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: November 3, 2005

SUBJECT: Jury Instructions: Approve Publication of Revisions and Additions to Civil Instructions (Cal. Rules of Court, rule 855(d)) (Action Required)

Issue Statement

The Advisory Committee on Civil Jury Instructions has completed its new revisions and additions to the Judicial Council Civil Jury Instructions (CACI) that were first published in September 2003.

Recommendation

The Advisory Committee recommends that the Judicial Council, effective December 2, 2005, approve for publication under rule 855(d) 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 the new 2006 edition of CACI.

The table of contents for the proposed revisions to the jury instructions is attached at pages 4 and 5. The revised and new civil jury instructions are included separately with this report.

Rationale for Recommendation

The Task Force on Jury Instructions was appointed in 1997 on the recommendation of the Blue Ribbon Commission on Jury System Improvement. The mission of the task force was to draft comprehensive, legally accurate jury instructions that are readily understood by the average juror. In July 2003, the council approved publication of approximately 800 civil jury instructions and special verdict forms. The instructions were published in September 2003. The Advisory Committee on Civil Jury Instructions is charged with maintaining and updating the instructions. The council approved the committee's last update at its June 2005 meeting.

The advisory committee drafted and edited the revisions and additions in this proposal, then circulated them for public comment. The official publisher (LexisNexis Matthew Bender) is preparing to publish both print and electronic versions of the revised instructions approved by the council.

The following instructions and verdict forms are included in this revised set: 332, 333, 372, 373, 374, 418, 430, 501, 532, 1203, VF-1704, VF-2100, 2332, 2700, 2703, 3103, 3201, 3202, 3204, 3210, 3244, VF-3203, 3921, 3948. Of these, 4 are newly drafted and 20 are revised.

The instructions were added or revised based on comments or suggestions from judges, attorneys, staff, and committee members. The committee also revises or adds instructions based on recent changes in the law; however, this factor was not involved in this set of revisions.

The following instructions and verdict forms were added or revised based primarily on comments received from judges and attorneys: 332, 333, 418, 430, 501, 532, 1203, 2332, 2700, 3103, 3201, 3202, 3204, 3210, 3244, VF-3203, 3921, 3948. For example, CACI No. 2700, *Nonpayment of Wages—Essential Factual Elements (Lab. Code, §§ 201, 202, 218),* was revised in response to a comment from an attorney noting that termination of employment is not an element of this claim.

The following instructions were added or revised based primarily on suggestions from staff or committee members: 372, 373, 374, VF-1704, VF-2100, 2703. For example, CACI No. VF-1704, *Defamation per se (Private Figure—Matter of Private Concern),* was revised after a committee member observed that it would be helpful to include a question regarding the affirmative defense of the truth, because this defense is raised frequently.

Alternative Actions Considered

The revisions that generated the most attention from commentators were those involving instructions pertaining to the Song-Beverley Consumer Warranty Act. In response to the comments, the committee made several changes to the instructions. Both the plaintiff bar and the defense bar have been active in commenting on the CACI lemon law instructions, and the committee is considering arranging a meeting with representatives from both sides to attempt to resolve any lingering issues.

Comments From Interested Parties

All revisions and additions to the civil jury instructions were circulated for public comment. The committee received many comments, evaluated them, and made changes to the instructions based on the recommendations. A chart summarizing the comments is included at pages 6–10.

Implementation Requirements and Costs

Implementation costs will be minimal. Under the publication agreement, the official publisher will make copies of the update available to all judicial officers free of charge. Additionally, consistent with the council's decision at its August 2005 meeting to copyright its new criminal jury instructions, future versions of the civil instructions will no longer be placed in the public domain, and 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 such use and reproduction. With respect to commercial publishers, the AOC will license their publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters that may be necessary.

Attachments

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Instruction	Commentator	Summary of Comments	Committee Response
Generally	Mr. Aubrey D. Boyd Law Offices of Aubrey D. Boyd	Agree with the Draft Report. In the future, consider two new instructions supplementing CACI 408 with tests for determining whether conduct is so reckless as to be totally outside the range of ordinary activity involved in a sport.	None. The committee has previously considered and rejected these suggestions.
332	Mr. Dean J. Zipser Orange County Bar Association	Recommend approval.	None.
333	Mr. Dean J. Zipser Orange County Bar Association	Recommend approval.	None.
	State Bar Litigation Section	Replace "both" with "all." Delete "consent" and use "into consenting" instead.	The committee agreed with these suggestions.
372	Mr. Dean J. Zipser Orange County Bar Association	Recommend approval.	None.
373	Mr. Dean J. Zipser Orange County Bar Association	Recommend approval.	None.
374	Mr. Dean J. Zipser Orange County Bar Association	Although technically correct, this instruction seems unnecessary. Perhaps a single general common count instruction could suffice for all species of common counts.	The committee disagreed with this comment. Separate instructions will be more useful to practitioners.
418	Mr. Dean J. Zipser Orange County Bar Association	Change first use note to "… then the bracketed portion of the second and last paragraphs should be read" to avoid confusion.	The committee agreed with this comment.
	State Bar Litigation Section	Place note regarding OSHA regulations under "Sources and Authority" and not under "Directions for Use."	The committee agreed with this comment.
430	Hon. Dennis S. Choate Superior Court of California, County of Orange	This instruction is still not fully accurate. It does not follow that *anything* more than a trivial or remote factor operates as a cause of harm.	The committee disagreed with this and believes that the new bracketed language adequately addresses this concern.
	Mr. Curt Cutting Horvitz & Levy	We support the proposed change.	None.
	Mr. Dean J. Zipser Orange County Bar Association	Recommend approval.	None.

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430	State Bar Litigation Section	Recommend minor editing change to new note under "Directions for Use."	The committee agreed with this comment.
501	Hon. Rolf Michael Treu Superior Court of California, County of Los Angeles	This instruction uses "similar" circumstances, while CACI 532 uses "same or similar" circumstances. Could be confusing to jury.	The committee agreed with this comment and changed this instruction to read "same or similar."
	Mr. Dean J. Zipser Orange County Bar Association	Recommend approval of change to use note.	None.
532	Hon. Rolf Michael Treu Superior Court of California, County of Los Angeles	This instruction uses "same or similar" circumstances, while CACI 501 uses "similar" circumstances. Could be confusing to jury.	The committee agreed with this comment. "Same or similar" will be retained in this instruction.
	Mr. Dean J. Zipser Orange County Bar Association	Recommend approval.	None.
1203	Mr. Geoffrey Becker Attorney	The change to element 6 will cause confusion regarding "to perform safely," which is not the *Barker* test. It will also create uncertainty as to whether expert testimony should be allowed on this issue.	The committee disagreed with this comment. It is unnecessary to repeat all the language in element 3 because element 6 is the causation element. A short hand reference to element 3 is sufficient.
	Mr. Dean J. Zipser Orange County Bar Association	Change element 6 to "failure to perform as safely as an ordinary consumer would expect at the time of use."	See above response.
2332	Mr. Dean J. Zipser Orange County Bar Association	Delete "unreasonably" from elements 3 and 5. When would there ever be a "reasonable" failure to properly investigate?	The committee disagreed with this comment. "Unreasonably" pertains to the decision to investigate, not to the scope of the investigation.
2700 series	Mr. Dean J. Zipser Orange County Bar Association	Add authority stating that certain Labor Code wage provisions do not apply to government entities.	The committee agreed with this comment.
3201	Mr. William E. Kennedy Law Office of William E. Kennedy	Delete "as requested by [*name of plaintiff*]" from element 6. A consumer request is not required under Song-Beverly.	The committee agreed with this comment.

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3201	Mr. Ronald F. Frank Bannan, Green, Frank & Terzian	Do not eliminate the "harm" and "causation" elements. Do not change "defect" to "match the written warranty" in element 5. Modify the first sentence that follows the numbered elements to, at a minimum, include the word "exact" before "cause."	The committee disagreed with these comments. A recent unpublished decision held that plaintiffs are not required to prove that they sustained damages other than the absence of replacement or reimbursement. The concept of "defect" is retained in other elements of this instruction. The word "exact" is not necessary.
	Mr. Michael E. Lindsey Law Office of Michael E. Lindsey	Delete "as requested by [*name of plaintiff*]" from element 6. A consumer request is not required under Song-Beverly.	The committee agreed with this comment.
	Mr. Dean J. Zipser Orange County Bar Association	Add "express" before "warranty." Also, add "in California" to element 1.	The committee disagreed with this comment. While it is true that the vehicle must have been purchased in California, that issue will almost certainly be resolved by the judge, not the jury. The word "express" is unnecessary because the nature of the breach is detailed in element 2.
	State Bar Litigation Section	Do not change "defect" to "match the written warranty" in element 5.	The committee disagreed with this comment. The concept of "defect" is retained in other elements of this instruction.
3202	Mr. William E. Kennedy Law Office of William E. Kennedy	Modify to clarify that two repair attempts are not required when the manufacturer refuses to make repairs to the vehicle the first time the consumer requests warranty assistance.	The committee agreed with this comment. This point will be addressed in the new direction for use.
	Mr. Dean J. Zipser Orange County Bar Association	A single repair attempt can be reasonable under *Gomez v. Volkswagen*. Strike the last sentence of the instruction.	The committee disagreed with this comment. The new direction for use clarifies the use of the last sentence.

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3202	State Bar Litigation Section	Add language to use note regarding where defendant has refused to make the repair.	The committee agreed with this comment.
3204	Mr. Ronald F. Frank Bannan, Green, Frank & Terzian	Add new element (f), stating whether a reasonable person would consider the defect to substantially impair the vehicle's use, value, or safety.	The committee partially agreed with this comment. The "reasonable person" standard will be added to the first sentence, to track element 3 in CACI 3201.
	Mr. Michael E. Lindsey Law Office of Michael E. Lindsey	Delete this instruction. In the alternative, add a definition of "nonconformity" and consider adding additional factors from *Schreidel v. American Honda Motor Co.*	The committee disagreed with this comment. The instruction makes it clear that the factors are optional and that parties may add their own factors.
	Mr. Dean J. Zipser Orange County Bar Association	Recommend approval.	None.
3210	Mr. Ronald F. Frank Bannan, Green, Frank & Terzian	This instruction omits injury, causation, damages, and justification for the rejection of the goods. These elements are required under UCC.	The committee disagreed with this comment. See response to his comment on CACI 3201. A use note will be added that these extra elements may be necessary in actions brought under UCC.
	Mr. Dean J. Zipser Orange County Bar Association	Add "of merchantability" after "implied warranty" in second sentence. Also add new element that implied warranty was not disclaimed.	The committee disagreed with this comment. "Merchantability" will not be understood by the average juror. Disclaimer is an affirmative defense.
3244	Mr. Ronald F. Frank Bannan, Green, Frank & Terzian	Define "willful" as meaning that the defendant's decision was made in bad faith or was unreasonable. Modify penultimate sentence.	The committee disagreed with this comment. The current draft is consistent with the statute.
	Mr. Dean J. Zipser Orange County Bar Association	Add "other than a claim for breach of an implied warranty" to element 2.	The committee disagreed with this additional language; however, a use note will be added to indicate that if there are multiple claims the jury should be told which claim this instruction applies to.

