this concern a bit differently in response to commentator Richard Spix, above.</p> <p>The committee restored the missing statutory</p>

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Instruction	Commentator	Summary of Comments	Committee Response
		<p>missing some pertinent statutory language.</p> <p>The tenant obligation in Civ. Code, § 1941.2(5) does not include all the necessary statutory language.</p>	<p>language.</p> <p>The committee restored the missing statutory language.</p>
4320 Affirmative Defense—Implied Warranty of Habitability	Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization	The phrase “insert other applicable standard relating to habitability” should be changed to “insert other applicable condition related to habitability.” The term “standard” might lead a jury to believe the plaintiff must violate a code standard to violate the implied warranty.	This language is for the drafter, not the jury. The committee did not see a danger that an attorney or a judge would misconstrue the term.
4321 Affirmative Defense—Retaliatory Eviction—Tenant’s Complaint	Legal Services of Northern California, by John Gianola, Managing Attorney	<p>Element 2 of the retaliation defense is limited to complaints about the condition of the property. However, the statutory retaliation defense also includes exercise by the lessee of rights “under this chapter.” This section should have a distinct instruction about whether the tenant was engaged in lawful activity and was retaliated against for the activity.</p> <p>A fourth element should be added. If the defendant proves that he/she engaged in protected activity within 180 days of service of the notice of termination of tenancy, the notice must state a good-faith nonretaliatory reason for eviction. (Civ. Code, § 1942.5(e).) If it doesn’t, the notice is defective. If it does state a reason, then the jury must determine if the reason is true.</p>	<p>Proposed CACI No. 4322 is such an instruction.</p> <p>The committee added a sentence at the end addressing the “lawful cause” exception of Civ. Code, § 1942.5(d) along with the good-faith burden of proof on the landlord from Civ. Code, § 1942.5(e). (See <i>Drouet v. Sup. Ct.</i> (2003) 31 Cal.4th 583.).</p>
4322	Todd B. Rothbard,	The instruction should make it clear that it does	The committee did not make any change.

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Instruction	Commentator	Summary of Comments	Committee Response
Affirmative Defense—Retaliatory Eviction—Engaging in Legally Protected Activity	Attorney at Law, San Jose CA	not apply in an unlawful detainer based on failure to pay rent or a violation of a lease condition.	While the tenant’s failure to pay rent or breach of other condition would be a “lawful cause” supporting eviction under Civ. Code, § 1942.5(d), it is subject to the good-faith limitation of Civ. Code, § 1942.5(e). (See <i>Drouet v. Sup. Ct.</i> (2003) 31 Cal.4th 583.)
4321 Affirmative Defense—Retaliatory Eviction—Tenant’s Complaint	Richard L. Spix, Attorney at Law, Santa Ana Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization East Bay Tenants Bar Association	It makes no sense and can only lead to confusion to instruct that protection is limited to 180 days when the common law provides additional protection.	The committee added language in the Directions for Use to address this issue. The common law does provide additional protection (<i>Barela v. Sup. Ct.</i> (1981) 30 Cal.App.3d 244, 251), but no direct authority was found for the proposition that the common law provides protection beyond 180 days for any act covered by Civ. Code, § 1942.5(a). <i>Glaser v. Meyers</i> (1982) 137 Cal.App.3d 770, cited by the commentator, holds that the statutory 180-day period does not apply in a tort action for wrongful eviction. <i>Dicta</i> supports extension to unlawful detainer.
4321 Affirmative Defense—Retaliatory Eviction—Tenant’s Complaint	Richard L. Spix, Attorney at Law, Santa Ana Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization	The element “was current in the payment of rent” is ambiguous. The term “rent due” is a conclusion of law and fact; including the propriety and amount of any repair and deduction, the extent of continuing habitability issues, and the amount of any disputed rental payment.	The committee agreed with the comment and reverted to the statutory language “not in default” rather than “current.” Further explanation of factors that might affect whether the tenant was in default were added to the Directions for Use.

Judicial Council of California Civil Jury Instructions (CACI07-02)

Instruction	Commentator	Summary of Comments	Committee Response
	Litigation Section of the State Bar of California, by Paul A. Renne on behalf of organization		
4321, 4322	Todd B. Rothbard, Attorney at Law, San Jose	Suggested adding that landlord had no lawful cause to file the action.	The committee added a sentence at the end addressing the “lawful cause” exception of Civ. Code, § 1942.5(d) along with the good-faith burden of proof on the landlord from Civ. Code, § 1942.5(e). (See <i>Drouet v. Sup. Ct.</i> (2003) 31 Cal.4th 583.).
4321, 4322	Richard L. Spix, Attorney at Law, Santa Ana Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization	Both instructions use the term “because” of the exercise of rights. The legislature deleted the word “dominant” from the burden of proof requirement, leaving the tenant to prove that retaliation is a substantial or motivating factor. For guidance of trial courts, examples of protected activity should include complaints, withholding of rent based on conditions, and first amendment issues.	The committee did not make this change. Civ. Code, § 1942.5(a) and (c) both use “because.” It is not clear from what statute “dominant” was deleted. The commentator cites only Labor Code cases in support of the position that “motivating factor” should be included in this instruction. Because counsel or the judge will be assembling the instruction, the committee did not think any examples were needed.
4323 Affirmative Defense— Discriminatory Eviction (Unruh Act)	Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization	A “protected class” is not necessary for a discrimination defense. The California Supreme Court has rejected the protected-class requirements with respect to tenants in holding that the Unruh Act prohibits all arbitrary discrimination by business establishments. (<i>Marina Point, Ltd. v. Wolfson</i> , (1982) 30 Cal.App.3d 721, 730-731.)	The committee agreed and recast the instruction so that it applies only under the Unruh Act, with the grounds for discrimination broadened to include <i>Marina Point</i> .

Judicial Council of California Civil Jury Instructions (CACI07-02)

Instruction	Commentator	Summary of Comments	Committee Response
		<p>The proposed instruction does not take into account discrimination based on a person’s disability.</p> <p>Additional instructions should be included after reviewing case law and the Unruh Act in addition to the California Fair Housing Law.</p>	<p>The committee did not make any change. Disability is a protected class under the Unruh Act and will be specified by the drafter if applicable.</p> <p>The committee will consider housing discrimination under the Fair Employment and Housing Act as a defense to an unlawful detainer in a future cycle.</p>
4324 Affirmative Defense—Waiver by Acceptance of Rent After Three-Day Notice	East Bay Tenants Bar Association	Waiver can occur when (1) a landlord accepts rent after the three-day notice period expires and (2) a landlord accepts rent after a breach of the rental agreement. The instruction only addresses the first waiver issue, but the title and directions state that both will be covered. The title and directions should be modified to reflect the limited nature of the issue covered.	The committee agreed and modified the title and the Directions for Use to make it clear that the instruction only applies if rent is accepted after a three-day notice has been served.
4324 Affirmative Defense—Waiver by Acceptance of Rent After Three-Day Notice	Eviction Defense Center, Oakland, by Jorge Aguilar II on behalf of organization	<p>There are distinct issues that can be waived. One is the waiver of the alleged breach for which a tenancy is terminated. The waiver of the breach is different from the waiver of the termination of the tenancy through the notice by accepting rent to cancel that notice or re-establish the tenancy. These types of waivers are subject to different principles.</p> <p>This instruction is incomplete and misleading. First, acceptance of rent to cover a period of time after the expiration of the notice</p>	<p>See response to similar comments from East Bay Tenants Bar Association, above.</p> <p>The committee did not make this change. <i>Karbelnig v. Brothwell</i> (1966) 244 Cal.App.2d 333, 342 holds that a landlord</p>

Judicial Council of California Civil Jury Instructions (CACI07-02)

Instruction	Commentator	Summary of Comments	Committee Response
		<p>reestablishes the tenancy. That is because the notice terminates the tenancy and forfeits the agreement if not satisfied. Acceptance of rent to cover a period of time after the expiration of the notice is not subject a landlord's statement any partial payment would be insufficient as proposed in subsection 2.</p> <p>An additional section should be included to indicate that it is the jury's prerogative to determine whether rent was accepted or timely rejected by the landlord.</p>	<p>(residential or commercial) may provide in the lease that acceptance of rent after the tenant's breach of a covenant other than the one to pay rent, does not constitute a waiver of the breach.</p> <p>The committee did not make this change. It thinks that the instruction adequately expresses the jury's role.</p>
4324 Affirmative Defense—Waiver by Acceptance of Rent After Three-Day Notice	Todd B. Rothbard, Attorney at Law, San Jose	Element 2 should provide an option for alleged breach of a condition in addition to nonpayment of rent.	See response to similar comments from East Bay Tenants Bar Association and Western Center on Law and Poverty, above.
4324 Affirmative Defense—Waiver by Acceptance of Rent After Three-Day Notice	Richard L. Spix, Attorney at Law, Santa Ana	The rejection by the landlord should be required to be prompt so as to avoid a conversion of the tenant's tender of rent.	The committee did not make this change. There is no direct authority on the question of promptness.
4324 Affirmative Defense—Waiver by Acceptance of Rent After Three-Day Notice	Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization	As written the instruction allows the landlord to recover possession if the lease contains a provision that acceptance of late rent does not affect the right to evict. This provision requires that the three-day notice contain an election of the landlord to declare a forfeiture. (Code Civ. Proc., § 1174; see <i>Briggs v. Electronic</i>	The committee did not make this change. All the statute and the <i>Briggs</i> case say is that if the notice contains a forfeiture provision (wording in the notice to warn the tenant that nonpayment during that three-day period will cost him his tenancy rights), the landlord is not required to accept payment

Judicial Council of California Civil Jury Instructions (CACI07-02)

Instruction	Commentator	Summary of Comments	Committee Response
		<i>Memories</i> (1975) 53 Cal.App.3d 900, 905.)	after the three-day period. Nothing addresses including the right to accept payment and still evict in the lease.
4324 Affirmative Defense—Waiver by Acceptance of Rent After Three-Day Notice	Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization East Bay Tenants Bar Association	A separate instruction should be drafted to cover the affirmative defense of waiver by acceptance of rent after a breach of the rental agreement other than the failure to pay rent.	The committee will consider an instruction to address waiver by acceptance of rent <i>before</i> a three-day notice is served in the next cycle.
4324 Affirmative Defense—Waiver by Acceptance of Rent After Three-Day Notice	Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization Richard L. Spix, Attorney at Law, Santa Ana	The instruction fails to distinguish between the two types of waiver that have been recognized and fails to accurately describe the application of the doctrine outside of three-day notices to pay rent or quit. Additional sections or instructions appear necessary.	See responses to similar comments from East Bay Tenants Bar Association and Eviction Defense Center, above.
4325 Affirmative Defense—Failure to Comply With Rent Control Ordinance	Santa Monica Rent Control Board by Michaelyn Jones, General Counsel on behalf of organization	Agree	No response is required.
4340 Damages for Reasonable Rental Value	Todd B. Rothbard, Attorney at Law, San Jose	The instruction should state that the fair rental value should be evaluated without reference to rent control laws.	The committee agreed and added an optional paragraph on this point.
4341 Statutory Damages on Showing of	Legal Services of Northern California by John Gianola,	The instruction does not comply with authority for award of holdover damages. Authorities require “willful, deliberate, intentional, and	The committee did not make this change. It believes that “willfully” sufficiently expresses the required standard without

Judicial Council of California Civil Jury Instructions (*CACI07-02*)

Instruction	Commentator	Summary of Comments	Committee Response
Malice	Managing Attorney, on behalf of organization	obstinate” conduct without a good-faith reasonable belief in his or her right to remain. The instruction as written can fairly be read to mean that malicious holdover damages are available whenever the tenant continues to occupy the property after expiration of any notice because he or she could know that he or she no longer has a right to possession after the notice expires. One who holds over because homelessness is the only alternative is not being malicious.	adding the other adverbs.
Proposed additional instruction (but see 4320)	Felix A. Seidler, Reeves & Seidler Alameda	Add an instruction including Civ. Code 1941.2 in toto.	Civ. Code 1941.2 is included in toto in Proposed <i>CACI</i> No. 4320.
Proposed additional instructions	Western Center on Law and Poverty by Deanna R. Kitamura on behalf of organization East Bay Tenants Bar Association	Instructions on affirmative defenses included in JC Form for UD Answer: (1) tenant’s right to repair and deduct; (2) landlord’s refusal of the rent; (3) landlord’s inability to demand rent for untenable dwellings (Civ. Code, § 1942.4); (4) landlord’s unclean hands; (5) landlord’s failure to provide translated rental agreement (Civ. Code, § 1632).	The committee will consider adding additional instructions in its next cycle. However, not every affirmative defense allowed in an answer presents a jury issue.

CIVIL JURY INSTRUCTIONS (CACI)
REVISIONS—FOR FINAL JUDICIAL COUNCIL APPROVAL
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2505. Retaliation (Gov. Code, § 12940(h))

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

1. That [name of plaintiff] [describe protected activity];
 2. **[That [name of defendant] [discharged/demoted[specify other adverse employment action]] [name of plaintiff];]**

[or]

[That [name of defendant] engaged in conduct that, taken as a whole, materially and adversely affected the terms and conditions of [name of plaintiff]’s employment;]
 3. That [name of plaintiff]’s [describe protected activity] was a motivating reason for [name of defendant]’s **[decision to [discharge/demote/[specify other adverse employment action]] [name of plaintiff]/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.
-

New September 2003; Revised August 2007

Directions for Use

In elements 1 and 3, 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].”

Read the second option for element 2 in cases involving a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. Give both options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. Also select “conduct” in element 3 if the second option or both options are included for element 2.

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].)~~
- “Employees may establish a prima facie case of unlawful retaliation by showing that (1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action.” (Miller v. Department of Corr. (2005) 36 Cal.4th 446, 472 [30 Cal.Rptr.3d 797, 115 P.3d 77], citing Flait v. North Am. Watch Corp. (1992) 3 Cal.App.4th 467, 476 [4 Cal.Rptr.2d 522].)
- “Retaliation claims are inherently fact-specific, and the impact of an employer’s action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.” (Yanowitz v. L’Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1052 [32 Cal.Rptr.3d 436, 116 P.3d 1123].)
- “Appropriately viewed, [section 12940(a)] protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee’s job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase ‘terms, conditions, or privileges’ of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide.”