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VF-3203	Mr. Ronald F. Frank Bannan, Green, Frank & Terzian	Modify this form consistent with comments on the instructions, *ante*. Modify the damages calculation question.	The committee disagreed with this comment.
	Mr. Dean J. Zipser Orange County Bar Association	Add "in California" in first paragraph after "new motor vehicle." Add use not that calculation for deduction is based on Civil Code section 1793.2(d)(2)(C).	The committee disagreed with this comment. See response to Mr. Zipser's comment on CACI 3201. The suggested use note is not necessary. Practitioners will be aware of the statute.
	State Bar Litigation Section	Modify this form consistent with comment on CACI 3201.	The committee disagreed with this comment.
3948	Mr. Curt Cutting Horvitz & Levy	Do not change the use note regarding false promise. Materiality and intent to harm are also required.	The committee modified the use note to avoid this potential misunderstanding.
	Hon. Rolf Michael Treu Superior Court of California, County of Los Angeles	Do not tell the jury that it may be asked to award additional damages. This may skew its deliberations on the amount of damages before it.	The committee disagreed with this comment. The jury should be provided with the context in which it is making its determinations.

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Judicial Council of California

Advisory Committee on Civil Jury Instructions

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332. Affirmative Defense—Duress (*Revised*)

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

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

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

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

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

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

Directions for Use

Use CACI No. 333, *Affirmative Defense—Economic Duress*, in cases involving economic duress.

Sources and Authority

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

- Civil Code section 1569 provides that the following acts constitute duress:
  1. Unlawful confinement of the person of the party, or of the husband or wife of such party, or of an ancestor, descendant, or adopted child of such party, husband, or wife;
  2. Unlawful detention of the property of any such person; or,
  3. Confinement of such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.

- Civil Code section 1570 provides:
  Menace consists in a threat:

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

- "Menace" is considered to be duress: "Under the modern rule, ' "[d]uress, which includes whatever destroys one's free agency and constrains [her] to do what is against [her] will, may be exercised by threats, importunity or any species of mental coercion. It is shown where a party 'intentionally used threats or pressure to induce action or nonaction to the other party's detriment.' " ' The coercion must induce the assent of the coerced party, who has no reasonable alternative to succumbing." (*In re Marriage of Baltins* (1989) 212 Cal.App.3d 66, 84 [260 Cal.Rptr. 403], internal citations omitted.)

- "Duress envisions some unlawful action by a party by which one's consent is obtained through fear or threats." (*Keithley v. Civil Service Bd. of The City of Oakland* (1970) 11 Cal.App.3d 443, 450 [80 Cal.Rptr. 809], internal citations omitted.)

- Duress is found only where fear is intentionally used as a means of procuring consent: "[A]n action for duress and menace cannot be sustained when the voluntary action of the apprehensive party is induced by his speculation upon or anticipation of a future event suggested to him by the defendant but not threatened to induce his conduct. The issue in each instance is whether the defendant intentionally exerted an unlawful pressure on the injured party to deprive him of contractual volition and induce him to act to his own detriment." (*Goldstein v. Enoch* (1967) 248 Cal.App.2d 891, 894–895 [57 Cal.Rptr. 19].)

- It is wrongful to use the threat of criminal prosecution to obtain a consent: "California law is clear that an agreement obtained by threat of criminal prosecution constitutes menace and is unenforceable as against public policy." (*Bayscene Resident Negotiators v. Bayscene Mobilehome Park* (1993) 15 Cal.App.4th 119, 127 [18 Cal.Rptr.2d 626].) However, a threat of legitimate civil action is not considered wrongful: "[T]he action or threat in duress or menace must be unlawful, and a threat to take legal action is not unlawful unless the party making the threat knows the falsity of his claim." (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 128 [54 Cal.Rptr. 533].)

- Standard duress is evaluated under a subjective standard: "The question in each case [is], Was the person so acted upon by threats of the person claiming the benefit of the contract, for the purpose of obtaining such contract, as to be bereft of the quality of mind essential to the making of a contract, and was the contract thereby obtained? Hence, under this theory duress is to be tested, not by the nature of the threats, but rather by the state of mind induced thereby in the victim." (*In re Marriage of Gonzalez* (1976) 57 Cal.App.3d 736, 744 [129 Cal.Rptr. 566].)

- The wrongful acts of a third party may constitute duress sufficient to allow rescission of a contract with a party, who, although not participating in those wrongful acts, had knowledge of the innocent party's position. (*Leeper v. Beltrami* (1959) 53 Cal.2d 195, 205–206 [1 Cal.Rptr. 12, 347 P.2d 12].)

- "[Defendant has] the burden of proving by a preponderance of the evidence the affirmative of the issues of duress and plaintiff's default." (*Fio Rito v. Fio Rito* (1961) 194 Cal.App.2d 311, 322 [14 Cal.Rptr. 845]; cf. *Stevenson v. Stevenson* (1940) 36 Cal.App.2d 494, 500 [97 P.2d 982].)

- ~~It is a well-established rule that evidence relied on to establish a defense of duress must establish the fact with reasonable certainty by clear, cogent, and convincing evidence. (*Stevenson v. Stevenson* (1940) 36 Cal.App.2d 494, 500 [97 P.2d 982].)~~

Secondary Sources

1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 416–422

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake,* §§ 215.20–215.21, 215.23–215.28, 215.120–215.121 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* (Matthew Bender)

27 California Legal Forms, Ch. 77, *Discharge of Obligations,* § 77.351 (Matthew Bender)

333. Affirmative Defense—Economic Duress (*Revised*)

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

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

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

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

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

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

Sources and Authority

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

- The doctrine of economic duress has been described recently as follows: " 'As it has evolved to the present day, the economic duress doctrine is not limited by early statutory and judicial expressions requiring an unlawful act in the nature of a tort or a crime. Instead, the doctrine now may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure. The assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment may constitute a wrongful act for purposes of the economic duress doctrine.'" (*Philippine Export and Foreign Loan Guarantee Corp. v. Chuidian* (1990) 218 Cal.App.3d 1058, 1077–1078 [267 Cal.Rptr. 457], internal citations omitted.)

- Economic duress is evaluated under an objective standard: "The doctrine of 'economic duress' can apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable

alternative, to agree to an unfavorable contract. The party subjected to the coercive act, and having no reasonable alternative, can then plead 'economic duress' to avoid the contract." (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644 [76 Cal.Rptr.2d 615], internal citation omitted.)

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

Secondary Sources

1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 420–422

17 California Forms of Pleading and Practice, Ch. 215, *Duress, Menace, Fraud, Undue Influence, and Mistake*, §§ 215.22, 215.122 (Matthew Bender)

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake* (Matthew Bender)

372. Common Count: Open Book Account (*New*)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/it] money on an open book account. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of defendant***] had (a) financial transaction(s);**

2. **That [***name of plaintiff***] kept an account of the debits and credits involved in the transaction(s);**

3. **That [***name of defendant***] owes [***name of plaintiff***] money on the account; and**

4. **The amount of money that [***name of defendant***] owes [***name of plaintiff***].**

Directions for Use

The instructions in this series are not intended to cover all available common counts. Users may need to draft their own instructions or modify the CACI instructions to fit the circumstances of the case.

Sources and Authority

- " 'A book account may be deemed to furnish the foundation for a suit in assumpsit … only when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant.' … 'The term "account," … clearly requires the recording of sufficient information regarding the transaction involved in the suit, from which the debits and credits of the respective parties may be determined, so as to permit the striking of a balance to ascertain what sum, if any, is due to the claimant.'" (*Robin v. Smith* (1955) 132 Cal.App.2d 288, 291 [282 P.2d 135], internal citations omitted.)

- "A book account is defined … as 'a detailed statement, kept in a book, in the nature of debit and credit, arising out of contract or some fiduciary relation.' It is, of course, necessary for the book to show against whom the charges are made. It must also be made to appear in whose favor the charges run. This may be shown by the production of the book from the possession of the plaintiff and his identification of it as the book in which he kept the account between him and the debtor. An open book account may consist of a single entry reflecting the establishment of an account between the parties, and may contain charges alone if there are no credits to enter. Money loaned is the proper subject of an open book account. Of course a mere private memorandum

does not constitute a book account." (*Joslin v. Gertz* (1957) 155 Cal.App.2d 62, 65–66 [317 P.2d 155], internal citations omitted.)

- "A book account may furnish the basis for an action on a common count ' "... when it contains a statement of the debits and credits of the transactions involved completely enough to supply evidence from which it can be reasonably determined what amount is due to the claimant." ' A book account is described as 'open' when the debtor has made some payment on the account, leaving a balance due." (*Interstate Group Administrators, Inc. v. Cravens, Dargan & Co.* (1985) 174 Cal.App.3d 700, 708 [220 Cal.Rptr. 250], internal citations and footnote omitted.)

- "[T]he most important characteristic of a suit brought to recover a sum owing on a book account is that the amount owed is determined by computing *all* of the credits and debits entered in the book account." (*Interstate Group Administrators, Inc., supra,* 174 Cal.App.3d at p. 708.)

- "It is apparent that the mere entry of dates and payments of certain sums in the credit column of a ledger or cash book under the name of a particular individual, without further explanation regarding the transaction to which they apply, may not be deemed to constitute a 'book account' upon which an action in *assumpsit* may be founded." (*Tillson v. Peters* (1940) 41 Cal.App.2d 671, 679 [107 P.2d 434].)

- "The law does not prescribe any standard of bookkeeping practice which all must follow, regardless of the nature of the business of which the record is kept. We think it makes no difference whether the account is kept in one book or several so long as they are permanent records, and constitute a system of bookkeeping as distinguished from mere private memoranda." (*Egan v. Bishop* (1935) 8 Cal.App.2d 119, 122 [47 P.2d 500].)

- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim . … Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial,* is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. … The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)

- "[S]ince the basic premise for pleading a common count … is that the person is thereby 'waiving the tort and suing in assumpsit,' any tort damages are out. Likewise excluded are damages for a breach of an express contract. The relief is something in the nature of a constructive trust and … 'one cannot be held to be a constructive trustee of something he had not acquired.' One must have acquired some money which in equity and good conscience belongs to the plaintiff or the defendant must be under a contract obligation with nothing remaining to be performed except the payment of a sum certain in money." (*Zumbrun v. University of Southern California* (1972) 25 Cal.App.3d 1, 14–15 [101 Cal.Rptr. 499], internal citations omitted.)

- " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." ' A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)

- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

- "A common count is not a specific cause of action, … rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (4th ed. 1997) Pleading, § 522
1 California Forms of Pleading and Practice, Ch. 8, *Accounts Stated and Open Accounts*, §§ 8.20, 8.47 (Matthew Bender)
12 California Forms of Pleading and Practice, Ch. 121, *Common Counts* (Matthew Bender)
4 California Points and Authorities, Ch. 43, *Common Counts and Bills of Particulars* (Matthew Bender)

373. Common Count: Account Stated (*New*)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/it] money on an account stated. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] owed [***name of plaintiff***] money from previous financial transactions;**

2. **That [***name of plaintiff***] and [***name of defendant***], by words or conduct, agreed that the amount stated in the account was the correct amount owed to [***name of plaintiff***];**

3. **That [***name of defendant***], by words or conduct, promised to pay the stated amount to [***name of plaintiff***];**

4. **That [***name of defendant***] has not paid [***name of plaintiff***] [any/all] of the amount owed under this account; and**

5. **The amount of money [***name of defendant***] owes [***name of plaintiff***].**

Sources and Authority

- "The essential elements of an account stated are: (1) previous transactions between the parties establishing the relationship of debtor and creditor; (2) an agreement between the parties, express or implied, on the amount due from the debtor to the creditor; (3) a promise by the debtor, express or implied, to pay the amount due." (*Zinn v. Fred R. Bright Co.* (1969) 271 Cal.App.2d 597, 600 [76 Cal.Rptr. 663], internal citations omitted.)

- "The agreement of the parties necessary to establish an account stated need not be express and frequently is implied from the circumstances. In the usual situation, it comes about by the creditor rendering a statement of the account to the debtor. If the debtor fails to object to the statement within a reasonable time, the law implies his agreement that the account is correct as rendered." (*Zinn, supra,* 271 Cal.App.2d at p. 600, internal citations omitted.)

- "An account stated is an agreement, based on the prior transactions between the parties, that the items of the account are true and that the balance struck is due and owing from one party to another. When the account is assented to, ' "it becomes a new contract. An action on it is not founded upon the original items, but upon the balance agreed to by the parties. … " Inquiry may not be had into those matters at all. It is upon the new contract by and under which the parties have adjusted their

differences and reached an agreement.' " (*Gleason v. Klamer* (1980) 103 Cal.App.3d 782, 786–787 [163 Cal.Rptr. 483], internal citations omitted.)

- "To be an account stated, 'it must appear that at the time of the statement an indebtedness from one party to the other existed, that a balance was then struck and agreed to be the correct sum owing from the debtor to the creditor, and that the debtor expressly or impliedly promised to pay to the creditor the amount thus determined to be owing.' The agreement necessary to establish an account stated need not be express and is frequently implied from the circumstances. When a statement is rendered to a debtor and no reply is made in a reasonable time, the law implies an agreement that the account is correct as rendered. Actions on accounts stated frequently arise from a series of transactions which also constitute an open book account. However, an account stated may be found in a variety of commercial situations. The acknowledgement of a debt consisting of a single item may form the basis of a stated account. The key element in every context is agreement on the final balance due." (*Maggio, Inc. v. Neal* (1987) 196 Cal.App.3d 745, 752–753 [241 Cal.Rptr. 883], internal citations omitted.)

- "An account stated need not be submitted by the creditor to the debtor. A statement expressing the debtor's assent and acknowledging the agreed amount of the debt to the creditor equally establishes an account stated." (*Truestone, Inc. v. Simi West Industrial Park II* (1984) 163 Cal.App.3d 715, 726 [209 Cal.Rptr. 757], internal citations omitted.)

- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim . … Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial,* is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "The account stated may be attacked only by proof of 'fraud, duress, mistake, or other grounds cognizable in equity for the avoidance of an instrument.' The defendant 'will not be heard to answer when action is brought upon the account stated that the claim or demand was unjust, or invalid.' " (*Gleason, supra,* 103 Cal.App.3d at p. 787, internal citations omitted.)

- "An account stated need not cover all the dealings or claims between the parties. There may be a partial settlement and account stated as to some of the transactions." (*Gleason, supra,* 103 Cal.App.3d at p. 790, internal citation omitted.)

- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the

allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

- "A common count is not a specific cause of action, … rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (4th ed. 1997) Pleading, § 515

1 Witkin, Summary of California Law (9th ed. 1987) Contracts, §§ 917, 918

1 California Forms of Pleading and Practice, Ch. 8, *Accounts Stated and Open Accounts*, §§ 8.10, 8.40–8.46 (Matthew Bender)

374. Common Count: Mistaken Receipt (*New*)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her/it] money [that was paid/for goods that were received] by mistake. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [paid [***name of defendant***] money/sent goods to [***name of defendant***]] by mistake;**

2. **That [***name of defendant***] did not have a right to [that money/the goods];**

3. **That [***name of plaintiff***] has asked [***name of defendant***] to return the [money/goods];**

4. **That [***name of defendant***] has not returned the [money/goods] to [***name of plaintiff***]; and**

5. **The amount of money that [***name of defendant***] owes [***name of plaintiff***].**

Sources and Authority

- " 'As Witkin states in his text, "[a] common count is proper whenever the plaintiff claims a sum of money due, either as an indebtedness in a sum certain, or for the reasonable value of services, goods, etc., furnished. It makes no difference in such a case that the proof shows the original transaction to be an express contract, a contract implied in fact, or a quasi-contract." ' A claim for money had and received can be based upon money paid by mistake, money paid pursuant to a void contract, or a performance by one party of an express contract." (*Utility Audit Co., Inc. v. City of Los Angeles* (2003) 112 Cal.App.4th 950, 958 [5 Cal.Rptr.3d 520], internal citations omitted.)

- "It is well settled that no contract is necessary to support an action for money had and received other than the implied contract which results by operation of law where one person receives the money of another which he has no right, conscientiously, to retain. Under such circumstances the law will imply a promise to return the money. The action is in the nature of an equitable one and is based on the fact that the defendant has money which, in equity and good conscience, he ought to pay to the plaintiffs. Such an action will lie where the money is paid under a void agreement, where it is obtained by fraud or where it was paid by a mistake of fact." (*Stratton v. Hanning* (1956) 139 Cal.App.2d 723, 727 [294 P.2d 66], internal citations omitted.)

- Restatement First of Restitution, section 28, provides:

A person who has paid money to another because of a mistake of fact and who does not obtain what he expected in return is entitled to restitution from the other if the mistake was induced:
(a) by the fraud of the payee, or
(b) by his innocent and material misrepresentation, or
(c) by the fraud or material misrepresentation of a person purporting to act as the payee's agent, or
(d) by the fraud or material misrepresentation of a third person, provided that the payee has notice of the fraud or representation before he has given or promised something of value.

- "Money paid upon a mistake of fact may be recovered under the common count of money had and received. The plaintiff, however negligent he may have been, may recover if his conduct has not altered the position of the defendant to his detriment." (*Thresher v. Lopez* (1921) 52 Cal.App. 219, 220 [198 P. 419], internal citations omitted.)

- " 'The common count is a general pleading which seeks recovery of money without specifying the nature of the claim . … Because of the uninformative character of the complaint, it has been held that the typical answer, a *general denial,* is sufficient to raise almost any kind of defense, including some which ordinarily require special pleading.' However, even where the plaintiff has pleaded in the form of a common count, the defendant must raise in the answer any new matter, that is, anything he or she relies on that is not put in issue by the plaintiff." (*Title Ins. Co. v. State Bd. of Equalization* (1992) 4 Cal.4th 715, 731 [14 Cal.Rptr.2d 822, 842 P.2d 121], internal citations and footnote omitted.)

- "Although such an action is one at law, it is governed by principles of equity. It may be brought 'wherever one person has received money which belongs to another, and which "in equity and good conscience," or in other words, in justice and right, should be returned. . . . The plaintiff's right to recover is governed by principles of equity, although the action is one at law.' " (*Mains v. City Title Ins. Co.* (1949) 34 Cal.2d 580, 586 [212 P.2d 873], internal citations omitted.)

- "In the common law action of general assumpsit, it is customary to plead an indebtedness using 'common counts.' In California, it has long been settled the allegation of claims using common counts is good against special or general demurrers. The only essential allegations of a common count are '(1) the statement of indebtedness in a certain sum, (2) the consideration, i.e., goods sold, work done, etc., and (3) nonpayment.' " (*Farmers Ins. Exchange v. Zerin* (1997) 53 Cal.App.4th 445, 460 [61 Cal.Rptr.2d 707], internal citations omitted.)

- "A common count is not a specific cause of action, … rather, it is a simplified form of pleading normally used to aver the existence of various forms of monetary indebtedness, including that arising from an alleged duty to make restitution under an assumpsit theory. When a common count is used as an alternative way of seeking the

same recovery demanded in a specific cause of action, and is based on the same facts, the common count is demurrable if the cause of action is demurrable." (*McBride v. Boughton* (2004) 123 Cal.App.4th 379, 394 [20 Cal.Rptr.3d 115], internal citations omitted.)

Secondary Sources

4 Witkin, California Procedure (4th ed. 1997) Pleading, § 515

12 California Forms of Pleading and Practice, Ch. 121, *Common Counts* (Matthew Bender

418. Presumption of Negligence per se (*Revised*)

[*Insert citation to statute, regulation, or ordinance***] states:**

_____.

If you decide~~:~~

1. **That [***name of plaintiff/defendant***] violated this law~~,~~ and**

2. **That the violation was a substantial factor in bringing about the harm,**

Then you must find that [*name of plaintiff/defendant***] was negligent [unless you also find that the violation was excused].**

If you find that [*name of plaintiff/defendant***] did not violate this law or that the violation was not a substantial factor in bringing about the harm [or if you find the violation was excused], then you must still decide whether [***name of plaintiff/defendant***] was negligent in light of the other instructions.**

Directions for Use

If a rebuttal is offered on the ground~~s~~ that the violation was excused, then the bracketed portion ~~of (b)~~ in the second and last paragraphs should be read. For an instruction on excuse, see ~~Instruction~~ CACI No. 420, *Negligence per se: Rebuttal of the Presumption of Negligence (Violation Excused).*

If the statute is lengthy, the judge may want to read it at the end of this instruction instead of at the beginning. The instruction would then need to be revised, to tell the jury that they will be hearing the statute at the end.