(Yanowitz, supra, 36 Cal.4th at p. 1053–1054, footnotes omitted.)

- “Contrary to [defendant]’s assertion that it is improper to consider collectively the alleged retaliatory acts, there is no requirement that an employer’s retaliatory acts constitute one swift blow, rather than a series of subtle, yet damaging, injuries. Enforcing a requirement that each act separately constitute an adverse employment action would subvert the purpose and intent of the statute.” (Yanowitz, supra, 36 Cal.4th at p. 1055–1056, internal citations omitted.)

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

- “The employment action must be both detrimental and substantial We must analyze [plaintiff]’s complaints of adverse employment actions to determine if they result in a material change in the terms of her employment, impair her employment in some cognizable manner, or show some other employment injury [W]e do not find that [plaintiff]’s complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of the actions upon which she relies were one time events The other allegations ... are not accompanied by facts which evidence both a substantial and detrimental effect on her employment.” (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511-512 [91 Cal.Rptr.2d 770], internal citations omitted.)
- “The retaliatory motive is ‘proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.’ ‘The causal link may be established by an inference derived from circumstantial evidence, “such as the employer’s knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision.” ’ ” (*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]. Note that the California Supreme Court is reviewing this issue. (See *Jones v. Lodge at Torrey Pines Partnership* (2007) 147 Cal.App.4th 475, 504 [54 Cal.Rptr.3d 379], review granted June 13, 2007, S151022.)
- “[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination.” (*Miller, supra*, 36 Cal.4th at p. 473–474, internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 922, 940, 941

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

1 Wrongful Employment Termination Practice (Cont.Ed.Bar) Discrimination Claims, §§ 2.83-2.88

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

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

California Civil Practice (Thomson West) Employment Litigation, §§ 2:74–2:75

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/[specify other adverse employment action]] [name of plaintiff]?

[or]

Did [name of defendant] engage in conduct that, taken as a whole, materially and adversely affected the terms and conditions of [name of plaintiff]'s 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 [name of plaintiff]'s [describe protected activity] a motivating reason for [name of defendant]'s [decision to [discharge/demote]/[specify other adverse employment action]] [name of plaintiff]/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 ~~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

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

[b. **Future economic loss**

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

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

\$ _____]

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

\$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised August 2007

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on CACI No. 2505, *Retaliation (Gov. Code, § 12940(h))*.

[Read the second option for question 2 in cases involving a pattern of employer harassment consisting of](#)

acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. Give both options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. Also select “conduct” in question 3 if the second option or both options are included for question 2.

If specificity is not required, users do not have to itemize all the damages listed in question 5 and do not have to categorize “economic” and “noneconomic” damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional; depending on the circumstances.

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

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.

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 for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages only if *[name of plaintiff]* proves by clear and convincing evidence that *[name of defendant]* 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 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 harm *[name of plaintiff]*.

There is no fixed **standard-formula** for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:

- (a) How reprehensible was *[name of defendant]*'s conduct? In deciding how reprehensible *[name of defendant]*'s conduct was, you may consider, among other factors:
 1. Whether the conduct caused physical harm;
 2. Whether *[name of defendant]* disregarded the health or safety of others;
 3. Whether *[name of plaintiff]* was financially weak or vulnerable and *[name of defendant]* knew *[name of plaintiff]* was financially weak or vulnerable and took advantage of *[him/her/it]*;
 4. Whether *[name of defendant]*'s conduct involved a pattern or practice; and
 5. Whether *[name of defendant]* acted with trickery or deceit.
- (b) Is there a reasonable relationship between the amount of punitive damages and

[*name of plaintiff*]'s harm [or between the amount of punitive damages and potential harm to [*name of plaintiff*] that [*name of defendant*] knew was likely to occur because of [his/her/its] conduct]? [Punitive damages may not be used to punish [*name of defendant*] for the impact of [his/her/its] alleged misconduct on persons other than [*name of plaintiff*].]

- (c) In view of [*name of defendant*]'s financial condition, what amount is necessary to punish [him/her] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [*name of defendant*] has substantial financial resources. [Any award you impose may not exceed [*name of defendant*]'s ability to pay.]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, [August 2007](#)

Directions for Use

~~CAUTION: The United States Supreme Court recently held that the Due Process Clause of the U.S. Constitution forbids the award of punitive damages to punish a defendant for injuries caused to nonparties. (*Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).) This instruction may need to be revised in light of this holding. The advisory committee will be considering revisions for the next release.~~

This instruction is intended to apply to individual persons only. When the plaintiff is seeking punitive damages against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When plaintiff is seeking punitive damages against both an individual person and a corporate defendant, use CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—Trial Not Bifurcated*.

For an instruction explaining “clear and convincing evidence,” see CACI No. 201, *More Likely True—Clear and Convincing Proof*.

Read the bracketed language ~~in subdivision~~ at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, ~~where if~~ damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or ~~where if~~ the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance

only damaging a pair of glasses]). The bracketed phrase should not be given where an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain ~~where~~ if the jury had found that there was no binding contract]).

Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm that the defendant’s conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)

Read the ~~bracketed language in subdivision~~ optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 422 [123 S.Ct. 1513, 155 L.Ed.2d 585].) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word “misrepresentation” is used in the instruction’s definition of “fraud.”

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.~~

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, supra, v. Farmers Insurance Exchange* (1978) 21 Cal.3d at p. 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)
- “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, 882 P.2d 894], 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, 529 P.2d 608].)
- “ ‘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 untrammelled 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, 813 P.2d 1348], 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.)
- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. ___ (2007 U.S. LEXIS 1332, *13).)
- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—

although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. ___ (2007 U.S. LEXIS 1332, *16).)

- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation 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.)
- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 427, internal citation omitted.)
- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra*, 54 Cal.3d at p. 112.)
- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams, supra*, 54 Cal.3d at p. 112, 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.)
- [“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 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 Found. v. Graham* \(1999\) 72 Cal. App. 4th 1135, 1162 , fn. 15 \[85 Cal.Rptr. 2d 726\].\)](#)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.12, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.01–54.06, 54.20–54.25 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 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 for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed **standard-formula** for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:

(a) How reprehensible was *[name of defendant]*'s conduct? In deciding how reprehensible *[name of defendant]*'s conduct was, you may consider, among other factors:

1. Whether the conduct caused physical harm;
2. Whether *[name of defendant]* disregarded the health or safety of others;
3. Whether *[name of plaintiff]* was financially weak or vulnerable and *[name of defendant]* knew *[name of plaintiff]* was financially weak or vulnerable and took advantage of *[him/her/it]*;
4. Whether *[name of defendant]*'s conduct involved a pattern or practice; and
5. Whether *[name of defendant]* acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and *[name of plaintiff]*'s harm [or between the amount of punitive damages and potential harm **to *[name of plaintiff]*** that *[name of defendant]* knew was likely to occur because of *[his/her/its]* conduct]? **[Punitive damages may not be used to punish *[name of defendant]* for the impact of *[his/her/its]* alleged misconduct on persons other than *[name of plaintiff]*.]**

(c) In view of *[name of defendant]*'s financial condition, what amount is necessary to punish *[him/her]* and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because *[name of defendant]* has substantial financial resources. [Any award you impose may not exceed *[name of defendant]*'s ability to pay.]

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, [August 2007](#)

Directions for Use

~~CAUTION: The United States Supreme Court recently held that the Due Process Clause of the U.S. Constitution forbids the award of punitive damages to punish a defendant for injuries caused to nonparties. (*Philip Morris USA v. Williams* (2007) 549 U.S. ____, ____, [127 S.Ct. 1057, 166 L.Ed.2d 940])~~

~~(2007 U.S. LEXIS 1332).— This instruction may need to be revised in light of this holding. The advisory committee will be considering revisions for the next release.~~

Read the bracketed language ~~in subdivision~~ at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, ~~where-if~~ damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or ~~where-if~~ the harm caused by defendant’s acts could have been great but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given ~~where-if~~ an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain ~~where-if~~ the jury had found that there was no binding contract].)

Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm the defendant’s conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)

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“A jury must be instructed . . . that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 422 [123 S.Ct. 1513, 155 L.Ed.2d 585].) An instruction on this point should be included within this instruction if appropriate to the facts.

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.)

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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, supra, v. Farmers Insurance Exchange (1978)*) 21 Cal.3d at p. 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)
- “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, 882 P.2d 894], 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, 529 P.2d 608].)
- “ ‘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 untrammelled 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, 813 P.2d 1348], 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.)
- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a

defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. ___ (2007 U.S. LEXIS 1332, *13).)

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- “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.)
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- “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.)
- [“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 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 Found. v. Graham* \(1999\) 72 Cal. App. 4th 1135, 1162 , fn. 15 \[85 Cal.Rptr. 2d 726\].\)](#)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1559, 1562, 1572–1577, 1607–1623

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.12, 14.37–14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.20–54.25, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 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

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. The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

You may award punitive damages 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 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 harm *[name of plaintiff]*.

[Name of plaintiff] must also prove **[one of]** the following by clear and convincing evidence:

1. **[That *[name of employee/agent]* was an officer, a director, or a managing agent of *[name of defendant]*, who was acting on behalf of *[name of defendant]*; **[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 such that his or her decisions ultimately

determine corporate policy.

There is no fixed **standard-formula** for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:

- (a) **How reprehensible was [name of defendant]’s conduct? In deciding how reprehensible [name of defendant]’s conduct was, you may consider, among other factors:**
- 1. Whether the conduct caused physical harm;**
 - 2. Whether [name of defendant] disregarded the health or safety of others;**
 - 3. Whether [name of plaintiff] was financially weak or vulnerable and [name of defendant] knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her/it];**
 - 4. Whether [name of defendant]’s conduct involved a pattern or practice; and**
 - 5. Whether [name of defendant] acted with trickery or deceit.**
- (b) **Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]’s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that [name of defendant] knew was likely to occur because of [his/her/its] conduct]? [Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff].]**
- (c) **In view of [name of defendant]’s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]’s ability to pay.]**
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New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, [August 2007](#)

Directions for Use

~~CAUTION: The United States Supreme Court recently held that the Due Process Clause of the U.S. Constitution forbids the award of punitive damages to punish a defendant for injuries caused to nonparties. (*Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).) This instruction may need to be revised in light of this holding. The advisory committee will be considering revisions for the next release.~~

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 CACI No. 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 CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*.

For an instruction explaining “clear and convincing evidence,” see CACI No. 201, *More Likely True—Clear and Convincing Proof*.

Read the bracketed language ~~in subdivision~~ at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, ~~where-if~~ damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or ~~where-if~~ the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given ~~where-if~~ an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain ~~where-if~~ the jury had found that there was no binding contract].)

Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm that the defendant’s conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)

Read the ~~bracketed language in subdivision~~ optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 422 [123 S.Ct. 1513, 155 L.Ed.2d 585].) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word “misrepresentation” is used in the instruction’s

definition of “fraud.”

See CACI No. 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.)~~

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.

- “[E]vidence of ratification of [agent’s] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- “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.)
- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)
- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. ___ (2007 U.S. LEXIS 1332, *13).)
- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible -- although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. ___ (2007 U.S. LEXIS 1332, *16).)
- “[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, 882 P.2d 894].)
- “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, 981 P.2d 944].)
- “[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., Inc.* (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, internal citations omitted.)
- “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.)
- [“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 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 Found. v. Graham (1999) 72 Cal. App. 4th 1135, 1162 , fn. 15 [85 Cal.Rptr. 2d 726].*)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.12, 14.20–14.23, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 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 for the conduct that harmed the plaintiff and to discourage 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]*, who acted on behalf of *[name of defendant]*; [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 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 harm *[name of plaintiff]*.

An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

There is no fixed **standard formula** for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following in determining the amount:

- (a) **How reprehensible was [name of defendant]’s conduct? In deciding how reprehensible [name of defendant]’s conduct was, you may consider, among other factors:**
- 1. Whether the conduct caused physical harm;**
 - 2. Whether [name of defendant] disregarded the health or safety of others;**
 - 3. Whether [name of plaintiff] was financially weak or vulnerable and [name of defendant] knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her/it];**
 - 4. Whether [name of defendant]’s conduct involved a pattern or practice; and**
 - 5. Whether [name of defendant] acted with trickery or deceit.**
- (b) **Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]’s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that [name of defendant] knew was likely to occur because of [his/her/its] conduct]? [Punitive damages may not be used to punish [name of defendant] for the impact of [his/her/its] alleged misconduct on persons other than [name of plaintiff].]**
- (c) **In view of [name of defendant]’s financial condition, what amount is necessary to punish it and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because [name of defendant] has substantial financial resources. [Any award you impose may not exceed [name of defendant]’s ability to pay.]**
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New September 2004; Revised April 2004, June 2004, December 2005, June 2006, April 2007, [August 2007](#)

Directions for Use

~~CAUTION: The United States Supreme Court recently held that the Due Process Clause of the U.S. Constitution forbids the award of punitive damages to punish a defendant for injuries caused to nonparties. (*Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).) This instruction may need to be revised in light of this holding. The advisory committee will be considering revisions for the next release.~~

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~~or managing agents. When the plaintiff seeks to hold an employer or principal liable for the conduct of a specific employee or agent, use CACI No. 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 CACI No. 3947, *Punitive Damages—Individual and Entity Defendants—*

Trial ~~not~~ Not Bifurcated.

For an instruction explaining “clear and convincing evidence,” see CACI No. 201, *More Likely True—Clear and Convincing Proof*.

Read the bracketed language ~~in subdivision~~ at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, ~~where-if~~ damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or ~~where-if~~ the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) ~~The bracketed phrase should not be given where-if an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain where-if the jury had found that there was no binding contract].)~~

Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm that the defendant’s conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)

Read the ~~bracketed language in subdivision~~ optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 422 [123 S.Ct. 1513, 155 L.Ed.2d 585].) An instruction on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word “misrepresentation” is used in the instruction’s definition of “fraud.”

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.)~~

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, 981 P.2d 944].)
- “[E]vidence of ratification of [agent’s] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- “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.)
- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)
- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. ____ (2007 U.S. LEXIS 1332, *13).)
- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury

may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. ___ (2007 U.S. LEXIS 1332, *16).)

- “[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, 882 P.2d 894].)
- “[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., Inc.* (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.)
- [“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 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 Found. v. Graham* \(1999\) 72 Cal. App. 4th 1135, 1162 , fn. 15 \[85 Cal.Rptr. 2d 726\].\)](#)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 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 for the conduct that harmed the plaintiff and to discourage 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], who acted on behalf of [name of entity defendant]; [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 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 harm [name of plaintiff].

An employee is a “managing agent” if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

There is no fixed ~~standard~~-formula for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following separately for each defendant in determining the amount:

- (a) How reprehensible was that defendant’s conduct? In deciding how reprehensible a defendant’s conduct was, you may consider, among other factors:
1. Whether the conduct caused physical harm;
 2. Whether the defendant disregarded the health or safety of others;
 3. Whether [name of plaintiff] was financially weak or vulnerable and the defendant knew [name of plaintiff] was financially weak or vulnerable and took advantage of [him/her/it];
 4. Whether the defendant’s conduct involved a pattern or practice; and
 5. Whether the defendant acted with trickery or deceit.
- (b) Is there a reasonable relationship between the amount of punitive damages and [name of plaintiff]’s harm [or between the amount of punitive damages and potential harm to [name of plaintiff] that the defendant~~[name of defendant]~~ knew was likely to occur because of ~~[his/her/its]~~his, her, or its conduct]? [Punitive damages may not be used to punish a defendant for the impact of his, her, or its alleged misconduct on persons other than [name of plaintiff].]
- (c) In view of that defendant’s financial condition, what amount is necessary to punish [him/her/it] and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant’s ability to pay.]

New September 2003; Revised April 2004, October 2004, December 2005, June 2006, April 2007, August 2007

Directions for Use

~~CAUTION: The United States Supreme Court recently held that the Due Process Clause of the U.S. Constitution forbids the award of punitive damages to punish a defendant for injuries caused to nonparties. (Philip Morris USA v. Williams (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).) This instruction may need to be revised in light of this holding. The advisory committee will be considering revisions for the next release.~~

This instruction is intended to apply ~~to cases where~~ if punitive damages are sought against both an individual person and a corporate defendant. When punitive damages are sought only against corporate defendants, use CACI No. 3943, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Trial Not Bifurcated*, or CACI No. 3945, *Punitive Damages—Entity Defendant—Trial Not Bifurcated*. When punitive damages are sought against an individual defendant, use CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*.

For an instruction explaining “clear and convincing evidence,” see CACI No. 201, *More Likely True—Clear and Convincing Proof*.

Read the bracketed language ~~in subdivision~~ at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, ~~where~~ if damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or ~~where~~ if the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) The bracketed phrase should not be given ~~where~~ if an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain ~~where~~ if the jury had found that there was no binding contract].)

Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm that the defendant’s conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) 549 U.S. _____, _____ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)

Read the ~~bracketed language in subdivision~~ optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

If any of the alternative grounds for seeking punitive damages are inapplicable to the facts of the case, they may be omitted.

See CACI No. 3940, *Punitive Damages—Individual Defendant—Trial Not Bifurcated*, for additional sources and authority.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 422 [123 S.Ct. 1513, 155 L.Ed.2d 585].) An instruction

on this point should be included within this instruction if appropriate to the facts.

In an appropriate case, the jury may be instructed that a false promise or a suggestion of a fact known to be false may constitute a misrepresentation as the word “misrepresentation” is used in the instruction’s definition of “fraud.”

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.)~~

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.

- “[E]vidence of ratification of [agent’s] actions by Hamilton, and any other findings made under Civil Code section 3294, subdivision (b), must be made by clear and convincing evidence.” (*Barton v. Alexander Hamilton Life Ins. Co. of America* (2003) 110 Cal.App.4th 1640, 1644 [3 Cal.Rptr.3d 258].)
- “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.)

- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation omitted.)
- “[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. ___ (2007 U.S. LEXIS 1332, *13).)
- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible— although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. ___ (2007 U.S. LEXIS 1332, *16).)
- “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, 882 P.2d 894].)
- “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, 981 P.2d 944].)

- “[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., Inc.* (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.)

- [“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 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 Found. v. Graham* \(1999\) 72 Cal.App.4th 1135, 1162 , fn. 15 \[85 Cal.Rptr.2d 726\].\)](#)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.12, 14.18–14.31, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, § 54.07 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 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 for the conduct that harmed the plaintiff and to discourage similar conduct in the future.

There is no fixed **standard-formula** for determining the amount of punitive damages, and you are not required to award any punitive damages. If you decide to award punitive damages, you should consider all of the following separately for each defendant in determining the amount:

- (a) How reprehensible was that defendant's conduct? In deciding how reprehensible a defendant's conduct was, you may consider, among other factors:
 - 1. Whether the conduct caused physical harm;
 - 2. Whether the defendant disregarded the health or safety of others;
 - 3. Whether *[name of plaintiff]* was financially weak or vulnerable and the defendant knew *[name of plaintiff]* was financially weak or vulnerable and took advantage of *[him/her/it]*;
 - 4. Whether the defendant's conduct involved a pattern or practice; and
 - 5. Whether the defendant acted with trickery or deceit.
- (b) Is there a reasonable relationship between the amount of punitive damages and *[name of plaintiff]*'s harm [or between the amount of punitive damages and potential harm to *[name of plaintiff]* that **the defendant**~~*[name of defendant]*~~ knew was likely to occur because of ~~**his/her/its**~~ **his, her, or its** conduct]? [Punitive damages may not be used to punish a defendant for the impact of his, her, or its alleged misconduct on persons other than *[name of plaintiff]*.]
- (c) In view of that defendant's financial condition, what amount is necessary to punish *[him/her/it]* and discourage future wrongful conduct? You may not increase the punitive award above an amount that is otherwise appropriate merely because a defendant has substantial financial resources. [Any award you impose may not exceed that defendant's ability to pay.]

New September 2003; Revised April 2004, October 2004, June 2006, April 2007, [August 2007](#)

Directions for Use

~~CAUTION: The United States Supreme Court recently held that the Due Process Clause of the U.S.~~

~~Constitution forbids the award of punitive damages to punish a defendant for injuries caused to nonparties. (*Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).) This instruction may need to be revised in light of this holding. The advisory committee will be considering revisions for the next release.~~

Read the bracketed language ~~in subdivision~~ at the end of the first sentence of factor (b) only if there is evidence that the conduct of defendant that allegedly gives rise to liability and punitive damages either caused or foreseeably threatened to cause harm to plaintiff that would not be included in an award of compensatory damages. (*Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159 [29 Cal.Rptr.3d 379, 113 P.3d 63].) The bracketed phrase concerning “potential harm” might be appropriate, for example, ~~where-if~~ damages actually caused by the defendant’s acts are not recoverable because they are barred by statute (*id.* at p. 1176, citing *Neal v. Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 929 [148 Cal.Rptr. 389, 582 P.2d 980] [in a bad faith insurance case, plaintiff died before judgment, precluding her estate’s recovery of emotional distress damages]), or ~~where-if~~ the harm caused by defendant’s acts could have been great, but by chance only slight harm was inflicted. (*Simon, supra*, 35 Cal.4th at p. 1177, citing *TXO Production Corp. v. Alliance Resources Corp.* (1993) 509 U.S. 443, 459 [113 S.Ct. 2711, 125 L.Ed.2d 366] [considering the hypothetical of a person wildly firing a gun into a crowd but by chance only damaging a pair of glasses].) ~~The bracketed phrase should not be given where-if~~ an award of compensatory damages is the “true measure” of the harm or potential harm caused by defendant’s wrongful acts. (*Simon, supra*, 35 Cal.4th at pp. 1178–1179 [rejecting consideration for purposes of assessing punitive damages of the plaintiff’s loss of the benefit of the bargain if/where the jury had found that there was no binding contract].) ~~;~~

Read the optional final sentence of factor (b) if there is a possibility that the jury might consider harm that the defendant’s conduct might have caused to nonparties in arriving at an amount of punitive damages. (See *Philip Morris USA v. Williams* (2007) 549 U.S. ___, ___ [127 S.Ct. 1057, 166 L.Ed.2d 940] (2007 U.S. LEXIS 1332).)

Read the ~~bracketed language in subdivision~~ optional final sentence of factor (c) only if the defendant has presented relevant evidence regarding that issue.

“A jury must be instructed ... that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.” (*State Farm Mutual Automobile Insurance Co. v. Campbell* (2003) 538 U.S. 408, 422 [123 S.Ct. 1513, 155 L.Ed.2d 585].) An instruction on this point should be included within this instruction if appropriate to the facts.

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.)~~

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, supra, v. Farmers Insurance Exchange (1978)*) 21 Cal.3d at p. 910, 928, fn. 13 [148 Cal.Rptr. 389, 582 P.2d 980].)
- “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, 882 P.2d 894], 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, 529 P.2d 608].)
- “ ‘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 untrammelled discretion, has made the award.’ ” (*Brewer v. Second Baptist Church of Los Angeles (1948)* 32 Cal.2d 791, 801 [197 P.2d 713], internal citations 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, 813 P.2d 1348], 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.)
- “[T]he Constitution’s Due Process Clause forbids a State to use a punitive damages award to punish a

defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. ___ (2007 U.S. LEXIS 1332, *13).)

- “Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse. Yet for the reasons given above, a jury may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties.” (*Philip Morris USA v. Williams, supra*, 549 U.S. at p. ___ (2007 U.S. LEXIS 1332, *16).)
- “We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 419, internal citation 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.)
- “The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” (*State Farm Mutual Automobile Insurance Co., supra*, 538 U.S. at p. 427, internal citation omitted.)
- “[T]he purpose of punitive damages is not served by financially destroying a defendant. The purpose is to deter, not to destroy.” (*Adams, supra*, 54 Cal.3d at p. 112.)
- “[A] punitive damages award is excessive if it is disproportionate to the defendant’s ability to pay.” (*Adams, supra*, 54 Cal.3d at p. 112, 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.)
- [“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 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 Found. v. Graham* \(1999\) 72 Cal.App.4th 1135, 1162 , fn. 15 \[85 Cal.Rptr.2d 726\].\)](#)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1581–1585

California Tort Damages (Cont.Ed.Bar) Punitive Damages, §§ 14.1–14.12, 14.21, 14.39

4 Levy et al., California Torts, Ch. 54, *Punitive Damages*, §§ 54.07, 54.24[4][d] (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages* (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

UNLAWFUL DETAINER

4300. Introductory Instruction

This is an action for what is called unlawful detainer. *[Name of plaintiff]*, the *[landlord/tenant]*, claims that *[name of defendant]* is *[his/her/its]* *[tenant/subtenant]* under a *[lease/rental agreement/sublease]* and that *[name of defendant]* no longer has the right to occupy the property *[by subleasing to [name of subtenant]]*. *[Name of plaintiff]* seeks to recover possession of the property from *[name of defendant]*. *[Name of defendant]* claims that *[he/she/it]* still has the right to occupy the property because *[insert defenses at issue]*.

The property involved in this case is *[describe property: e.g., “an apartment,” “a house,” “space in a commercial building”]* located in *[city or area]* at *[address]*.

New August 2007

Directions for Use

If the plaintiff is the landlord or owner and the defendant is the tenant, select “landlord” and “tenant,” in the first sentence. If the plaintiff is a tenant seeking to recover possession from a subtenant, select “tenant” and “subtenant.” (Code Civ. Proc., § 1161(3).)

If the plaintiff is the landlord or owner, select either “lease” or “rental agreement” in the first sentence. Commercial documents are usually called “leases” while residential documents are often called “rental agreements.” Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select “sublease.”

If the defendant is a tenant who has subleased the premises to someone else, add the bracketed language in the first paragraph referring to subleasing.

Sources and Authority

- Code of Civil Procedure section 1171 provides: “Whenever an issue of fact is presented by the pleadings, it must be tried by a jury, unless such jury be waived as in other cases. The jury shall be formed in the same manner as other trial juries in an action of the same jurisdictional classification in the Court in which the action is pending.”
- Code of Civil Procedure section 1161(3) provides, in part: “A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant or held by a servant, employee, agent, or licensee, in case of his or her unlawful detention of the premises underlet to him or her or held by him or her.”
- “The remedy of unlawful detainer is designed to provide means by which the timely possession of premises which are wrongfully withheld may be secured to the person entitled thereto.” (*Knowles v. Robinson* (1963) 60 Cal.2d 620, 625 [36 Cal.Rptr. 33, 387 P.2d 833].)

- “Chapter 4 of title 3 of part 3 of the Code of Civil Procedure is commonly known as the Unlawful Detainer Act (hereafter, the Act). The Act is broad in scope and available to both lessors and lessees who have suffered certain wrongs committed by the other. Procedures and proceedings in unlawful detainer were not known at common law and are entirely creatures of statute. As such, they are governed solely by the statutes which created them. Thus, where the Act ‘deals with matters of practice, its provisions supersede the rules of practice contained in other portions of the code.’ ” (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799], internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 703

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, § 19:214

2 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 9.5, 9.34–9.36

1 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) §§ 1.4–1.5

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.01 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.02

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.12 (Matthew Bender)

UNLAWFUL DETAINER

4301. Expiration of Fixed-Term Tenancy—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] [and [name of subtenant], a subtenant of [name of defendant],] no longer [has/have] the right to occupy the property because the [lease/rental agreement/sublease] has ended. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] [owns/leases] the property;**
 - 2. That [name of plaintiff] [leased/subleased] the property to [name of defendant] until [insert end date];**
 - 3. That [name of plaintiff] did not give [name of defendant] permission to continue occupying the property after the [lease/rental agreement/sublease] ended; and**
 - 4. That [name of defendant] [or subtenant [name of subtenant]] is still occupying the property.**
-

New August 2007

Directions for Use

Uncontested elements may be deleted from this instruction.