Rebuttal of the presumption of negligence is addressed in the instructions that follow (see ~~Instructions~~ CACI Nos. 420 and 421).

Sources and Authority

- Evidence Code section 669 codifies the common law presumption of negligence per se and the grounds for rebutting the presumption. Subdivision (a) sets forth the conditions that cause the presumption to arise:
  The failure of a person to exercise due care is presumed if:
  (1) He violated a statute, ordinance, or regulation of a public entity;
  (2) The violation proximately caused death or injury to person or property;

(3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
(4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

- In general, the first two elements of Evidence Code section 669(a) are questions to be decided by the trier of fact, while the last two are always questions of law. (*Cade v. Mid-City Hospital Corp.* (1975) 45 Cal.App.3d 589, 597 [119 Cal.Rptr. 571]; see also Law Revision Cal. Com., Evid. Code, § 669.) However, in some circumstances violation of the law and/or causation can be decided as questions of law. In those cases, it is unnecessary to instruct the jury on the elements decided by the court.

- This jury instruction addresses the establishment of the two factual elements underlying the presumption of negligence. If they are not established, then a finding of negligence cannot be based on the alleged statutory violation. However, negligence can still be proven by other means. (*Nunneley v. Edgar Hotel* (1950) 36 Cal.2d 493, 500–501 [225 P.2d 497].)

- Statutory negligence, or negligence per se, sets the conduct prescribed by the statute as the standard of care. (*Casey v. Russell* (1982) 138 Cal.App.3d 379, 383 [188 Cal.Rptr. 18].) Criminal statutes may be used to set the applicable standard of care. (See *Ramirez v. Plough, Inc.* (1993) 6 Cal.4th 539, 547 [25 Cal.Rptr.2d 97, 863 P.2d 167].) Federal statutes and regulations may be adopted as the standard of care in a negligence action. (*DiRosa v. Showa Denko K. K.* (1996) 44 Cal.App.4th 799, 808 [52 Cal.Rptr.2d 128].)

- Safety orders and regulations of administrative agencies may be used to set the standard of care. However, an administrative agency cannot independently impose a duty of care unless the Legislature has properly delegated that authority to the agency ~~by~~. (*California Service Station & Auto. Repair Assn. v. American Home Assurance Co.* (1998) 62 Cal.App.4th 1166, 1175 [73 Cal.Rptr.2d 182].)

- OSHA regulations, where applicable, may be used as a basis for negligence per se instructions. (Lab. Code, § 6304.5; *Elsner v. Uveges* (2004) 34 Cal.4th 915, 935–936 [22 Cal.Rptr.3d 530, 102 P.3d 915].)

- This doctrine applies to negligence of the defendant or contributory negligence of the plaintiff. (*Nevis v. Pacific Gas and Electric~~,~~ Co.* (1954) 43 Cal.2d 626, 631, fn.1 [275 P.2d 761].)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 818–837, pp. 170–194

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, §§ 3.10, 3.13 (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) §§ 1.28–1.31

4 California Trial Guide, Unit 90, *Closing Argument,* §§ 90.88, 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 7, *Proof,* § 7.04 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.70, 165.80, 165.81 (Matthew Bender)

430. Causation: Substantial Factor (*Revised*)

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

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

Directions for Use

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

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

In asbestos-related cancer cases, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203] requires an additional instruction regarding exposure to a particular product. See ~~Instruction~~ CACI No. 435, *Causation for Asbestos-Related Cancer Claims.*

~~Tentative Draft No. 3 (April 7, 2003) for the~~ The Restatement Third of Torts, ~~in its treatment of Torts: Liability for Physical Harm (Basic Principles),~~ section 29 (Tent. Draft

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

Sources and Authority

- *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398]; *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953 [67 Cal.Rptr.2d 16, 941 P.2d 1203]; *Mitchell v. Gonzales* (1991) 54 Cal.3d 1041 [1 Cal.Rptr.2d 913, 819 P.2d 872].

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

- *Espinosa v. Little Company of Mary Hospital* (1995) 31 Cal.App.4th 1304, 1313–1314 [37 Cal.Rptr.2d 541].

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

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

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, § 968, pp. 358–359, *id.* (2002 supp.) Torts, § 968A, pp. 253–256

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

California Tort Guide (Cont.Ed.Bar 1996) §§ 1.13–1.15

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

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

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

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

MEDICAL NEGLIGENCE

501. Standard of Care for Health Care Professionals (*Revised*)

A [*insert type of medical practitioner***] is negligent if [he/she] fails to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful [***insert type of medical practitioners***] would use in the same or similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."**

[You must determine the level of skill, knowledge, and care that other reasonably careful [*insert type of medical practitioners***] would use in the same or similar circumstances, based only on the testimony of the expert witnesses [including [***name of defendant***]] who have testified in this case.]**

Directions for Use

This instruction is intended to apply to nonspecialist physicians, surgeons, and dentists. The standards of care for nurses, specialists, and hospitals are addressed in separate instructions.

The second paragraph should be used ~~except~~ only in cases where the court determines that expert testimony is ~~not~~ necessary to establish the standard of care.

In appropriate cases where the standard of care is set by statute or regulation, refer to instructions on negligence per se (CACI Nos. 418–421). (See *Galvez v. Frields* (2001) 88 Cal.App.4th 1410 [107 Cal.Rptr.2d 50].)

See ~~Instructions~~ CACI Nos. 219–221 on evaluating the credibility of expert witnesses.

Sources and Authority

- "With unimportant variations in phrasing, we have consistently held that a physician is required to possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances." (*Landeros v. Flood* (1976) 17 Cal.3d 399, 408 [131 Cal.Rptr. 69, 551 P.2d 389]; see also *Brown v. Colm* (1974) 11 Cal.3d 639, 642–643 [114 Cal.Rptr. 128, 552 P.2d 688].)

- "The courts require only that physicians and surgeons exercise in diagnosis and treatment that reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by members of the medical profession under similar circumstances." (*Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36 [210 Cal.Rptr. 762, 694 P.2d 1134].)

- In *Hinson v. Clairemont Community Hospital* (1990) 218 Cal.App.3d 1110, 1119–1120 [267 Cal.Rptr. 503] (disapproved on other grounds in *Alexander v. Superior Court* (1993) 5 Cal.4th 1218, 1228 [23 Cal.Rptr.2d 397, 859 P.2d 96]), the court observed that failure to possess the requisite level of knowledge and skill is negligence, although a breach of this portion of the standard of care does not, by itself, establish actionable malpractice.

- "The standard of care against which the acts of a medical practitioner are to be measured is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony, unless the conduct required by the particular circumstances is within the common knowledge of laymen." (*Alef v. Alta Bates Hospital* (1992) 5 Cal.App.4th 208, 215 [6 Cal.Rptr.2d 900].)

- " 'Ordinarily, the standard of care required of a doctor, and whether he exercised such care, can be established only by the testimony of experts in the field.' 'But to that rule there is an exception that is as well settled as the rule itself, and that is where "negligence on the part of a doctor is demonstrated by facts which can be evaluated by resort to common knowledge, expert testimony is not required since scientific enlightenment is not essential for the determination of an obvious fact." ' " (*Gannon v. Elliot* (1993) 19 Cal.App.4th 1, 6 [23 Cal.Rptr.2d 86], internal citations omitted.)

- "We have already held upon authority that the failure to remove a sponge from the abdomen of a patient is negligence of the ordinary type and that it does not involve knowledge of *materia medica* or surgery but that it belongs to that class of mental lapses which frequently occur in the usual routine of business and commerce, and in the multitude of commonplace affairs which come within the group of ordinary actionable negligence. The layman needs no scientific enlightenment to see at once that the omission can be accounted for on no other theory than that someone has committed actionable negligence." (*Ales v. Ryan* (1936) 8 Cal.2d 82, 93 [64 P.2d 409].)

- The medical malpractice standard of care applies to veterinarians. (*Williamson v. Prida* (1999) 75 Cal.App.4th 1417, 1425 [89 Cal.Rptr.2d 868].)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 774, 792, pp. 113, 137

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals,* § 30.12, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.11 (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) § 9.1

17 California Forms of Pleading and Practice, Ch. 209, *Dentists*, § 209.42 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, §§ 295.13, 295.43, 295.45 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

532. Informed Consent—Definition (*Revised*)

A patient's consent to a medical procedure must be "informed." A patient gives an "informed consent" only after the [*insert type of medical practitioner***] has fully explained the proposed treatment or procedure.**

A [*insert type of medical practitioner***] must explain the likelihood of success and the risks of agreeing to a medical procedure in language that the patient can understand. A [***insert type of medical practitioner***] must give the patient as much information as [he/she] needs to make an informed decision, including any risk that a reasonable person would consider important in deciding to have the proposed treatment or procedure, and any other information skilled practitioners would disclose to the patient under the same or similar circumstances. The patient must be told about any risk of death or serious injury or significant potential complications that may occur if the procedure is performed. A [***insert type of medical practitioner***] is not required to explain minor risks that are not likely to occur.**

Directions for Use

This instruction should be read in conjunction with ~~Instruction~~ CACI No. 533, *Failure to Obtain Informed Consent—Essential Factual Elements.*

If the patient is a minor or is incapacitated, tailor the instruction accordingly.

Also, see ~~Instruction~~ CACI No. 531, *Consent on Behalf of Another*.

Sources and Authority

- A physician is required to disclose "all information relevant to a meaningful decisional process." (*Cobbs v. Grant* (1972) 8 Cal.3d 229, 242 [104 Cal.Rptr. 505, 502 P.2d 1].)

- "When a doctor recommends a particular procedure then he or she must disclose to the patient all material information necessary to the decision to undergo the procedure, including a reasonable explanation of the procedure, its likelihood of success, the risks involved in accepting or rejecting the proposed procedure, and any other information a skilled practitioner in good standing would disclose to the patient under the same or similar circumstances." (*Mathis v. Morrissey* (1992) 11 Cal.App.4th 332, 343 [13 Cal.Rptr.2d 819].)

- "A physician has a duty to inform a patient in lay terms of the dangers inherently and potentially involved in a proposed treatment." (*McKinney v. Nash* (1981) 120 Cal.App.3d 428, 440 [174 Cal.Rptr. 642].)