If the plaintiff is the landlord or owner, select “lease” or “rental agreement” in the first sentence and in element 3 as appropriate, “owns” in element 1, and “leased” in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select “sublease” in the first paragraph and in element 3, “leases” in element 1, and “subleased” in element 2. (Code Civ. Proc., § 1161(3).)

If persons other than the tenant-defendant are occupying the premises, include the bracketed language in the first paragraph and in element 4.

Sources and Authority

- Code of Civil Procedure section 1161 provides, in part:

A tenant of real property ... is guilty of unlawful detainer:

1. When he or she continues in possession, in person or by subtenant ... after the expiration of the term for which it is let to him or her; provided the expiration is of a nondefault nature however brought about without the permission of his or her landlord, or the successor in estate of his or her landlord, if applicable; including the case where the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant, or employer and employee, or principal and agent, or licensor and licensee, has been lawfully terminated or the time fixed for occupancy by the agreement between the parties has expired; but nothing in this subdivision shall be construed as preventing the removal of the occupant in any other lawful manner; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.

...

3. A tenant may take proceedings, similar to those prescribed in this chapter, to obtain possession of the premises let to a subtenant or held by a servant, employee, agent, or licensee, in case of his or her unlawful detention of the premises underlet to him or her or held by him or her.

- Civil Code section 1952.3(a) provides, in part: “[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action”
- “ ‘In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord’s title.’ ” (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)
- “The most important difference between a periodic tenancy and a tenancy for a fixed term—such as six months—is that the latter terminates at the end of such term, without any requirement of notice as in the former. In order to create an estate for a definite period, the duration must be capable of exact computation when it becomes possessory, otherwise no such estate is created.” (*Camp v. Matich* (1948) 87 Cal.App.2d 660, 665–666 [197 P.2d 345], internal citations omitted.)
- “It is well established that it is the duty of the tenant as soon as his tenancy expires by its own limitations, to surrender the possession of the premises and that no notice of termination is necessary, the lease itself terminating the tenancy; and if he continues in possession beyond that period without the permission of the landlord, he is guilty of unlawful detainer, and an action may be commenced against him at once, under the provisions of subdivision 1 of section 1161 of the Code of Civil Procedure, without the service upon him of any notice.” (*Ryland v. Appelbaum* (1924) 70 Cal.App. 268, 270 [233 P. 356], internal citations omitted.)
- “If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages.” (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 664, 678, 721

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, § 19:43

1 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) § 8.82

1 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) §§ 5.4, 7.8

23 California Points and Authorities, Ch. 236, Unlawful Detainer, § 236.42 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

UNLAWFUL DETAINER

**4302. Termination for Failure to Pay Rent—
Essential Factual Elements**

[Name of plaintiff] claims that [name of defendant] [and [name of subtenant], a subtenant of [name of defendant],] no longer [has/have] the right to occupy the property because [name of defendant] has failed to pay the rent. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] [owns/leases] the property;**
 - 2. That [name of plaintiff] [rented/subleased] the property to [name of defendant];**
 - 3. That under the [lease/rental agreement/sublease], [name of defendant] was required to pay rent in the amount of \$[specify amount] per [specify period, e.g., month];**
 - 4. That [name of plaintiff] properly gave [name of defendant] three days' written notice to pay the rent or vacate the property [or that [name of defendant] actually received this notice at least three days before [date on which action was filed]];**
 - 5. That as of [date of three-day notice], at least the amount stated in the three-day notice was due;**
 - 6. That [name of defendant] did not pay [or attempt to pay] the amount stated in the notice within three days after [service/receipt] of the notice; and**
 - 7. That [name of defendant] [or subtenant [name of subtenant]] is still occupying the property.**
-

New August 2007

Directions for Use

Uncontested elements may be deleted from this instruction.

Include the bracketed references to a subtenancy in the opening paragraph and in element 7 if persons other than the tenant-defendant are occupying the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1, "rented" in element 2, and either "lease" or "rental agreement" in element 3. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a

subtenant, select “leases” in element 1, “subleased” in element 2, and “sublease” in element 3. (Code Civ. Proc., § 1161(3).)

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 4. Defective service is waived if defendant admits receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96].)

If the lease specifies a time period for notice other than the three-day period, substitute that time period in elements 4, 5, and 6, provided that it is not less than three days.

There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] (tenant must be given three days to pay, so period does not begin until actual notice is received) with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] (notice is effective when posted and mailed). This conflict is accounted for in element 6.

See CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*, for an instruction regarding proper notice.

Sources and Authority

- Code of Civil Procedure section 1161 provides, in part:

A tenant of real property ... is guilty of unlawful detainer:

2. When he or she continues in possession, in person or by subtenant, without the permission of his or her landlord ... after default in the payment of rent, pursuant to the lease or agreement under which the property is held, and three days' notice, in writing, requiring its payment ... shall have been served upon him or her and if there is a subtenant in actual occupation of the premises, also upon the subtenant.”

- Civil Code section 1952.3(a) provides, in part: “[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action”
- “[M]ere failure of a tenant to quit the premises during the three-day notice period does not necessarily justify an unlawful detainer action. If a tenant vacates the premises and surrenders possession to the landlord prior to the complaint being filed, then no action for unlawful detainer will lie even though the premises were not surrendered during the notice period. This is true because the purpose of an unlawful detainer action is to recover possession of the premises for the landlord. Since an action in unlawful detainer involves a forfeiture of the tenant’s right to possession, one of the matters that must be pleaded and proved for unlawful detainer is that the tenant remains in possession of the premises. Obviously this cannot be established where the tenant has surrendered the premises to

landlord prior to the filing of the complaint. In such a situation the landlord's remedy is an action for damages and rent." (*Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 Cal.App.3d 900, 905–906 [126 Cal.Rptr. 34], footnote and internal citations omitted.)

- “Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor’s right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained.” (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr. 2d 457] internal citations omitted.)
- “Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter’s residence or usual place of business *and* sending a copy through the mail to the tenant’s *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required.” (*Liebovich, supra*, 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)
- “If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages.” (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 723

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, § 19:200

1 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 8.35-8.45

1 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) §§ 5.2, 6.17-6.37

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

UNLAWFUL DETAINER

4303. Sufficiency and Service of Notice of Termination for Failure to Pay Rent

[Name of plaintiff] contends that *[he/she/it]* properly gave *[name of defendant]* three days' notice to pay the rent or vacate the property. To prove that the notice contained the required information and was properly given, *[name of plaintiff]* must prove all of the following:

1. That the notice informed *[name of defendant]* in writing that *[he/she/it]* must pay the amount due within three days or vacate the property;
2. That the notice stated *[no more than/a reasonable estimate of]* the amount due, and the name, telephone number, and address of the person to whom the amount should be paid, and

[Use if payment was to be made personally.

the usual days and hours that the person would be available to receive the payment;]

[or: Use if payment was to be made into a bank account.

the number of an account in a bank located within five miles of the rental property into which the payment could be made, and the name and street address of the bank;]

[or: Use if an electronic funds transfer procedure had been previously established.

that payment could be made by electronic funds transfer;]

3. That the notice was given to *[name of defendant]* at least three days before *[insert date on which action was filed]*.

Notice was properly given if *[select one of the following manners of service:]*

[the notice was delivered to *[name of defendant]* personally.]

[or:

[name of defendant]* was not at home or work, and the notice was left with a responsible person at *[name of defendant]*'s residence or place of work, and a copy was also mailed to the address of the rented property in an envelope addressed to *[name of defendant]*. In this case, notice is considered given on the date the second notice was *[received by *[name of defendant]*/placed in the mail].

[or:

a responsible person was not present at [name of defendant]’s residence or work, and the notice was posted on the property in a place where it would easily be noticed, and a copy was also mailed to the address of the rented property in an envelope addressed to [name of defendant]. In this case, notice is considered given on the date the second notice was [received by [name of defendant]/placed in the mail].]

[The three-day notice period begins the day after the notice was given to [name of defendant]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [name of defendant]’s time to pay the rent or vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]

[If [name of plaintiff] did not properly give [name of defendant] the required written notice, the notice is still effective if [name of defendant] actually received it at least three days before [insert date on which action was filed].]

[A notice stating a reasonable estimate of the amount of rent due that is within 20 percent of the amount actually due is reasonable unless [name of defendant] proves that it was not reasonable. In determining the reasonableness of the estimate, you may consider whether calculating the amount of rent required information primarily within the knowledge of [name of defendant] and whether [name of defendant] accurately furnished that information to [name of plaintiff].]

New August 2007

Directions for Use

Use the reasonable-estimate option in the first sentence of element 2 and include the final paragraph only in cases involving commercial leases. (Code Civ. Proc., § 1161.1(a); see also Code Civ. Proc., § 1161.1(e) [presumption that if amount found to be due is within 20 percent of amount stated in notice, then estimate was reasonable].)

In element 2, select the applicable manner in which the notice specifies that payment is to be made; directly to the landlord, into a bank account, or by electronic funds transfer. (Code Civ. Proc., § 1161(2).)

Select the manner of service used; personal service, substituted service by leaving the notice at the defendant’s home or place of work, or substituted service by posting on the property. (Code Civ. Proc., § 1162.) There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] (tenant must be given three days to pay, so period does not begin until actual notice is received) with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277

Cal.Rptr. 316] (notice is effective when posted and mailed). This conflict is accounted for in the second and third bracketed options for the manner of service.

Read the third-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout, provided that it is not less than three days.

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the next-to-last paragraph. Defective service is waived if defendant admits receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96].)

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- Code Civil Procedure section 1161(2) provides, in part: “When he or she continues in possession ... without the permission of his or her landlord ... after default in the payment of rent ... and three days’ notice, in writing, requiring its payment, stating the amount which is due, the name, telephone number, and address of the person to whom the rent payment shall be made, and, if payment may be made personally, the usual days and hours that person will be available to receive the payment (provided that, if the address does not allow for personal delivery, then it shall be conclusively presumed that upon the mailing of any rent or notice to the owner by the tenant to the name and address provided, the notice or rent is deemed received by the owner on the date posted, if the tenant can show proof of mailing to the name and address provided by the owner), or the number of an account in a financial institution into which the rental payment may be made, and the name and street address of the institution (provided that the institution is located within five miles of the rental property), or if an electronic funds transfer procedure has been previously established, that payment may be made pursuant to that procedure, or possession of the property, shall have been served upon him or her and if there is a subtenant in actual occupation of the premises, also upon the subtenant.”
- Code of Civil Procedure 1161.1 provides, in part:

With respect to application of Section 1161 in cases of possession of commercial real property after default in the payment of rent:

- (a) If the amount stated in the notice provided to the tenant pursuant to subdivision (2) of Section 1161 is clearly identified by the notice as an estimate and the amount claimed is not in fact correct, but it is determined upon the trial or other judicial determination that rent was owing, and the amount claimed in the notice was reasonably estimated, the tenant shall be subject to judgment for possession and the actual amount of rent and other sums found to be due. However, if (1) upon receipt of

such a notice claiming an amount identified by the notice as an estimate, the tenant tenders to the landlord within the time for payment required by the notice, the amount which the tenant has reasonably estimated to be due and (2) if at trial it is determined that the amount of rent then due was the amount tendered by the tenant or a lesser amount, the tenant shall be deemed the prevailing party for all purposes. If the court determines that the amount so tendered by the tenant was less than the amount due, but was reasonably estimated, the tenant shall retain the right to possession if the tenant pays to the landlord within five days of the effective date of the judgment (1) the amount previously tendered if it had not been previously accepted, (2) the difference between the amount tendered and the amount determined by the court to be due, and (3) any other sums as ordered by the court.

(e) For the purposes of this section, there is a presumption affecting the burden of proof that the amount of rent claimed or tendered is reasonably estimated if, in relation to the amount determined to be due upon the trial or other judicial determination of that issue, the amount claimed or tendered was no more than 20 percent more or less than the amount determined to be due. However, if the rent due is contingent upon information primarily within the knowledge of the one party to the lease and that information has not been furnished to, or has not accurately been furnished to, the other party, the court shall consider that fact in determining the reasonableness of the amount of rent claimed or tendered pursuant to subdivision (a).

- Code of Civil Procedure section 1162 provides:

The notices required by Sections 1161 and 1161a may be served, either:

1. By delivering a copy to the tenant personally; or,
 2. If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence; or,
 3. If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.
- “A valid three-day pay rent or quit notice is a prerequisite to an unlawful detainer action. Because of the summary nature of an unlawful detainer action, a notice is valid only if the lessor strictly complies with the statutorily mandated notice requirements. [¶] A three-day notice must contain ‘the amount which is due.’ A notice which demands rent in excess of the amount due does not satisfy this requirement. This rule ensures that a landlord will not be entitled to regain possession in an unlawful detainer action unless the tenant has had the opportunity to pay the delinquent rent.” (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697 [32 Cal.Rptr.2d 635], internal citations and footnote omitted.)

- “[W]e do not agree that a proper notice may not include anything other than technical rent. It is true that subdivision 2 of Code of Civil Procedure section 1161 relates to a default in the payment of rent. However, the subdivision refers to the ‘lease or agreement under which the property is held’ and requires the notice state ‘the amount which is due.’ The language is not ‘the amount of rent which is due’ or ‘the rent which is due.’ We think the statutory language is sufficiently broad to encompass any sums due under the lease or agreement under which the property is held.” (*Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 492 [144 Cal.Rptr. 474].)
- “[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action.” (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
- “Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter’s residence or usual place of business and sending a copy through the mail to the tenant’s *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required.” (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)
- “We ... hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent.” (*Davidson, supra*, 138 Cal.App.3d Supp. at p. 14.)
- “We ... hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed.” (*Walters, supra*, 226 Cal.App.3d Supp. at p. 20.)
- “An unlawful detainer action based on failure to pay rent must be preceded by a three-day notice to the tenant to pay rent or quit the premises. Failure to state the exact amount of rent due in the notice is fatal to the subsequent unlawful detainer action.” (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 606, fn. 2 [267 Cal.Rptr. 189], internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 722 – 725, 727

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, §§ 19:202-19:204

1 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 8.26–8.68

1 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) §§ 5.2, 6.10–6.30, Ch. 8

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.22
(Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful
Detainer*, §§ 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, §
333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.13, 236.13A (Matthew
Bender)

UNLAWFUL DETAINER

**4304. Termination for Violation of Terms of Lease/Agreement—
Essential Factual Elements**

[Name of plaintiff] claims that [name of defendant] [and [name of subtenant], a subtenant of [name of defendant],] no longer [has/have] the right to occupy the property because [name of defendant] has failed to perform [a] requirement(s) under [his/her/its] [lease/rental agreement/sublease]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] [owns/leases] the property;**
 - 2. That [name of plaintiff] [rented/subleased] the property to [name of defendant];**
 - 3. That under the [lease/rental agreement/sublease], [name of defendant] agreed [insert required condition(s) that were not performed];**
 - 4. That [name of defendant] failed to perform [that/those] requirement(s) by [insert description of alleged failure to perform];**
 - 5. That [name of defendant]’s failure to perform [that/those] requirement(s) was not trivial, but was a substantial breach of [an] important obligation[s] under the [lease/rental agreement/sublease];**
 - 6. That [name of plaintiff] properly gave [name of defendant] [and [name of subtenant]] three days’ written notice to [either [describe action to correct failure to perform] or] vacate the property[, or that [name of defendant] actually received this notice at least three days before [date on which action was filed]]; [and]**
 - [7. That [name of defendant] did not [describe action to correct failure to perform]; and]**
 - [7/8]. That [name of defendant] [or subtenant [name of subtenant]] is still occupying the property.**
-

New August 2007

Directions for Use

Uncontested elements may be deleted from this instruction.

Include the bracketed references to a subtenancy in the opening paragraph, in element 6, and in the last element if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select either “lease” or “rental agreement” in the opening paragraph and in elements 3 and 5, “owns” in element 1, and “rented” in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select “sublease” in the opening paragraph and in elements 3 and 5, “leases” in element 1, and “subleased” in element 2. (Code Civ. Proc., § 1161(3).)

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 6. Defective service is waived if defendant admits timely receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96].)

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 6.

If the violation of the condition or covenant involves waste, nuisance, or illegal activity and cannot be cured (see Code Civ. Proc., § 1161(4)), omit the bracketed language in element 6 and element 7. If a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action. (*Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246], internal citation omitted.)

Local or federal law may impose additional requirements for the termination of a rental agreement based on breach of a condition. This instruction should be modified accordingly.

See CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*, for an instruction on proper written notice.

See also CACI No. 312, *Substantial Performance*.

Sources and Authority

- Code of Civil Procedure section 1161 provides, in part:

A tenant of real property ... is guilty of unlawful detainer:

3. When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any

mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease.

- Civil Code section 1952.3(a) provides, in part: “[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action”
- “[Code of Civil Procedure section 1161(3)] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord’s claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of this statute is to speedily permit a landlord to obtain possession of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law otherwise would accord him under the proceeding.” (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449].)
- “The law sensibly recognizes that although every instance of noncompliance with a contract’s terms constitutes a breach, not every breach justifies treating the contract as terminated. Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as ‘material,’ ‘substantial,’ or ‘total.’ ” (*Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487], internal citations omitted.)
- “California too accepts that ‘[whether] a breach is so material as to constitute cause for the injured party to terminate a contract is ordinarily a question for the trier of fact.’ ” (*Superior Motels, Inc., supra*, 195 Cal.App.3d at pp. 1051-1052, internal citations omitted.)
- “If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages.” (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 723

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, § 19:201

1 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 8.50-8.54

1 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) §§ 5.2, 6.38-6.49

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.20 (Matthew Bender)

UNLAWFUL DETAINER

4305. Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement

[Name of plaintiff] contends that [he/she/it] properly gave [name of defendant] three days' notice to [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property. To prove that the notice contained the required information and was properly given, [name of plaintiff] must prove all of the following:

1. That the notice informed [name of defendant] in writing that [he/she/it] must, within three days, [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property;
2. That the notice described how [name of defendant] failed to comply with the requirements of the [lease/rental agreement/sublease] [and how to correct the failure];
3. That the notice was given to [name of defendant] at least three days before [insert date on which action was filed];

Notice was properly given if [select one of the following manners of service:]

[the notice was delivered to [name of defendant] personally.]

[or:

[name of defendant] was not at home or work, and the notice was left with a responsible person at [name of defendant]'s residence or place of work, and a copy was also mailed to the address of the rented property in an envelope addressed to [name of defendant]. In this case, notice is considered given on the date the second notice was [received by [name of defendant]/placed in the mail].]

[or:

a responsible person was not present at [name of defendant]'s residence or work, and the notice was posted on the property in a place where it would easily be noticed, and a copy was also mailed to the address of the rented property in an envelope addressed to [name of defendant]. In this case, notice is considered given on the date the second notice was [received by [name of defendant]/placed in the mail].]

[The three-day notice period begins on the day after the notice was given to [name of defendant]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [name of defendant]'s time to correct the failure or to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]

[If [name of plaintiff] did not properly give [name of defendant] the required written notice, the notice is still effective if [name of defendant] actually received it at least three days before [insert date on which action was filed].]

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Directions for Use

If the violation of the condition or covenant cannot be cured, omit the bracketed language in the first paragraph and in elements 1 and 2. If a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action. (*Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 64 Cal.Rptr. 246], internal citation omitted.)

If the plaintiff is the landlord or owner, select either “lease” or “rental agreement” in the optional language in the opening paragraph and in elements 1 and 2. Commercial documents are usually called “leases” while residential documents are often called “rental agreements.” Select the term that is used on the written document. If the plaintiff is a tenant seeking to recover possession from a subtenant, select “sublease.” (Code Civ. Proc., § 1161(3).)

Select the manner of service used; personal service, substituted service by leaving the notice at the defendant’s home or place of work, or substituted service by posting on the property. (Code Civ. Proc., § 1162.) There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] (tenant must be given three days to pay, so period does not begin until actual notice is received) with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] (notice is effective when posted and mailed). This conflict is accounted for in the second and third bracketed options for the manner of service.

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If a lease specifies a time period for giving notice other than the three-day period, substitute that time period for three days throughout the instruction, provided that it is not less than three days.

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the last paragraph. Defective service is waived if defendant admits timely receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96].)

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- Code of Civil Procedure section 1161 provides, in part:

A tenant of real property ... is guilty of unlawful detainer:

3. When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease.

- Code of Civil Procedure section 1162 provides:

The notices required by Sections 1161 and 1161a may be served, either:

1. By delivering a copy to the tenant personally; or,
 2. If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence; or,
 3. If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.
- “[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action.” (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
 - “We ... hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent.” (*Davidson, supra*, 138 Cal.App.3d Supp. at p. 14.)

- “We ... hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed.” (*Walters, supra*, 226 Cal.App.3d Supp. at p. 20.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 723, 727

Miller & Starr, California Real Estate (Rutter Group) Ch. 19, *Landlord-Tenant*, §§ 19:202-19:204

1 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 8.26–8.68

1 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) §§ 5.2, 6.10–6.16, 6.25-6.29, 6.38-6.49, Ch. 8

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.23, 210.24 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, §§ 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.12 (Matthew Bender)

UNLAWFUL DETAINER

**4306. Termination of Month-to-Month Tenancy—
Essential Factual Elements**

[Name of plaintiff] claims that [name of defendant] [and [name of subtenant], a subtenant of [name of defendant],] no longer [has/have] the right to occupy the property because the tenancy has ended. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] [owns/leases] the property;**
 - 2. That [name of plaintiff] [rented/subleased] the property to [name of defendant] under a month-to-month [lease/rental agreement/sublease];**
 - 3. That [name of plaintiff] gave [name of defendant] proper [30/60] days' written notice that the tenancy was ending [or that [name of defendant] actually received this notice at least [30/60] days before [date on which action was filed]]; and**
 - 4. That [name of defendant] [or subtenant [name of subtenant]] is still occupying the property.**
-

New August 2007

Directions for Use

Uncontested elements may be deleted from this instruction.

Include the bracketed references to a subtenancy in the opening paragraph and in element 4 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select "owns" in element 1 and "rented" and either "lease" or "rental agreement" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "leases" in element 1 and "subleased" and "sublease" in element 2. (Code Civ. Proc., § 1161(3).)

In element 3, select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days' notice is generally required. (Civ. Code, §§ 1946, 1946.1(b)-(d).)

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 3. Defective service is waived if defendant admits timely receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96].)

Do not give this instruction to terminate a tenancy if the tenant is receiving federal financial assistance through the Section 8 program. (See *Wasatch Property Management v. Degrade* (2005) 35 Cal.4th 1111, 1115 [29 Cal.Rptr.2d 262, 112 P.3d 647]; Civ. Code, § 1954.535 (90 days' notice required).) Specific grounds for terminating a federally subsidized low-income housing tenancy are required and must be set forth in the notice. (See, e.g., 24 C.F.R. § 982.310.)

See CACI No. 4307, *Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy*, for an instruction on proper advanced written notice.

Sources and Authority

- Code of Civil Procedure section 1161 provides, in part:

A tenant of real property ... is guilty of unlawful detainer:

1. When he or she continues in possession, in person or by subtenant ... after the expiration of the term for which it is let to him or her; provided the expiration is of a nondefault nature however brought about without the permission of his or her landlord ... including the case where the person to be removed became the occupant of the premises as a servant, employee, agent, or licensee and the relation of master and servant, or employer and employee, or principal and agent, or licensor and licensee, has been lawfully terminated or the time fixed for occupancy by the agreement between the parties has expired; but nothing in this subdivision shall be construed as preventing the removal of the occupant in any other lawful manner; but in case of a tenancy at will, it must first be terminated by notice, as prescribed in the Civil Code.
- Civil Code section 1946 provides: “A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days; provided, however, that as to tenancies from month to month either of the parties may terminate the same by giving at least 30 days’ written notice thereof at any time and the rent shall be due and payable to and including the date of termination. It shall be competent for the parties to provide by an agreement at the time such tenancy is created that a notice of the intention to terminate the same may be given at any time not less than seven days before the expiration of the term thereof. The notice herein required shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail addressed to the other party. In addition, the lessee may give such notice by sending a copy by certified or registered mail addressed to the agent of the

lessor to whom the lessee has paid the rent for the month prior to the date of such notice or by delivering a copy to the agent personally.”

- Civil Code section 1946.1 provides, in part:
 - (a) Notwithstanding Section 1946, a hiring of residential real property for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his or her intention to terminate the tenancy, as provided in this section.
 - (b) An owner of a residential dwelling giving notice pursuant to this section shall give notice at least 60 days prior to the proposed date of termination. A tenant giving notice pursuant to this section shall give notice for a period at least as long as the term of the periodic tenancy prior to the proposed date of termination.
 - (c) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if any tenant or resident has resided in the dwelling for less than one year.
 - (d) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if all of the following apply:
 - (1.)The dwelling or unit is alienable separate from the title to any other dwelling unit.
 - (2.)The owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent, as defined in Sections 17004 and 17200 of the Financial Code, or a licensed real estate broker, as defined in Section 10131 of the Business and Professions Code.
 - (3.)The purchaser is a natural person or persons.
 - (4.)The notice is given no more than 120 days after the escrow has been established.
 - (5.)Notice was not previously given to the tenant pursuant to this section.
 - (6.)The purchaser in good faith intends to reside in the property for at least one full year after the termination of the tenancy.
 - ...
 - (f) The notices required by this section shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail.
- Civil Code section 1944 provides: “A hiring of lodgings or a dwelling-house for an unspecified term is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a monthly rate of rent is presumed to be for

one month. In the absence of any agreement respecting the length of time or the rent, the hiring is presumed to be monthly.”

- Civil Code section 1952.3(a) provides, in part: “[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action”
- “ ‘In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord’s title.’ ” (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)
- “If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages.” (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)
- “The Act provides that as a prerequisite to filing an unlawful detainer action based on a terminated month-to-month tenancy, the landlord must serve the tenant with a 30-day written notice of termination.” (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799], internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 680

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, § 19:188

1 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 8.69-8.80

1 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) §§ 5.3, 7.5, 7.11

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.40 (Matthew Bender)

UNLAWFUL DETAINER

4307. Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy

[Name of plaintiff] contends that [he/she/it] properly gave [name of defendant] written notice that the tenancy was ending. To prove that the notice contained the required information and was properly given, [name of plaintiff] must prove all of the following:

- 1. That the notice informed [name of defendant] in writing that the tenancy would end on a date at least [30/60] days after notice was given to [him/her/it];**
- 2. That the notice was given to [name of defendant] at least [30/60] days before the date that the tenancy was to end; and**
- 3. That the notice was given to [name of defendant] at least [30/60] days before [insert date on which action was filed];**

Notice was properly given if [select one or more of the following manners of service:]

[the notice was delivered to [name of defendant] personally][./; or]

[the notice was sent by certified or registered mail in an envelope addressed to [name of defendant], in which case notice is considered given on the date the notice was placed in the mail][./; or]

[[name of defendant] was not at home or work, and the notice was left with a responsible person at [name of defendant]'s home or place of work, and a copy was also mailed to the address of the rented property in an envelope addressed to [name of defendant]. In this case, notice is considered given on the date the second notice was placed in the mail][./; or]

[a responsible person was not present at [name of defendant]'s home or work, and the notice was posted on the property in a place where it would easily be noticed, and a copy was also mailed to the property in an envelope addressed to [name of defendant]. In this case, notice is considered given on the date the second notice was placed in the mail].

[The [30/60]-day notice period begins on the day after the notice was given to [name of defendant]. If the last day of the notice period falls on a Saturday, Sunday, or holiday, [name of defendant]'s time to vacate the property is extended to include the first day after the Saturday, Sunday, or holiday that is not also a Saturday, Sunday, or holiday.]