- Courts have observed that *Cobbs* created a two-part test for disclosure. "First, a physician must disclose to the patient the potential of death, serious harm, and other complications associated with a proposed procedure." (*Daum v. SpineCare Medical Group, Inc.* (1997) 52 Cal.App.4th 1285, 1301 [61 Cal.Rptr.2d 260].) "Second, '[b]eyond the foregoing minimal disclosure, a doctor must also reveal to his patient such additional information as a skilled practitioner of good standing would provide under similar circumstances.' " (*Id.* at p. 1302, citation omitted.) The doctor has no duty to discuss minor risks inherent in common procedures when it is common knowledge that such risks are of very low incidence. (*Cobbs, supra,* 8 Cal.3d at p. 244.)

- The courts have defined "material information" as follows: "Material information is that which the physician knows or should know would be regarded as significant by a reasonable person in the patient's position when deciding to accept or reject the recommended medical procedure. To be material, a fact must also be one which is not commonly appreciated. If the physician knows or should know of a patient's unique concerns or lack of familiarity with medical procedures, this may expand the scope of required disclosure." (*Truman v. Thomas* (1980) 27 Cal.3d 285, 291 [165 Cal.Rptr. 308, 611 P.2d 902], internal citations omitted.)

- "Obviously involved in the equation of materiality are countervailing factors of the seriousness and remoteness of the dangers involved in the medical procedure as well as the risks of a decision not to undergo the procedure." (*McKinney, supra,* 120 Cal.App.3d at p. 441.)

- Expert testimony is not required to establish the duty to disclose the potential of death, serious harm, and other complications. (*Cobbs, supra,* 8 Cal.3d at p. 244.) Expert testimony is admissible to show what other information a skilled practitioner would have given under the circumstances. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1191–1192 [23 Cal.Rptr.2d 13, 858 P.2d 598].)

- A physician must also disclose personal interests unrelated to the patient's health, whether research or economic, that may affect his or her medical judgment. (*Moore v. Regents of Univ. of California* (1990) 51 Cal.3d 120, 129–132 [271 Cal.Rptr. 146, 793 P.2d 479], cert. denied 499 U.S. 936 [111 S. Ct. 1388, 113 L. Ed. 2d 444] (1991).)

- Appellate courts have rejected a general duty of disclosure concerning a treatment or procedure a physician does not recommend. However, in some cases, "there may be evidence that would support the conclusion that a doctor should have disclosed information concerning a nonrecommended procedure." (*Vandi v. Permanente Medical Group, Inc.* (1992) 7 Cal.App.4th 1064, 1071 [9 Cal.Rptr.2d 463].)

Secondary Sources

5 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 360–361, pp. 446–449

3 Levy et al., California Torts, Ch. 31, *Liability of Physicians and Other Medical Practitioners* (Matthew Bender)

California Tort Guide (Cont.Ed.Bar 1996) § 9.11

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.14 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 414, *Physicians and Other Medical Personnel* (Matthew Bender)

2 California Points and Authorities, Ch. 21, *Assault and Battery* (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons* (Matthew Bender)

33 California Legal Forms, Ch. 104, *Health Care Transactions, Consents, and Directives,* § 104.11 (Matthew Bender)

1203. Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements (*Revised*)

[*Name of plaintiff***] claims the [***product***]'s design was defective because the [***product***] did not perform as safely as an ordinary consumer would have expected it to perform. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [manufactured/distributed/sold] the [***product***];**

2. **[That, at the time of the use, the [***product***] was substantially the same as when it left [***name of defendant***]'s possession;]**

   [or]

   [That any changes made to the [*product***] after it left [***name of defendant***]'s possession were reasonably foreseeable to [***name of defendant***];]**

3. **That the [***product***] did not perform as safely as an ordinary consumer would have expected at the time of use;**

4. **That the [***product***] was used [or misused] in a way that was reasonably foreseeable to [***name of defendant***];**

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

6. **That the [***product***]'s ~~design~~ <u>failure to perform safely</u> was a substantial factor in causing [***name of plaintiff***]'s harm.**

Directions for Use

If both tests (the consumer expectation test and the risk-benefit test) for design defect are asserted by the plaintiff, the burden-of-proof instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431].)

Some cases state that product misuse must be pleaded as an affirmative defense (see, e.g., *Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].) However, the <u>advisory</u> ~~sub~~committee feels that absence of unforeseeable misuse is an element of plaintiff's claim and that foreseeable misuse is more properly asserted by defendant in support of a claim of contributory negligence. But see below:

- "[P]roduct misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the *sole* reason that the product caused injury." (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121], internal citation omitted.)

- " 'Misuse' is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm. This causation is one of the elements of the 'misuse' affirmative defense and thus the burden falls on the defendant to prove it." (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)

Sources and Authority

- In *Barker v. Lull Engineering* (1978) 20 Cal.3d 413 [143 Cal.Rptr. 225, 573 P.2d 443], the court established two alternative tests for determining whether a product is defectively designed. Under the first test, a product may be found defective in design if the plaintiff demonstrates that the product "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Id*. at p. 429.) Under the second test, a product is defective if the risk of danger inherent in the design outweighs the benefits of such design. (*Id*. at p. 430.)

- "[The] dual standard for design defect assures an injured plaintiff protection from products that either fall below ordinary consumer expectations as to safety or that, on balance, are not as safely designed as they should be." (*Barker*, *supra,* 20 Cal.3d at p. 418.)

- The consumer expectation test "acknowledges the relationship between strict tort liability for a defective product and the common law doctrine of warranty, which holds that a product's presence on the market includes an implied representation 'that it [will] safely do the jobs for which it was built.' " (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 562 [34 Cal.Rptr.2d 607, 822 P.2d 298], internal citations omitted.)

- Use of this instruction is limited by the following principles: "[T]he jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses. Unless the facts actually permit an inference that the product's performance did not meet the minimum safety expectations of its ordinary users, the jury must engage in the balancing of risks and benefits required by the second prong of *Barker*. Accordingly, as *Barker* indicated, instructions are misleading and incorrect if they allow a jury to avoid this risk-benefit analysis in a case where it is required." (*Soule, supra,* 8 Cal.4th at p. 568.)

- "[T]he consumer expectation test is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design

violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*." (*Soule, supra,* 8 Cal.4th at p. 567.)

- "In determining whether a product's safety satisfies [the consumer expectation test], the jury considers the expectations of a hypothetical reasonable consumer, rather than those of the particular plaintiff in the case." (*Campbell v. General Motors Corp.* (1982) 32 Cal.3d 112, 126, fn. 6 [184 Cal.Rptr. 891, 649 P.2d 224].)

- State-of-the-art evidence is not relevant when the plaintiff relies on a consumer expectation theory of design defect. (*Morton v. Owens-Corning Fiberglas Corp.* (1995) 33 Cal.App.4th 1529, 1536 [40 Cal.Rptr.2d 22].)

- "[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse." (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7 [116 Cal.Rptr. 575], disapproved and overruled on another issue in *Soule, supra*, 8 Cal.4th at p. 580.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1254–1264

California Products Liability Actions, Ch. 2, *Liability for Defective Products,* § 2.11, Ch. 7, *Proof,* § 7.02 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.11 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability* (Matthew Bender)

DEFAMATION

VF-1704. Defamation per se~~—Essential Factual Elements~~Affirmative Defense of the Truth (Private Figure—Matter of Private Concern) (*Revised*)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make ~~one or more of~~ the following statement~~(s)~~ to [a person/persons] other than [***name of plaintiff***]? [~~*List*~~ *Insert claimed per se defamatory statement~~(s)~~.*]**

   _____Yes _____No

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

2. **Did the [person/people] to whom the statement~~s were~~ was made reasonably understand that the statement~~(s)~~ ~~[~~was~~/were]~~ about [***name of plaintiff***]?**

   _____Yes _____No

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

3. **Did [this person/these people] reasonably understand the statement~~(s)~~ to mean that [***insert ground(s) for defamation per se, e.g., "[name of plaintiff] had committed a crime"***]?**

   _____Yes _____No

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

4. **Was the statement substantially true?**

   ____ Yes ____ No

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

~~4~~5. **Did [***name of defendant***] fail to use reasonable care to determine the truth or falsity of the statement~~(s)~~?**

_____Yes _____No

If your answer to question 45 is yes, then answer question ~~5~~6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

ACTUAL DAMAGES

~~5~~6. What are [*name of plaintiff*]'s actual damages?

[a. Past economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] had to pay as a result of the defamatory statements~~]~~ $_____]

[b. Future economic loss, including harm to [*name of plaintiff*]'s property, business, trade, profession, or occupation, and expenses [*name of plaintiff*] will have to pay as a result of the defamatory statements~~]~~ $_____]

[c. Past noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation~~]~~ $_____]

[d. Future noneconomic loss including shame, mortification, or hurt feelings, and harm to [*name of plaintiff*]'s reputation~~]~~ $_____]

TOTAL $_____

If [*name of plaintiff*] has not proved any actual damages, then answer question ~~6~~7.

If [*name of plaintiff*] has proved any actual damages, skip question ~~6~~7 and answer question ~~7~~8.

ASSUMED DAMAGES TO REPUTATION

~~6~~7. What are the damages you award [*name of plaintiff*] for the assumed harm to [his/her] reputation? You must award at least a nominal sum. $_____

Regardless of your answer to question ~~6~~7, answer question ~~7~~8.

PUNITIVE DAMAGES

~~7~~8. Has [*name of plaintiff***] proved by clear and convincing evidence that [***name of defendant***] acted with malice, oppression, or fraud?**

____ Yes ____ No

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

~~8~~9. What amount, if any, do you award as punitive damages against [*name of defendant***]? $_____**

Signed: _____
Presiding Juror

Dated: _____

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

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case.

This verdict form is based on ~~Instruction~~ CACI No. 1704, *Defamation per se—Essential Factual Elements (Private Figure—Matter of Private Concern)*, and CACI No. 1720, *Defense of the Truth*. Delete question 4 if the affirmative defense of the truth is not at issue.

Multiple statements may need to be set out separately, and if separate damages are claimed as to each statement, separate verdict forms may be needed for each statement because all the elements may need to be found as to each statement.

If specificity is not required, users do not have to itemize all the damages listed in question ~~5~~6. The breakdown is optional; depending on the circumstances, users may wish to break down the damages even further.

Give the jury question 3 only if the statement is not defamatory on its face.

Additional questions on the issue of punitive damages may be needed if the defendant is a corporate or other entity.

Omit question ~~8~~9 if the issue of punitive damages has been bifurcated.

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

This form may be modified if the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest on specific losses that occurred prior to judgment.