[If [name of plaintiff] did not properly give [name of defendant] the required written notice, the notice is still effective if [name of defendant] actually received it at least [30/60] days before [insert date on which action was filed].]

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Directions for Use

Select the applicable number of days' notice required by statute. Thirty days is sufficient for commercial tenancies, residential tenancies of less than a year's duration, and certain transfers of the ownership interest to a bona fide purchaser. For residential tenancies of a year or more's duration, 60 days is generally required. (Civ. Code, §§ 1946, 1946.1(b)-(d).)

If 30 days' notice is sufficient and the lease provided for a notice period other than the statutory 30-day period (but not less than 7), insert that number instead of "30" or "60" throughout the instruction. (Civ. Code, § 1946.)

Select all manners of service used, including personal service, certified or registered mail, substituted service by leaving the notice at the defendant's home or place of work, and substituted service by posting on the property. (Civ. Code, §§ 1946, 1946.1(f); Code Civ. Proc., § 1162.)

Read the next-to-last paragraph if the last day of the notice period fell on a Saturday, Sunday, or holiday.

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the last paragraph. Defective service is waived if defendant admits timely receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96].)

Local ordinances may impose additional notice requirements for the termination of a rental agreement. This instruction should be modified accordingly.

Sources and Authority

- Civil Code section 1946 provides: "A hiring of real property, for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his intention to terminate the same, at least as long before the expiration thereof as the term of the hiring itself, not exceeding 30 days; provided, however, that as to tenancies from month to month either of the parties may terminate the same by giving at least 30 days' written notice thereof at any time and the rent shall be due and payable to and including the date of termination. It shall be competent for the parties to provide by an agreement at the time such tenancy is created that a notice of the intention to terminate the same may be given at any time not less than seven days before the expiration of the term thereof. The notice herein required shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy

by certified or registered mail addressed to the other party. In addition, the lessee may give such notice by sending a copy by certified or registered mail addressed to the agent of the lessor to whom the lessee has paid the rent for the month prior to the date of such notice or by delivering a copy to the agent personally.”

- Civil Code section 1946.1 provides, in part:
 - (a) Notwithstanding Section 1946, a hiring of residential real property for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his or her intention to terminate the tenancy, as provided in this section.
 - (b) An owner of a residential dwelling giving notice pursuant to this section shall give notice at least 60 days prior to the proposed date of termination. A tenant giving notice pursuant to this section shall give notice for a period at least as long as the term of the periodic tenancy prior to the proposed date of termination.
 - (c) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if any tenant or resident has resided in the dwelling for less than one year.
 - (d) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if all of the following apply:
 - (1) The dwelling or unit is alienable separate from the title to any other dwelling unit.
 - (2) The owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent, as defined in Sections 17004 and 17200 of the Financial Code, or a licensed real estate broker, as defined in Section 10131 of the Business and Professions Code.
 - (3) The purchaser is a natural person or persons.
 - (4) The notice is given no more than 120 days after the escrow has been established.
 - (5) Notice was not previously given to the tenant pursuant to this section.
 - (6) The purchaser in good faith intends to reside in the property for at least one full year after the termination of the tenancy.
 - ...
 - (f) The notices required by this section shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail.
- Code of Civil Procedure section 1162 provides, in part:

The notices required ... may be served, either:

1. By delivering a copy to the tenant personally; or,
 2. If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence; or,
 3. If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.
- “[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action.” (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 680

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, §§ 19:188, 19:192

1 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 8.69–8.80

1 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) § 5.3, Ch. 7

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.21, 210.27 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, §§ 5.11, 5.12

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.11 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.10–236.12 (Matthew Bender)

UNLAWFUL DETAINER

4320. Affirmative Defense—Implied Warranty of Habitability

[Name of defendant] claims that [he/she] does not owe [any/the full amount of] rent because [name of plaintiff] has not maintained the property in a habitable condition during the period for which rent was not paid. To succeed on this defense, [name of defendant] must prove that [name of plaintiff] substantially failed to provide one or more of the following:

[effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors[./; or]

[plumbing or gas facilities that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

[a water supply capable of producing hot and cold running water furnished to appropriate fixtures, and connected to a sewage disposal system][./; or]

[heating facilities that complied with applicable law in effect at the time of installation, and that were maintained in good working order][./; or]

[electrical lighting with wiring and electrical equipment that complied with applicable law in effect at the time of installation and that were maintained in good working order][./; or]

[building, grounds, and all areas under control of the landlord, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin][./; or]

[an adequate number of containers for garbage and rubbish, in clean condition and good repair][./; or]

[floors, stairways, and railings maintained in good repair][./; or]

[Insert other applicable standard relating to habitability.]

[Name of plaintiff]’s failure to meet these requirements does not necessarily mean that the property was not habitable. The failure must be substantial.

[Even if [name of defendant] proves that [name of plaintiff] substantially failed to meet any of these requirements, [name of defendant]’s defense fails if [name of plaintiff] proves that [name of defendant] has done any of the following that contributed substantially to the condition or interfered substantially with [name of plaintiff]’s ability to make the necessary repairs:

[substantially failed to keep [his/her] living area as clean and sanitary as the condition of the property permits][./; or]

[substantially failed to dispose of all rubbish, garbage, and other waste, in a clean and sanitary manner][./; or]

[substantially failed to properly use and operate all electrical, gas, and plumbing fixtures and keep them as clean and sanitary as their condition permits][./; or]

[intentionally destroyed, defaced, damaged, impaired, or removed any part of the property, equipment, or accessories, or allowed others to do so][./; or]

[substantially failed to use the property for living, sleeping, cooking, or dining purposes only as appropriate based on the design of the property.]

The fact that [name of defendant] has continued to occupy the property does not necessarily mean that the property is habitable.

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Directions for Use

This instruction applies only to residential tenancies. (See Code Civ. Proc., § 1174.2(a).)

The habitability standards included are those set forth in Civil Code section 1941.1. Use only those relevant to the case. Or insert other applicable standards as appropriate, for example, other statutory or regulatory requirements (*Knight v. Hallsthammer* (1981) 29 Cal.3d 46, 59, fn.10 [171 Cal.Rptr. 707, 623 P.2d 268]; see Health & Saf. Code, §§ 17920.3, 17920.10) or security measures. (See *Secretary of Housing & Urban Dev. v. Layfield* (1978) 88 Cal.App.3d Supp. 28, 30 [152 Cal.Rptr. 342].)

If the landlord alleges that the implied warranty of habitability does not apply because of the tenant's affirmative misconduct, select the applicable reasons. The first two reasons do not apply if the landlord has expressly agreed in writing to perform those acts. (Civ. Code, § 1941.2(b).)

Sources and Authority

- Civil Code section 1941 provides: "The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenable, except such as are mentioned in section nineteen hundred and twenty-nine."
- Code of Civil Procedure section 1174.2 provides:

- (a) In an unlawful detainer proceeding involving residential premises after default in payment of rent and in which the tenant has raised as an affirmative defense a breach of the landlord's obligations under Section 1941 of the Civil Code or of any warranty of habitability, the court shall determine whether a substantial breach of these obligations has occurred. If the court finds that a substantial breach has occurred, the court (1) shall determine the reasonable rental value of the premises in its untenable state to the date of trial, (2) shall deny possession to the landlord and adjudge the tenant to be the prevailing party, conditioned upon the payment by the tenant of the rent that has accrued to the date of the trial as adjusted pursuant to this subdivision within a reasonable period of time not exceeding five days, from the date of the court's judgment or, if service of the court's judgment is made by mail, the payment shall be made within the time set forth in Section 1013, (3) may order the landlord to make repairs and correct the conditions which constitute a breach of the landlord's obligations, (4) shall order that the monthly rent be limited to the reasonable rental value of the premises as determined pursuant to this subdivision until repairs are completed, and (5) except as otherwise provided in subdivision (b), shall award the tenant costs and attorneys' fees if provided by, and pursuant to, any statute or the contract of the parties. If the court orders repairs or corrections, or both, pursuant to paragraph (3), the court's jurisdiction continues over the matter for the purpose of ensuring compliance. The court shall, however, award possession of the premises to the landlord if the tenant fails to pay all rent accrued to the date of trial, as determined due in the judgment, within the period prescribed by the court pursuant to this subdivision. The tenant shall, however, retain any rights conferred by Section 1174.
- (b) If the court determines that there has been no substantial breach of Section 1941 of the Civil Code or of any warranty of habitability by the landlord or if the tenant fails to pay all rent accrued to the date of trial, as required by the court pursuant to subdivision (a), then judgment shall be entered in favor of the landlord, and the landlord shall be the prevailing party for the purposes of awarding costs or attorneys' fees pursuant to any statute or the contract of the parties.
- (c) As used in this section, "substantial breach" means the failure of the landlord to comply with applicable building and housing code standards which materially affect health and safety.
- (d) Nothing in this section is intended to deny the tenant the right to a trial by jury. Nothing in this section shall limit or supersede any provision of Chapter 12.75 (commencing with Section 7060) of Division 7 of Title 1 of the Government Code.

- Civil Code section 1941.1 provides:

A dwelling shall be deemed untenable for purposes of Section 1941 if it substantially lacks any of the following affirmative standard characteristics or is a residential unit described in Section 17920.3 or 17920.10 of the Health and Safety Code:

- (a) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.
 - (b) Plumbing or gas facilities that conformed to applicable law in effect at the time of installation, maintained in good working order.
 - (c) A water supply approved under applicable law that is under the control of the tenant, capable of producing hot and cold running water, or a system that is under the control of the landlord, that produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.
 - (d) Heating facilities that conformed with applicable law at the time of installation, maintained in good working order.
 - (e) Electrical lighting, with wiring and electrical equipment that conformed with applicable law at the time of installation, maintained in good working order.
 - (f) Building, grounds, and appurtenances at the time of the commencement of the lease or rental agreement, and all areas under control of the landlord, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.
 - (g) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter and being responsible for the clean condition and good repair of the receptacles under his or her control.
 - (h) Floors, stairways, and railings maintained in good repair.
- Civil Code section 1941.2 provides:
 - (a) No duty on the part of the landlord to repair a dilapidation shall arise under Section 1941 or 1942 if the tenant is in substantial violation of any of the following affirmative obligations, provided the tenant's violation contributes substantially to the existence of the dilapidation or interferes substantially with the landlord's obligation under Section 1941 to effect the necessary repairs:
 - (1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.
 - (2) To dispose from his dwelling unit of all rubbish, garbage and other waste, in a clean and sanitary manner.
 - (3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.
 - (4) Not to permit any person on the premises, with his permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.
 - (5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.

(b) Paragraphs (1) and (2) of subdivision (a) shall not apply if the landlord has expressly agreed in writing to perform the act or acts mentioned therein.

- “Once we recognize that the tenant’s obligation to pay rent and the landlord’s warranty of habitability are mutually dependent, it becomes clear that the landlord’s breach of such warranty may be directly relevant to the issue of possession. If the tenant can prove such a breach by the landlord, he may demonstrate that his nonpayment of rent was justified and that no rent is in fact ‘due and owing’ to the landlord. Under such circumstances, of course, the landlord would not be entitled to possession of the premises.” (*Green v. Superior Court* (1974) 10 Cal.3d 616, 635 [111 Cal.Rptr. 704, 517 P.2d 1168].)
- “We have concluded that a warranty of habitability is implied by law in residential leases in this state and that the breach of such a warranty may be raised as a defense in an unlawful detainer action. Under the implied warranty which we recognize, a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease. This implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that ‘bare living requirements’ must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord’s obligations under the common law implied warranty of habitability we now recognize.” (*Green, supra*, 10 Cal.3d at p. 637, footnotes omitted.)
- “[U]nder *Green*, a tenant may assert the habitability warranty as a defense in an unlawful detainer action. The plaintiff, of course, is not required to plead negative facts to anticipate a defense.” (*De La Vara v. Municipal Court* (1979) 98 Cal.App.3d 638, 641 [159 Cal.Rptr. 648], internal citations omitted.)
- “[T]he fact that a tenant was or was not aware of specific defects is not determinative of the duty of a landlord to maintain premises which are habitable. The same reasons which imply the existence of the warranty of habitability—the inequality of bargaining power, the shortage of housing, and the impracticability of imposing upon tenants a duty of inspection—also compel the conclusion that a tenant’s lack of knowledge of defects is not a prerequisite to the landlord’s breach of the warranty.” (*Knight, supra*, 29 Cal.3d at p. 54.)
- “At least in a situation where, as here, a landlord has notice of alleged uninhabitable conditions not caused by the tenants themselves, a landlord’s breach of the implied warranty of habitability exists whether or not he has had a ‘reasonable’ time to repair. Otherwise, the mutual dependence of a landlord’s obligation to maintain habitable premises, and of a tenant’s duty to pay rent, would make no sense.” (*Knight, supra*, 29 Cal.3d at p. 55, footnote omitted.)
- “[A] tenant may defend an unlawful detainer action against a current owner, at least with respect to rent currently being claimed due, despite the fact that the uninhabitable conditions first existed under a former owner.” (*Knight, supra*, 29 Cal.3d at p. 57.)