CONVERSION

VF-2100. Conversion (*New*)

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [own/possess/have a right to possess] a [***insert description of personal property***]?**

   ____ Yes **____ No**

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

2. **Did [***name of defendant***] intentionally [[take possession of/prevent [***name of plaintiff***] from having access to] the [***insert description of personal property***] for a significant period of time]/[destroy the [***insert description of personal property***]]?**

   ____ Yes **____ No**

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

3. **Did [***name of plaintiff***] consent?**

   ____ Yes **____ No**

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

4. **Was [***name of plaintiff***] harmed?**

   ____ Yes **____ No**

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

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

   ____ Yes **____ No**

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

6. What are [*name of plaintiff***]'s damages ?**

$_____

Signed: _____
Presiding Juror

Dated: _____

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

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. This verdict form is based on CACI No. 2100, *Conversion—Essential Factual Elements.*

If the case involves multiple items of personal property as to which the evidence differs, users may need to modify question 2 to focus the jury on the different items.

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

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

[*Name of plaintiff***] claims that [***name of defendant***] breached the obligation of good faith and fair dealing by failing to properly investigate [his/her/its] loss. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] suffered a loss covered under an insurance policy with [***name of defendant***];**

2. **That [***name of plaintiff***] notified [***name of defendant***] of the loss;**

3. **That [***name of defendant***] unreasonably failed to properly investigate the loss and [denied coverage/failed to pay insurance benefits/delayed payment of insurance benefits];**

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

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

~~When investigating~~ To properly investigate a claim, an insurance company ~~has a duty to~~ must diligently search for~~,~~ and ~~to~~ consider~~,~~ evidence that supports an insured's claimed loss. ~~An insurance company may not reasonably and in good faith deny payments to its insured without thoroughly investigating the grounds for its denial.~~

Directions for Use

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

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

Sources and Authority

- "[A]n insurer may breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claim." (*Egan v. Mutual of Omaha Insurance Co.* (1979) 24 Cal.3d 809, 817 [169 Cal.Rptr. 691, 620 P.2d 141].)

- "To fulfill its implied obligation, an insurer must give at least as much consideration to the interests of the insured as it gives to its own interests. When the insurer

unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort. And an insurer cannot reasonably and in good faith deny payments to its insured without fully investigating the grounds for its denial." (*Frommoethelydo v. Fire Insurance Exchange* (1986) 42 Cal.3d 208, 214–215 [228 Cal.Rptr. 160, 721 P.2d 41], internal citation omitted.)

- "To protect [an insured's] interests it is essential that an insurer fully inquire into possible bases that might support the insured's claim. Although we recognize that distinguishing fraudulent from legitimate claims may occasionally be difficult for insurers, … an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." (*Egan, supra,* 24 Cal.3d at p. 819.)

- "When investigating a claim, an insurance company has a duty to diligently search for evidence which supports its insured's claim. If it seeks to discover only the evidence that defeats the claim it holds its own interest above that of the insured." (*Mariscal v. Old Republic Insurance Co.* (1996) 42 Cal.App.4th 1617, 1620 [50 Cal.Rptr.2d 224].)

- "An unreasonable failure to investigate amounting to … unfair dealing may be found when an insurer fails to consider, or seek to discover, evidence relevant to the issues of liability and damages. … [¶] The insurer's willingness to reconsider its denial of coverage and to continue an investigation into a claim has been held to weigh in favor of its good faith." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 880 [93 Cal.Rptr.2d 364], internal citation omitted.)

- "[W]hether an insurer breached its duty to investigate [is] a question of fact to be determined by the particular circumstances of each case." (*Paulfrey v. Blue Chip Stamps* (1983) 150 Cal.App.3d 187, 196 [197 Cal.Rptr. 501].)

- "[W]ithout actual presentation of a claim by the insured in compliance with claims procedures contained in the policy, there is no duty imposed on the insurer to investigate the claim." (*California Shoppers, Inc. v. Royal Globe Insurance Co.* (1985) 175 Cal.App.3d 1, 57 [221 Cal.Rptr. 171].)

- "It would seem reasonable that any responsibility to investigate on an insurer's part would not arise unless and until the threshold issue as to whether a claim was filed, or a good faith effort to comply with claims procedure was made, has been determined. In no event could an insured fail to keep his/her part of the bargain in the first instance, and thereafter seek recovery for breach of a duty to pay seeking punitive damages based on an insurer's failure to investigate a nonclaim." (*Paulfrey, supra,* 150 Cal.App.3d at pp. 199–200.)

Secondary Sources

2 California Insurance Law & Practice, Ch. 13, *Claims Handling and the Duty of Good Faith,* § 13.04[1]–[3] (Matthew Bender)

1 California Liability Insurance Practice: Claims & Litigation (Cont.Ed.Bar 2002) Investigating the Claim, §§ 9.2, 9.14–9.22, pp. 302–303, 313–321

Croskey et al., California Practice Guide: Insurance Litigation (The Rutter Group 2002) 12:848–12:874, pp. 12C-14–12C-21

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

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

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

2700. Nonpayment of Wages—Essential Factual Elements (Lab. Code, §§ 201, 202, 218) (*Revised*)

[*Name of plaintiff***] claims that [***name of defendant***] owes [him/her] unpaid wages. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] performed work for [***name of defendant***];**

~~2. That [[***name of defendant***] discharged [***name of plaintiff***]]/[[***name of plaintiff***] quit [his/her] job];~~

~~3~~2. **That [***name of defendant***] owes [***name of plaintiff***] wages under the terms of the employment; and**

~~4~~3. **The amount of unpaid wages.**

"Wages" includes all amounts for labor performed by an employee, whether the amount is calculated by time, task, piece, commission, or some other method.

Directions for Use

This instruction is intended for use in a civil action for payment of wages. Depending on the allegations in the case, the definition of "wages" may be modified to include additional compensation, such as earned vacation, nondiscretionary bonuses, or severance pay.

The court may modify this instruction or write an appropriate instruction in cases where the defendant employer claims a permissible setoff from the plaintiff employee's unpaid wages. Under California Wage Orders, an employer may deduct from an employee's wages for cash shortage, breakage, or loss of equipment if the employer proves that this was caused by a dishonest or willful act~~,~~ or by the gross negligence of the employee. (See, e.g., Cal. Code Regs., tit. 8, § 11010, subd. 8.)

If the defendant disputes the existence of an employment relationship, the court may consider modifying and giving ~~Instruction~~ CACI No. 3704, *Existence of "Employee" Status Disputed,* in the Vicarious Responsibility series.

Sources and Authority

Labor Code section 218 provides, in part: "Nothing in this article shall limit the right of any wage claimant to sue directly or through an assignee for any wages or penalty due. …"

- Labor Code section 201 provides, in part: "If an employer discharges an employee, the wages earned and unpaid at the time of discharge are due and payable immediately."

- Labor Code section 202 provides, in part: "If an employee not having a written contract for a definite period quits his or her employment, his or her wages shall become due and payable not later than 72 hours thereafter, unless the employee has given 72 hours previous notice of his or her intention to quit, in which case the employee is entitled to his or her wages at the time of quitting."

- Labor Code section 200 defines "wages" as including "all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis, or other method of calculation. [¶] … 'Labor' includes labor, work, or service whether rendered or performed under contract, subcontract, partnership, station plan, or other agreement if the labor to be paid for is performed personally by the person demanding payment."

- Labor Code section 206(a) provides: "In case of a dispute over wages, the employer shall pay, without condition and within the time set by this article, all wages, or parts thereof, conceded by him to be due, leaving to the employee all remedies he might otherwise be entitled to as to any balance claimed."

- Labor Code section 221 provides: "It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee."

- "[Labor Code] section 221 has long been held to prohibit deductions from an employee's wages for cash shortages, breakage, loss of equipment, and other business losses that may result from the employee's simple negligence." (*Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1118 [41 Cal.Rptr.2d 46].)

- Labor Code section 220 provides:
  (a) Sections 201.5, 201.7, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205, and 205.5 do not apply to the payment of wages of employees directly employed by the State of California. Except as provided in subdivision (b), all other employment is subject to these provisions.
  (b) Sections 200 to 211, inclusive, and Sections 215 to 219, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation. All other employments are subject to these provisions.

- California Wage Orders provide: "No employer shall make any deduction from the wage or require any reimbursement from an employee for any cash shortage, breakage, or loss of equipment, unless it can be shown that the shortage, breakage, or loss is caused by a dishonest or willful act, or by the gross negligence of the employee." (Cal. Code Regs., tit. 8, § 11010, subd. 8.)

- "[A]n employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 6 [177 Cal.Rptr. 803].)

- Labor Code section 206.5 provides, in part: "No employer shall require the execution of any release of any claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of such wages has been made."

- Labor Code section 219(a) provides, in part: "[N]o provision of [Labor Code sections 200 through 243] can in any way be contravened or set aside by a private agreement, whether written, oral, or implied."

Secondary Sources

2 Witkin, Summary of California Law (9th ed. 1987) Agency and Employment, § 335, pp. 327–329; *id.* (2002 supp.) at § 335, pp. 341–343

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws,* § 5.40 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes,* §§ 250.13[1][a], 250.40[3][a], 250.65 (Matthew Bender)

Bancroft-Whitney's California Civil Practice: Employment Litigation (1993) Wage and Hour, §§ 4:67, 4:76, pp. 51, 55–56

2703. Nonpayment of Overtime Compensation—Proof of Overtime Hours Worked (*Revised*)

State law requires California employers to keep payroll records showing the hours worked by and wages paid to employees.

If [*name of defendant***] did not keep accurate records of the hours worked by [***name of plaintiff***], then [***name of plaintiff***] may prove the number of overtime hours worked by making a reasonable estimate of those hours.**

In determining the amount of overtime hours worked, you may consider [*name of plaintiff***]'s estimate of the number of overtime hours worked and any evidence presented by [***name of defendant***] that [***name of plaintiff***]'s estimate is unreasonable. ~~If you find [*name of plaintiff*]'s estimate to be reasonable, then you must accept it even though the result is only approximate.~~**

Directions for Use

This instruction is intended for use when the plaintiff is unable to provide evidence of the precise number of hours worked because of the employer's failure to keep accurate payroll records. (See *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 727–728 [245 Cal.Rptr. 36].)

Sources and Authority

- Labor Code section 1194(a) provides: "Notwithstanding any agreement to work for a lesser wage, any employee receiving less than … the legal overtime compensation applicable to the employee is entitled to recover in a civil action the unpaid balance of the full amount of this … overtime compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

- "Although the employee has the burden of proving that he performed work for which he was not compensated, public policy prohibits making that burden an impossible hurdle for the employee. … 'In such situation … an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate.' " (*Hernandez, supra,* 199 Cal.App.3d at p. 727, internal citation omitted.)