- “Without evaluating the propriety of instructing the jury on each item included in the defendants’ requested instruction, it is clear that, where appropriate under the facts of a given case, tenants are entitled to instructions based upon relevant standards set forth in Civil Code section 1941.1 whether or not the ‘repair and deduct’ remedy has been used.” (*Knight, supra*, 29 Cal.3d at p. 58.)
- “The defense of implied warranty of habitability is not applicable to unlawful detainer actions involving commercial tenancies.” (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174], internal citation omitted.)
- “In defending against a 30-day notice, the sole purpose of the [breach of the warranty of habitability] defense is to reduce the amount of daily damages for the period of time after the notice expires.” (*N. 7th St. Assocs. v. Constante* (2001) 92 Cal.App.4th Supp. 7, 11, fn. 1 [111 Cal.Rptr.2d 815].)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 625

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, § 19:224

1 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 8.109-8.112

2 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 10.64, 12.36–12.37

1 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) Ch. 15

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, §§ 210.64, 210.95A (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.61 (Matthew Bender)

UNLAWFUL DETAINER

**4321. Affirmative Defense—Retaliatory Eviction—Tenant’s Complaint
(Civ. Code, § 1942.5(a))**

[Name of defendant] claims that [name of plaintiff] is not entitled to evict [him/her/it] because [name of plaintiff] filed this lawsuit in retaliation for [name of defendant]’s having exercised [his/her/its] rights as a tenant. To succeed on this defense, [name of defendant] must prove all of the following:

- 1. That [name of defendant] was not in default in the payment of [his/her/its] rent;**
- 2. That [name of plaintiff] filed this lawsuit because [name of defendant] had complained about the condition of the property to [[name of plaintiff]/[name of appropriate agency]]; and**
- 3. That [name of plaintiff] filed this lawsuit within 180 days after**

[Select the applicable date(s) or event(s):]

[the date on which [name of defendant], in good faith, gave notice to [name of plaintiff] or made an oral complaint to [name of plaintiff] regarding the conditions of the property][./; or]

[the date on which [name of defendant], in good faith, filed a written complaint, or an oral complaint that was registered or otherwise recorded in writing, with [name of appropriate agency], of which [name of plaintiff] had notice, for the purpose of obtaining correction of a condition of the property][./; or]

[the date of an inspection or a citation, resulting from a complaint to [name of appropriate agency] of which [name of plaintiff] did not have notice][./; or]

[the filing of appropriate documents to begin a judicial or an arbitration proceeding involving the conditions of the property][./; or]

[entry of judgment or the signing of an arbitration award that determined the issue of the conditions of the property against [name of plaintiff]].

[Even if [name of defendant] has proved that [name of plaintiff] filed this lawsuit with a retaliatory motive, [name of plaintiff] is still entitled to possession of the premises if [he/she/it] proves that [he/she/it] also filed the lawsuit in good faith for a reason stated in the [3/30/60]-day notice.]

New August 2007

Directions for Use

This instruction is based solely on Civil Code section 1942.5(a), which has the 180-day limitation. The remedies provided by this statute are in addition to any other remedies provided by statutory or decisional law. (Civ. Code, § 1942.5(h).) Thus, there are two parallel and independent sources for the doctrine of retaliatory eviction: the statute and the common law. (*Barela v. Superior Court* (1981) 30 Cal.3d 244, 251 [178 Cal.Rptr 618, 636 P.2d 582].) Whether the common law provides additional protection against retaliation beyond the 180-day period has not been decided. (See *Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 776 [187 Cal.Rptr. 242] [statute not a limit in tort action for wrongful eviction; availability of the common law retaliatory eviction defense, unlike that authorized by section 1942.5, is apparently not subject to time limitations].)

There may be additional issues of fact that the jury must resolve in order to decide whether the tenant is in default in the payment of rent (element 1). If necessary, instruct that the tenant is not in default if he or she has exercised any legally protected right not to pay the contractual amount of rent, such as a habitability defense, a “repair and deduct” remedy, or a rent increase that is alleged to be retaliatory.

For element 3, select the appropriate date or event that triggered the 180-day period within which a landlord may not file an unlawful detainer. (Civ. Code, § 1942.5(a).)

Include the last paragraph if the landlord alleges that there was also a lawful cause for the eviction (see Civ. Code, § 1942.5(d)), and that this cause was both asserted in good faith and set forth in the notice terminating the tenancy. (See Civ. Code, § 1942.5(e); *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 595-596 [3 Cal.Rptr.3d 205, 73 P.3d 1185] [landlord asserting lawful cause under 1942.5(d) must also establish good faith under 1942.5(e), but need not establish total absence of retaliatory motive].)

Sources and Authority

- Civil Code section 1942.5(a) provides:

If the lessor retaliates against the lessee because of the exercise by the lessee of his rights under this chapter or because of his complaint to an appropriate agency as to tenantability of a dwelling, and if the lessee of a dwelling is not in default as to the payment of his rent, the lessor may not recover possession of a dwelling in any action or proceeding, cause the lessee to quit involuntarily, increase the rent, or decrease any services within 180 days of any of the following:

- (1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, or has made an oral complaint to the lessor regarding tenantability.
- (2) After the date upon which the lessee, in good faith, has filed a written complaint, or an oral complaint which is registered or otherwise recorded in writing, with an appropriate

- agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability.
- (3) After the date of an inspection or issuance of a citation, resulting from a complaint described in paragraph (2) of which the lessor did not have notice.
 - (4) After the filing of appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenantability.
 - (5) After entry of judgment or the signing of an arbitration award, if any, when in the judicial proceeding or arbitration the issue of tenantability is determined adversely to the lessor.
- Civil Code section 1942.5(d) provides: “Nothing in this section shall be construed as limiting in any way the exercise by the lessor of his or her rights under any lease or agreement or any law pertaining to the hiring of property or his or her right to do any of the acts described in subdivision (a) or (c) for any lawful cause. Any waiver by a lessee of his or her rights under this section is void as contrary to public policy.”
 - Civil Code section 1942.5(e) provides: “Notwithstanding subdivisions (a) to (d), inclusive, a lessor may recover possession of a dwelling and do any of the other acts described in subdivision (a) within the period or periods prescribed therein, or within subdivision (c), if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an arbitration, if any, states the ground upon which the lessor, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in subdivision (a) or (c). If the statement is controverted, the lessor shall establish its truth at the trial or other hearing.”
 - “The defense of ‘retaliatory eviction’ has been firmly ensconced in this state’s statutory law and judicial decisions for many years. ‘It is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer proceeding.’ The retaliatory eviction doctrine is founded on the premise that ‘[a] landlord may normally evict a tenant for any reason or for no reason at all, but he may not evict for an improper reason’” (*Barela, supra*, 30 Cal.3d at p. 249, internal citations omitted.)
 - “Thus, California has two parallel and independent sources for the doctrine of retaliatory eviction. This court must decide whether petitioner raised a legally cognizable defense of retaliatory eviction under the statutory scheme and/or the common law doctrine.” (*Barela, supra*, 30 Cal.3d at p. 251.)
 - “Retaliatory eviction occurs, as Witkin observes, ‘[When] a landlord exercises his legal right to terminate a residential tenancy in an authorized manner, but with the motive of retaliating against a tenant who is not in default but has exercised his legal right to obtain compliance with requirements of habitability.’ It is recognized as an affirmative defense in California; and as appellant correctly argues, it extends beyond warranties of habitability into the area of First Amendment rights.” (*Four Seas Inv. Corp. v. International Hotel Tenants’ Assn.* (1978) 81 Cal.App.3d 604, 610 [146 Cal.Rptr. 531], internal citations omitted.)

- “If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. . . . ‘If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all. The question of permissible or impermissible purpose is one of fact for the court or jury.’ ” (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97], internal citations omitted.)
- “[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith--i.e., a bona fide--intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence.” (*Drouet supra*, 31 Cal.4th at p. 596.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 706, 709, 712

Miller & Starr, California Real Estate (Rutter Group) Ch. 19, *Landlord-Tenant*, § 19:225

1 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 8.113-8.117

2 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 10.65, 12.38

1 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) Ch. 16

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

UNLAWFUL DETAINER

4322. Affirmative Defense—Retaliatory Eviction—Engaging in Legally Protected Activity (Civ. Code, § 1942.5(c))

[Name of defendant] claims that [name of plaintiff] is not entitled to evict [him/her/it] because [name of plaintiff] filed this lawsuit in retaliation for [name of defendant]’s having engaged in legally protected activities. To succeed on this defense, [name of defendant] must prove both of the following:

1. *[Insert one or both of the following options:]*

[That [name of defendant] lawfully organized or participated in [a tenants’ association/an organization advocating tenants’ rights];] [or]

[That [name of defendant] lawfully and peaceably [insert description of lawful activity];]

AND

2. **That [name of plaintiff] filed this lawsuit because [name of defendant] engaged in [this activity/these activities].**

[Even if [name of defendant] has proved that [name of plaintiff] filed this lawsuit with a retaliatory motive, [name of plaintiff] is still entitled to possession of the premises if [he/she/it] proves that [he/she/it] also filed the lawsuit in good faith for a reason stated in the [3/30/60]-day notice.]

New August 2007

Directions for Use

In element 1, select the tenant’s conduct that is alleged to be the reason for the landlord’s retaliation. (Civ. Code, § 1942.5(c).)

Include the last paragraph if the landlord alleges that there was also a lawful cause for the eviction (see Civ. Code, § 1942.5(d)), and that this cause was both asserted in good faith and set forth in the notice terminating the tenancy. (See Civ. Code, § 1942.5(e); *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 595-596 [3 Cal.Rptr.3d 205, 73 P.3d 1185] [landlord asserting lawful cause under 1942.5(d) must also establish good faith under 1942.5(e), but need not establish total absence of retaliatory motive].)

Sources and Authority

- Civil Code section 1942.5(c) provides: “It is unlawful for a lessor to increase rent, decrease services, cause a lessee to quit involuntarily, bring an action to recover possession, or threaten to do any of those acts, for the purpose of retaliating against the lessee because he or she has lawfully organized or participated in a lessees’ association or an organization advocating lessees’ rights or has lawfully and peaceably exercised any rights under the law. In an action brought by or against the lessee pursuant to this subdivision, the lessee shall bear the burden of producing evidence that the lessor’s conduct was, in fact, retaliatory.”
- Civil Code section 1942.5(d) provides: “Nothing in this section shall be construed as limiting in any way the exercise by the lessor of his or her rights under any lease or agreement or any law pertaining to the hiring of property or his or her right to do any of the acts described in subdivision (a) or (c) for any lawful cause. Any waiver by a lessee of his or her rights under this section is void as contrary to public policy.”
- Civil Code section 1942.5(e) provides: “Notwithstanding subdivisions (a) to (d), inclusive, a lessor may recover possession of a dwelling and do any of the other acts described in subdivision (a) within the period or periods prescribed therein, or within subdivision (c), if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an arbitration, if any, states the ground upon which the lessor, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in subdivision (a) or (c). If the statement is controverted, the lessor shall establish its truth at the trial or other hearing.”
- “If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. ... ‘If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all. The question of permissible or impermissible purpose is one of fact for the court or jury.’ ” (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97], internal citations omitted.)
- “In an unlawful detainer action, where the defense of retaliatory eviction is asserted pursuant to Civil Code section 1942.5, the tenant has the overall burden of proving his landlord’s retaliatory motive by a preponderance of the evidence. If the landlord takes action for a valid reason not listed in the unlawful detainer statutes, he must give notice to the tenant of the ground upon which he proceeds; and if the tenant controverts that ground, the landlord has the burden of proving its existence by a preponderance of the evidence.” (*Western Land Office, Inc. v. Cervantes* (1985) 175 Cal.App.3d 724, 741 [220 Cal.Rptr. 784].)
- “[T]he burden was on the tenants to establish retaliatory motive by a preponderance of the evidence.” (*Western Land Office, Inc., supra*, 175 Cal.App.3d at p. 744.)
- “[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith--i.e., a

bona fide--intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence.” (*Drouet, supra*, 31 Cal.4th at p. 596.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 706, 709, 712

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, § 19:225

1 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 8.113-8.117

2 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 10.65, 12.38

1 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) Ch. 16

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

UNLAWFUL DETAINER

4323. Affirmative Defense—Discriminatory Eviction (Unruh Act)

[Name of defendant] **claims that** *[name of plaintiff]* **is not entitled to evict [him/her] because** *[name of plaintiff]* **is discriminating against [him/her] because of** *[insert protected class, e.g., her national origin, or other characteristic protected from arbitrary discrimination].* **To succeed on this defense, [name of defendant] must prove both of the following:**

- 1. That** *[name of defendant]* **is [perceived as/associated with someone who is [perceived as]]** *[insert protected class, e.g., Hispanic, or other characteristic]; and*
- 2. That** *[name of plaintiff]* **filed this lawsuit because of** *[insert one of the following:]*

[[his/her/its] perception of] *[name of defendant]'s [insert protected class, e.g., national origin, or other characteristic].]*

[[name of defendant]'s association with someone who is [perceived as] *[insert protected class, e.g., Hispanic, or other characteristic].]*

New August 2007

Directions for Use

Throughout the instruction, insert either the defendant's protected status under the Unruh Act (see Civ. Code, § 52(b)) or other characteristic on the basis of which the defendant alleges that he or she has been arbitrarily discriminated against. (See *Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 725–726 [180 Cal.Rptr. 496, 640 P.2d 115] [excluding all tenants with children is arbitrary illegal discrimination].)

In element 1, select the appropriate language based on whether the defendant (1) is a member of the protected class, (2) is perceived as a member of the protected class, (3) is associated with someone who is a member of the protected class, or (4) is associated with someone who is perceived as a member of the protected class.

In element 2, include the bracketed language regarding perception if the defendant is not actually a member of the protected class, but the allegation is that the plaintiff believes that the defendant is a member.

See also the Sources and Authority section under CACI No. 3020, *Unruh Civil Rights Act (Civ. Code, §§ 51, 52)—Essential Factual Elements*.

Sources and Authority

- Civil Code section 51 (Unruh Act) provides, in part: “(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, medical condition, marital status, or sexual orientation are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.”
- “In evaluating the legality of the challenged exclusionary policy in this case, we must recognize at the outset that in California, unlike many other jurisdictions, the Legislature has sharply circumscribed an apartment owner's traditional discretion to accept and reject tenants on the basis of the landlord's own likes or dislikes. California has brought such landlords within the embrace of the broad statutory provisions of the Unruh Act, Civil Code section 51. Emanating from and modeled upon traditional ‘public accommodations’ legislation, the Unruh Act expanded the reach of such statutes from common carriers and places of public accommodation and recreation, e.g., railroads, hotels, restaurants, theaters and the like, to include ‘all business establishments of every kind whatsoever.’ ” (*Marina Point, supra*, 30 Cal.3d at pp. 730-731, footnote omitted.)
- “[T]he ‘identification of particular bases of discrimination -- color, race, religion, ancestry, and national origin -- is illustrative rather than restrictive. Although the legislation has been invoked primarily by persons alleging discrimination on racial grounds, its language and its history compel the conclusion that the Legislature intended to prohibit *all arbitrary discrimination by business establishments*’.” (*Marina Point, supra*, 30 Cal.3d at p. 732, original italics.)
- “We hold that defendant should have been permitted to produce proof of the allegations of his special defenses of discrimination, which if proven would bar the court from ordering his eviction because such ‘state action’ would be violative of both federal and state Constitutions.” (*Abstract Inv. Co. v. Hutchinson* (1962) 204 Cal.App.2d 242, 255 [22 Cal.Rptr. 309].)
- Evictions that contravene statutory or constitutional strictures provide a valid defense to unlawful detainer actions. (*Marina Point, supra*, 30 Cal.3d at p. 727.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 682-683

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, § 19:223

1 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 8.118-8.128

2 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 10.53, 10.67, 10.68

7 California Real Estate Law and Practice, Ch. 214, *Government Regulation and Enforcement*, § 214.10 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.21

11 California Forms of Pleading and Practice, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.31 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Unlawful Detainer*, § 35.45 (Matthew Bender)

UNLAWFUL DETAINER

4324. Affirmative Defense—Waiver by Acceptance of Rent After Three-Day Notice

[Name of defendant] claims that [name of plaintiff] is not entitled to evict [him/her/it] because [name of plaintiff] accepted payment of rent after the three-day notice period had expired. To succeed on this defense, [name of defendant] must prove:

[1]. That [name of plaintiff] accepted a [partial] payment of rent after the three-day notice period had expired[./; and]

[2. That [name of plaintiff] failed to provide actual notice to [name of defendant] that partial payment would be insufficient to avoid eviction.]

If [name of defendant] has proven that [he/she/it] paid rent, then [he/she/it] has the right to continue occupying the property unless [name of plaintiff] proves [either of the following:]

[1. That [he/she/it] rejected the rent payment][./; or]

[2. That the lease contained a provision stating that acceptance of late rent would not affect [his/her/its] right to evict [name of defendant].]

New August 2007

Directions for Use

The affirmative defense in this instruction applies to an unlawful detainer for nonpayment of rent or breach of another condition of the lease if the landlord accepts a rent payment after the three-day period to cure or quit has expired. The instruction may be adapted for use if the tenant claims that the landlord waived a breach of a condition by accepting rent and then subsequently served a notice of forfeiture and filed an unlawful detainer.

With regard to the tenant-defendant's burden, include the word "partial" in element 1 and read element 2 only in cases involving commercial tenancies and partial payment. (Code Civ. Proc., § 1161.1(c).)

Sources and Authority

- Code Civil Procedure section 1161.1(c), applicable only to commercial real property, provides: "If the landlord accepts a partial payment of rent after filing the complaint pursuant to Section 1166, the landlord's acceptance of the partial payment is evidence only of that payment, without waiver of any rights or defenses of any of the parties. The landlord shall be entitled to amend the complaint to reflect the partial payment without creating a necessity for the filing of an additional answer or other responsive pleading by the tenant, and without prior leave of court, and such an amendment shall not delay the matter from proceeding."

However, this subdivision shall apply only if the landlord provides actual notice to the tenant that acceptance of the partial rent payment does not constitute a waiver of any rights, including any right the landlord may have to recover possession of the property.”

- “It is a general rule that the right of a lessor to declare a forfeiture of the lease arising from some breach by the lessee is waived when the lessor, with knowledge of the breach, accepts the rent specified in the lease. While waiver is a question of intent, the cases have required some positive evidence of rejection on the landlord’s part or a specific reservation of rights in the lease to overcome the presumption that tender and acceptance of rent creates.” (*EDC Assocs. v. Gutierrez* (1984) 153 Cal.App.3d 167, 170 [200 Cal.Rptr. 333], internal citations omitted.)
- “The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general rule and is supported by ample authority. ... ‘The most familiar instance of the waiver of the forfeiture of a lease arises from the acceptance of rent by the landlord after condition broken, and it is a universal rule that if the landlord accepts rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease for which a forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot afterward be asserted for that particular breach or any other breach which occurred prior to the acceptance of the rent. In other words, the acceptance by a landlord of the rents, with full knowledge of a breach in the conditions of the lease, and of all of the circumstances, is an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease, and demanding a forfeiture thereof.’ ” (*Kern Sunset Oil Co. v. Good Roads Oil Co.* (1931) 214 Cal. 435, 440-441 [6 P.2d 71], internal citations omitted.)
- “Here the lessor not only relied upon the express agreement in the contract of the lease against waiver of its right to assert a forfeiture for the acceptance of rent after knowledge of the breach of covenant prohibiting assignment of the lease without its written consent first obtained, but it also gave notice that its acceptance of the rent after the breach of covenant became known was not to be construed as a consent to the assignment of the lease or a waiver of its right to assert a forfeiture.” (*Karbelnig v. Brothwell* (1966) 244 Cal.App.2d 333, 342 [53 Cal.Rptr. 335].)
- “The landlord had the obligation of going forward with the evidence in order to prove that the money orders were not negotiated or that it took other action to insure that there was no waiver. ‘Although a plaintiff ordinarily has the burden of proving every allegation of the complaint and a defendant of proving any affirmative defense, fairness and policy may sometimes require a different allocation. Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim.’ ” (*EDC Assocs.*, *supra*, 153 Cal.App.3d at p. 171, internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 669

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, § 19:205

2 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) § 10.60

1 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) §§ 6.31-6.37, 6.41, 6.42

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.65 (Matthew Bender)

UNLAWFUL DETAINER

4325. Affirmative Defense—Failure to Comply With Rent Control Ordinance

[Name of defendant] **claims that** [name of plaintiff] **is not entitled to evict [him/her] because** [name of plaintiff] **violated** [insert name of local governmental entity]’s rent control law. **To succeed on this defense, [name of defendant] must prove the following:**

[Insert elements of rent control defense.]

New August 2007

Directions for Use

Insert the elements of the relevant local rent control law into this instruction.

Sources and Authority

- “[T]he statutory remedies for recovery of possession and of unpaid rent do not preclude a defense based on municipal rent control legislation enacted pursuant to the police power imposing rent ceilings and limiting the grounds for eviction for the purpose of enforcing those rent ceilings.” (*Birkenfeld v. Berkeley* (1976) 17 Cal.3d 129, 149 [130 Cal. Rptr. 465, 550 P.2d 1001], internal citations and footnote omitted.)
- “Although municipalities have power to enact ordinances creating substantive defenses to eviction, such legislation is invalid to the extent it conflicts with general state law.” (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 697 [209 Cal.Rptr. 682, 693 P.2d 261], affd. (1986) 475 U.S. 260 [106 S.Ct. 1045, 89 L.Ed.2d 206], internal citations omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 594

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, § 19:102

1 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 7.53-7.76

2 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) Ch. 17

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.65 (Matthew Bender)

UNLAWFUL DETAINER

4340. Damages for Reasonable Rental Value

[Name of plaintiff] also claims that [he/she/it] was harmed by [name of defendant]’s wrongful occupancy of the property. If you decide that [name of defendant] wrongfully occupied the property, you must also decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called “damages.”

The amount of damages is the reasonable rental value of the premises during the time [name of defendant] occupied the property after the [____]-day notice period expired. The amount agreed between the parties as rent is evidence of the reasonable rental value of the property, but you may award a greater or lesser amount based on all the evidence presented during the trial.

[In determining the reasonable rental value of the premises, do not consider any limitations on the amount of rent that can be charged because of a local rent control ordinance.]

New August 2007

Directions for Use

In the second paragraph, insert the applicable number of days’ notice required, whether 3, 30, 60, or some other number provided for in the lease. (Civ. Code, §§ 1946, 1946.1; Code Civ. Proc., § 1161.)

Include the optional last paragraph if the property is subject to rent control.

Sources and Authority

- Code of Civil Procedure section 1174(b) provides: “The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. If the defendant is found guilty of forcible entry, or forcible or unlawful detainer, and malice is shown, the plaintiff may be awarded statutory damages of up to six hundred dollars (\$ 600), in addition to actual damages, including rent found due. The trier of fact shall determine whether actual damages, statutory damages, or both, shall be awarded, and judgment shall be entered accordingly.”
- “It is well established that losses sustained after termination of a tenancy may be recovered, and that ‘damages awarded ... in an unlawful detainer action for withholding possession of the property are not “rent” but are in fact damages.’ Thus, a landlord is entitled to recover as damages the reasonable value of the use of the premises during the

time of the unlawful detainer either on a tort theory or a theory of implied-in-law contract. It is also settled that rent control regulations have no application to an award of damages for unlawfully withholding property.” (*Adler v. Elphick* (1986) 184 Cal.App.3d 642, 649-650 [229 Cal.Rptr. 254], internal citations omitted.)

- “In unlawful detainer, recovery of possession is the main object and recovery of rent a mere incident.” (*Harris v. Bissell* (1921) 54 Cal.App. 307, 313 [202 P. 453].)
- “It is well established that unlawful detainer actions are wholly created and strictly controlled by statute in California. The ‘mode and measure of plaintiff’s recovery’ are limited by these statutes. The statutes prevail over inconsistent general principles of law and procedure because of the special function of unlawful detainer actions to restore immediate possession of real property.” (*Balassy v. Superior Court* (1986) 181 Cal.App.3d 1148, 1151 [226 Cal. Rptr. 817], internal citations omitted.)
- “It is well settled that damages allowed in unlawful detainer proceedings are only those which *result from* the unlawful detention and accrue during that time. Although a lessee guilty of unlawful detention may have also breached the terms of the lease contract, damages resulting therefrom are not necessarily damages resulting from the unlawful detention. As such, he is precluded from litigating a cause of action for these breaches in unlawful detainer proceedings.” (*Vasey v. California Dance Co.* (1997) 70 Cal.App.3d 742, 748 [139 Cal.Rptr. 72], original italics, internal citations omitted.)
- “[W]hen a 30-day notice is used to terminate a month-to-month tenancy, and any default in the payment of rents to that time are not claimed in a 3-day notice to pay rent or quit, the unlawful detainer proceeding thereon is not founded on a default in the payment of rent within the meaning of section 1174, subdivision (b); damages for the detention of the premises commencing with the end of the tenancy may be recovered, but rents accrued and unpaid prior to the end of the tenancy may not be recovered in that unlawful detainer proceeding.” (*Castle Park No. 5 v. Katherine* (1979) 91 Cal.App.3d Supp. 6, 12 [154 Cal. Rptr. 498].)
- “ ‘If a tenant unlawfully detains possession after the termination of a lease, the landlord is entitled to recover as damages the reasonable value of the use of the premises during the time of such unlawful detainer. He is not entitled to recover rent for the premises because the leasehold interest has ended.’ [¶] The amount agreed between the parties as rent is evidence of the rental value of the property. But, ‘[since] the action is not upon contract, but for recovery of possession and, incidentally, for the damages occasioned by the unlawful detainer, such rental value may be greater or less than the rent provided for in the lease.’ ” (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 9 [177 Cal.Rptr. 96], internal citations and footnote omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 738

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, § 19:208

2 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 12.27-12.30, 13.19

2 California Eviction Defense Manual (2d ed. Cont.Ed.Bar) §§ 26.5–26.12

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.94 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.27

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.13 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.22 (Matthew Bender)

UNLAWFUL DETAINER

4341. Statutory Damages on Showing of Malice (Code Civ. Proc., § 1174(b))

[Name of plaintiff] claims that [he/she/it] is entitled to statutory damages in addition to actual damages. To recover statutory damages, [name of plaintiff] must prove that [name of defendant] acted with malice.

A tenant acts with malice if he or she willfully continues to occupy the property with knowledge that he or she no longer has the right to do so.

You must determine how much, if any, statutory damages should be awarded, up to a maximum of \$600. You should not award any statutory damages if you find that [name of defendant] had a good-faith and a reasonable belief in [his/her/its] right to continue to occupy the premises.

New August 2007

Sources and Authority

- Code of Civil Procedure section 1174(b) provides: “The jury or the court, if the proceedings be tried without a jury, shall also assess the damages occasioned to the plaintiff by any forcible entry, or by any forcible or unlawful detainer, alleged in the complaint and proved on the trial, and find the amount of any rent due, if the alleged unlawful detainer be after default in the payment of rent. If the defendant is found guilty of forcible entry, or forcible or unlawful detainer, and malice is shown, the plaintiff may be awarded statutory damages of up to six hundred dollars (\$ 600), in addition to actual damages, including rent found due. The trier of fact shall determine whether actual damages, statutory damages, or both, shall be awarded, and judgment shall be entered accordingly.”
- “The rule appears to be well established in California that a lessee of real property who wilfully, deliberately, intentionally and obstinately withholds possession of the property, with knowledge of the termination of his lease and against the will of the landlord, is liable for [statutory] damages.” (*Erbe Corp. v. W & B Realty Co.* (1967) 255 Cal.App.2d 773, 780 [63 Cal.Rptr. 462].)
- “Authorities ... do not hold that the [penalty should be imposed] where the conduct of the tenant is characterized by good faith and a reasonable belief in his right to remain” (*Board of Public Service Comm’rs v. Spear* (1924) 65 Cal.App. 214, 217–218 [223 P.423], internal citations omitted, overruled, other grounds, *Richard v. Degen & Brody, Inc.* (1960) 181 Cal.App. 2d 289, 302–304, 5 Cal.Rptr. 263.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 738

Miller & Starr, California Real Estate (The Rutter Group) Ch. 19, *Landlord-Tenant*, § 19:208

2 California Landlord-Tenant Practice (2d ed. Cont.Ed.Bar) §§ 12.32–12.34

2 California Eviction Defense Manual (Cont.Ed.Bar) § 26.13

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.95 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, § 5.27

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.13 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.22 (Matthew Bender)