- "It is the trier of fact's duty to draw whatever reasonable inferences it can from the employee's evidence where the employer cannot provide accurate information." (*Hernandez, supra,* 199 Cal.App.3d at p. 728, internal citation omitted.)

- Labor Code section 1174(d) provides: "Every person employing labor in this state shall … [k]eep … payroll records showing the hours worked daily by and the wages paid to, and the number of piece-rate units earned by and any applicable piece rate paid to, employees employed at the respective plants or establishments. These records shall be kept in accordance with rules established for this purpose by the commission, but in any case shall be kept on file for not less than two years."

- "Absent an explicit, mutual wage agreement, a fixed salary does not serve to compensate an employee for the number of hours worked under statutory overtime requirements. …[¶]Since there was no evidence of a wage agreement between the parties that appellant's … per week compensation represented the payment of minimum wage or included remuneration for hours worked in excess of 40 hours per week, … appellant incurred damages of uncompensated overtime." (*Hernandez, supra,* 199 Cal.App.3d at pp. 725–726, internal citations omitted.)

Secondary Sources

1 Wilcox, California Employment Law, Ch. 5, *Administrative and Judicial Remedies Under Wage and Hour Laws,* § 5.72[1] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes* (Matthew Bender)

3103. Neglect—Essential Factual Elements (Welf. & Inst. Code, § 15610.57) (*Revised*)

[*Name of plaintiff***] claims that [he/she/[***name of decedent***]] was neglected by [***name of defendant***] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] had care or custody of [***name of plaintiff/decedent***];**

2. **That [***name of plaintiff/decedent***] was [65 years of age or older/a dependent adult] <u>at the time of the conduct</u>;**

3. **That [***name of defendant***] failed to use the degree of care that a reasonable person in the same situation would have used by [***insert one or more of the following:***]**

   [failing to assist in personal hygiene or in the provision of food, clothing, or shelter;]

   [failing to provide medical care for physical and mental health needs;]

   [failing to protect [*name of plaintiff/decedent***] from health and safety hazards;]**

   [failing to prevent malnutrition or dehydration;]

   [*insert other grounds for neglect;***]**

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

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

Directions for Use

This instruction is intended for plaintiffs who are not seeking survival damages for pain and suffering or attorney fees and costs. Plaintiffs who are seeking such damages should use ~~Instruction~~ <u>CACI No.</u> 3104, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Individual or Individual and Employer Defendants (Welf. & Inst. Code, §§ 15657, 15610.57),* or ~~Instruction~~ <u>CACI No.</u> 3105, *Neglect—Essential Factual Elements—Enhanced Remedies Sought—Employer Defendant (Welf. & Inst. Code, §§ 15657, 15610.57).* The instructions in this ~~set~~ <u>series</u> are not intended to cover every circumstance in which a plaintiff can bring a cause of action under the Elder Abuse and Dependent Adult Civil Protection Act.

This instruction is not intended for cases involving professional negligence against health-care providers as defined by the California Medical Injury Compensation Reform Act of 1975 (MICRA) (see Welf. & Inst. Code, § 15657.2).

Sources and Authority

- Welfare and Institutions Code section 15610.07 provides:
  "Abuse of an elder or a dependent adult" means either of the following:
  (a) Physical abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment with resulting physical harm or pain or mental suffering.
  (b) The deprivation by a care custodian of goods or services that are necessary to avoid physical harm or mental suffering.

- Welfare and Institutions Code section 15610.57 provides:
  (a) "Neglect" means either of the following:
    (1) The negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise.
    (2) The negligent failure of the person themselves to exercise that degree of care that a reasonable person in a like position would exercise.
  (b) Neglect includes, but is not limited to, all of the following:
    (1) Failure to assist in personal hygiene, or in the provision of food, clothing, or shelter.
    (2) Failure to provide medical care for physical and mental health needs. No person shall be deemed neglected or abused for the sole reason that he or she voluntarily relies on treatment by spiritual means through prayer alone in lieu of medical treatment.
    (3) Failure to protect from health and safety hazards.
    (4) Failure to prevent malnutrition or dehydration.
    (5) Failure of an elder or dependent adult to satisfy the needs specified in paragraphs (1) to (4), inclusive, for himself or herself as a result of poor cognitive functioning, mental limitation, substance abuse, or chronic poor health.

- "[T]he statutory definition of neglect set forth in the first sentence of Welfare and Institutions Code section 15610.57 is substantially the same as the ordinary definition of neglect." (*Conservatorship of Gregory v. Beverly Enterprises, Inc.* (2000) 80 Cal.App.4th 514, 521 [95 Cal.Rptr.2d 336].)

- Welfare and Institutions Code section 15657.2 provides: "Notwithstanding this article, any cause of action for injury or damage against a health care provider, as defined in Section 340.5 of the Code of Civil Procedure, based on the health care provider's alleged professional negligence, shall be governed by those laws which specifically apply to those professional negligence causes of action."

- Welfare and Institutions Code section 15610.27 provides: " 'Elder' means any person residing in this state, 65 years of age or older."

- Welfare and Institutions Code section 15610.23 provides:
  (a) "Dependent adult" means any person residing in this state between the ages of 18 and 64 years who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.
  (b) "Dependent adult" includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

- "The purpose of the [Elder Abuse Act] is essentially to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 33 [82 Cal.Rptr.2d 610, 971 P.2d 986].)

- "The Act was expressly designed to protect elders and other dependent adults who 'may be subjected to abuse, neglect, or abandonment … .' Within the Act, two groups of persons who ordinarily assume responsibility for the 'care and custody' of the elderly are identified and defined: health practitioners and care custodians. A 'health practitioner' is defined in section 15610.37 as a 'physician and surgeon, psychiatrist, psychologist, dentist, …' etc., who 'treats an elder … for any condition.' 'Care custodians,' on the other hand, are administrators and employees of public and private institutions that provide 'care or services for elders or dependent adults,' including nursing homes, clinics, home health agencies, and similar facilities which house the elderly. The Legislature thus recognized that both classes of professionals—health practitioners as well as care custodians—should be charged with responsibility for the health, safety and welfare of elderly and dependent adults." (*Mack v. Soung* (2000) 80 Cal.App.4th 966, 974 [95 Cal.Rptr.2d 830], internal citations omitted.)

Secondary Sources

~~2~~ California Elder Law Litigation (Cont.Ed.Bar. ~~1993–2002~~ 2003–2005) ~~§§ 12.58–12.62~~ §§ 2.70–2.72

1 California Forms of Pleading and Practice, Ch. 5, Abuse of Minors and Elderly, § 5.33030 (Matthew Bender)

3201. Violation of Civil Code Section 1793.2(d)—New Motor Vehicle—Essential Factual Elements (*Revised*)

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

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

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

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

4. **[That [***name of plaintiff***] delivered the vehicle to [***name of defendant***] or its authorized repair facility for repair of the defect[s];]**

   [That [*name of plaintiff***] notified [***name of defendant***] in writing of the need for repair of the defect[s] because [he/she] reasonably could not deliver the vehicle to [***name of defendant***] or its authorized repair facility because of the nature of the defect[s]<u>;</u>];~~;~~**

5. **That [***name of defendant***] or its authorized repair facility failed to repair the ~~defect[s]~~ <u>vehicle to match the written warranty</u> after a reasonable number of opportunities to do so; <u>and</u>**

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

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

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

[It is not necessary for [*name of plaintiff***] to prove the cause of a defect in the [***new motor vehicle***].]**

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

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

Directions for Use

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

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*new motor vehicle*] had a defect covered by the warranty;

See also ~~Instruction~~ CACI No. 1243, *Notification/Reasonable Time*.

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

Include the bracketed sentence preceding the final bracketed paragraph if appropriate to the facts. The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

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

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

Sources and Authority

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

- "A plaintiff pursuing an action under the Act has the burden to prove that (1) the vehicle had a nonconformity covered by the express warranty that substantially

impaired the use, value or safety of the vehicle (the nonconformity element); (2) the vehicle was presented to an authorized representative of the manufacturer of the vehicle for repair (the presentation element); and (3) the manufacturer or his representative did not repair the nonconformity after a reasonable number of repair attempts (the failure to repair element)." (*Oregel, supra,* 90 Cal.App.4th at p. 1101.)

- The Song-Beverly Act does not apply unless the vehicle was purchased in California. (*Cummins, Inc. v. Superior Court* (2005) 36 Cal.4th 478 [30 Cal.Rptr.3d 823, 115 P.3d 98].)

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

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

- Civil Code section 1791.2 provides:
  (a) "Express warranty" means:
    (1) A written statement arising out of a sale to the consumer of a consumer good pursuant to which the manufacturer, distributor, or retailer undertakes to preserve or maintain the utility or performance of the consumer good or provide compensation if there is a failure in utility or performance; or
    (2) In the event of any sample or model, that the whole of the goods conforms to such sample or model.
  (b) It is not necessary to the creation of an express warranty that formal words such as "warrant" or "guarantee" be used, but if such words are used then an express warranty is created. An affirmation merely of the value of the goods or a statement purporting to be merely an opinion or commendation of the goods does not create a warranty.
  (c) Statements or representations such as expressions of general policy concerning customer satisfaction which are not subject to any limitation do not create an express warranty.

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

- Civil Code section 1793.22(e)(2) provides, in part: " 'New motor vehicle' means a new motor vehicle that is bought or used primarily for personal, family, or household purposes. 'New motor vehicle' also means a new motor vehicle … that is bought or used primarily for business purposes by a person … or any … legal entity, to which

not more than five motor vehicles are registered in this state. 'New motor vehicle' includes the chassis, chassis cab, and that portion of a motor home devoted to its propulsion …, a dealer-owned vehicle and a 'demonstrator' or other motor vehicle sold with a manufacturer's new car warranty."

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

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

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

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

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

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

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

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

- "[T]he Act does not *require* consumers to take any affirmative steps to secure relief for the failure of a manufacturer to service or repair a vehicle to conform to applicable warranties—other than, of course, permitting the manufacturer a reasonable opportunity to repair the vehicle. … [A]s a practical matter, the consumer will likely request replacement or restitution. But the consumer's request is not mandated by any provision in the Act. Rather, the consumer's request for replacement or restitution is often prompted by the manufacturer's unforthright approach and stonewalling of fundamental warranty problems." (*Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 302–303 [45 Cal.Rptr.2d 10].)

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

- Civil Code section 1795.6 provides, in part:
  (a) Every warranty period relating to an … express warranty accompanying a sale or consignment for sale of consumer goods selling for fifty dollars ($50) or more shall automatically be tolled for the period from the date upon which the buyer either (1) delivers nonconforming goods to the manufacturer or seller for warranty repairs or service or (2), pursuant to [sections 1793.2(c) or 1793.22], notifies the manufacturer or seller of the nonconformity of the goods up to, and including, the date upon which (1) the repaired or serviced goods are delivered to the buyer, (2) the buyer is notified the goods are repaired or serviced and are available for the buyer's possession or (3) the buyer is notified that repairs or service is completed, if repairs or service is made at the buyer's residence.
  (b) Notwithstanding the date or conditions set for the expiration of the warranty period, such warranty period shall not be deemed expired if … : (1) after the buyer has satisfied the requirements of subdivision (a), the warranty repairs or service has not been performed due to delays caused by circumstances beyond the

control of the buyer or (2) the warranty repairs or service performed upon the nonconforming goods did not remedy the nonconformity for which such repairs or service was performed and the buyer notified the manufacturer or seller of this failure within 60 days after the repairs or service was completed. When the warranty repairs or service has been performed so as to remedy the nonconformity, the warranty period shall expire in accordance with its terms, including any extension to the warranty period for warranty repairs or service.

Secondary Sources

3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 51, 55, 306–308, pp. 47–48, 50–51, 240–243; *id.* (2002 supp.) at §§ 51, 55, 306–308, pp. 14–15, 94–103

1 Sales & Leases (Cont.Ed.Bar 2001) Warranties, §§ 7.4, 7.8, 7.15, 7.87, pp. 233–234, 239, 245–246, 293–294; *id.*, Prelitigation Remedies, at § 13.68, pp. 619–620; *id.*, Litigation Remedies, at § 14.25, pp. 658–659; *id.*, Division 10: Leasing of Goods, at § 17.31, p. 807

California Products Liability Actions, Ch. 2, *Liability for Defective Products,* § 2.31 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties,* § 502.43[5][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:1, 53:3–53:4, 53:10–53:11, 53:14–53:17, 53:22–53:23, 53:26–53:27, pp. 6, 8–10, 14–15, 18–23, 27–29, 31–34; *id*. (2001 supp.) at §§ 53:3–53:4, 53:10, 53:14, 53:16, 53:26–53:27, pp. 29–33, 36–37

3202. "Repair Opportunities" Explained (*Revised*)

Each time the [*consumer good/new motor vehicle***] was given to [***name of defendant***] [or its representative] for repair counts as an opportunity to repair, even if [it/they] did not do any repair work.**

In determining whether [*name of defendant***] had a reasonable number of opportunities to fix the [***consumer good/new motor vehicle***], you should consider all the circumstances surrounding each repair visit. [***Name of defendant***] must have been given at least two opportunities to fix the [[***consumer good***]/substantially impairing defect].**

Directions for Use

Use the "substantially impairing defect" option in the last sentence only in cases involving new motor vehicles.

The last sentence of this instruction may be omitted in cases where the evidence shows that only one repair attempt was possible because of the subsequent malfunction and destruction of the vehicle or where the defendant refused to attempt the repair. (See *Bishop v. Hyundai Motor America* (1996) 44 Cal.App.4th 750 [52 Cal.Rptr.2d 134]; *Gomez v. Volkswagen of America, Inc.* (1985) 169 Cal.App.3d 921 [215 Cal.Rptr. 507].)

Sources and Authority

- Civil Code section 1793.2(d) provides, in part:
  (1) Except as provided in paragraph (2), if the manufacturer or its representative in this state does not service or repair the goods to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either replace the goods or reimburse the buyer. …
  (2) If the manufacturer or its representative in this state is unable to service or repair a new motor vehicle … to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle … or promptly make restitution to the buyer.

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

- "Section 1793.2(d) requires the manufacturer to afford the specified remedies of restitution or replacement if that manufacturer is unable to repair the vehicle 'after a reasonable number of attempts.' 'Attempts' is plural. The statute does not require the manufacturer to make restitution or replace a vehicle if it has had only one opportunity to repair that vehicle." (*Silvio v. Ford Motor Co.* (2003) 109 Cal.App.4th 1205, 1208 [135 Cal.Rptr.2d 846].)

Secondary Sources

2 California UCC Sales & Leases (Cont.Ed.Bar 2002) Prelitigation Remedies, § 17.70

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.43 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

3204. "Substantially Impaired" Explained (*Revised*)

In deciding whether a reasonable person would believe that the vehicle's defect[s], if any, substantially impaired the vehicle's use, value, or safety, you ~~should~~ may consider, among other factors, the following:

(a) [The nature of the defect[s];]

(b) [The cost and length of time required for repair;]

(c) [Whether past repair attempts have been successful;]

(d) [The degree to which the vehicle could be used while awaiting repair;]

(e) [The availability and cost of ~~alternative~~ comparable transportation during the repairs;] [and]

(f) [*Insert other appropriate factor.***]**

Directions for Use

Some or all of the stated factors may not be necessary in every case. Depending on the facts of the case, other factors may be added as appropriate.

Sources and Authority

- "Whether the impairment is substantial is determined by an objective test, based on what a reasonable person would understand to be a defect. This test is applied, however, within the specific circumstances of the buyer." (*Lundy v. Ford Motor Co.* (2001) 87 Cal.App.4th 472, 478 [104 Cal.Rptr.2d 545], internal citations omitted.)

- "The issue of whether the problems constituted substantial impairment is one for the trier of fact." (*Schreidel v. American Honda Motor Co.* (1995) 34 Cal.App.4th 1242, 1250 [40 Cal.Rptr.2d 576], internal citations omitted.)

- "The term ['substantially'] modifies its object, 'impairment.' It injects an element of degree; not every impairment is sufficient to satisfy the statute. The most analogous definition of 'substantially' we have found in a context similar to its usage here is in the Uniform Commercial Code, section 2-608. Like the clause at issue here, this provision requires a determination of whether a defect 'substantially impairs' the value of goods sold to a buyer. Under it, the trier of fact may consider: 'the nature of the defects; the cost and length of time required for repair; whether past repair attempts have been successful; the degree to which the goods can be used while

> repairs are attempted; [inconvenience to buyer]; and the availability and cost of alternative goods pending repair. …' It may be that this term, like 'reasonable,' is incapable of precise definition. At the least, the requirement is not satisfied by any impairment, however insignificant, that affects use, value, or safety." (*Lundy, supra,* 87 Cal.App.4th at p. 478, internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 307

8 California Forms of Pleading and Practice, Ch. 91, *Automobiles: Actions Involving Defects and Repairs*, §§ 91.12[2], 91.64 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.53 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, Forms 144, 206 (Matthew Bender)

3210. Breach of Implied Warranty of Merchantability—Essential Factual Elements (*Revised*)

[*Name of plaintiff***] claims that ~~[he/she] was harmed because~~ the [***consumer good***] did not have the quality that a buyer would reasonably expect. This is known as "breach of an implied warranty." To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That at the time of purchase [***name of defendant***] was in the business of [selling [***consumer goods***] to retail buyers] [manufacturing [***consumer goods***]]; and**

3. **That the [***consumer good***] [***insert one or more of the following:***]**

   [was not of the same quality as those generally acceptable in the trade;] [or]

   [was not fit for the ordinary purposes for which such goods are used;] [or]

   [was not adequately contained, packaged, and labeled;] [or]

   [did not measure up to the promises or facts stated on the container or label.]

Directions for Use

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

> That [*name of plaintiff*] took reasonable steps to notify [*name of defendant*] within a reasonable time that the [*consumer good*] did not have the quality that a buyer would reasonably expect;

See also ~~Instruction~~ CACI No. 1243, *Notification/Reasonable Time*. Instructions on damages and causation may be necessary in actions brought under the Commercial Code.

Delete element 2 if the defendant is the manufacturer of the consumer good in question or if it is uncontested that the defendant was a retail seller within the meaning of the act.

If appropriate to the facts, add: "It is not necessary for [*name of plaintiff*] to prove the cause of a defect of the [consumer good]." The Song-Beverly Consumer Warranty Act does not require a consumer to prove the cause of the defect or failure, only that the

consumer good "did not conform to the express warranty." (See *Oregel v. American Isuzu Motors, Inc.* (2001) 90 Cal.App.4th 1094, 1102, fn. 8 [109 Cal.Rptr.2d 583].)

In addition to sales of consumer goods, the Consumer Warranty Act applies to leases—see Civil Code sections 1791(g)–(i) and 1795.4. This instruction may be modified for use in cases involving the implied warranty of merchantability in a lease of consumer goods.

Sources and Authority

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

- Civil Code section 1791.1(a) provides:
  "Implied warranty of merchantability" … means that the consumer goods meet each of the following:
  (1) Pass without objection in the trade under the contract description.
  (2) Are fit for the ordinary purposes for which such goods are used.
  (3) Are adequately contained, packaged, and labeled.
  (4) Conform to the promises or affirmations of fact made on the container or label.

- Civil Code section 1792 provides, in part: "Unless disclaimed in the manner prescribed by [the act], every sale of consumer goods that are sold at retail in this state shall be accompanied by the manufacturer's and the retail seller's implied warranty that the goods are merchantable. The retail seller shall have a right of indemnity against the manufacturer in the amount of any liability under this section."

- Commercial Code section 2714(2) provides: "The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount."

- "Unlike express warranties, which are basically contractual in nature, the implied warranty of merchantability arises by operation of law. … [D]efendants' liability for an implied warranty does not depend upon any specific conduct or promise on their part, but instead turns upon whether their product is merchantable under the code." (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 117 [120 Cal.Rptr. 681, 534 P.2d 377], internal citations omitted.)

- "Unless specific disclaimer methods are followed, an implied warranty of merchantability accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)

- The implied warranty of merchantability "does not 'impose a general requirement that goods precisely fulfill the expectation of the buyer. Instead, it provides for a

minimum level of quality.' " (*American Suzuki Motor Corp. v. Superior Court* (1995) 37 Cal.App.4th 1291, 1295–1296 [44 Cal.Rptr.2d 526], internal citation omitted.)

- "The question of reimbursement or replacement is relevant only under [Civil Code] section 1793.2. … [T]his section applies only when goods cannot be made to conform to the 'applicable express warranties.' It has no relevance to the implied warranty of merchantability." (*Music Acceptance Corp., supra,* 32 Cal.App.4th at p. 620.)

- Civil Code section 1791.1(d) provides, in part: "Any buyer of consumer goods injured by a breach of the implied warranty of merchantability … has the remedies provided in Chapter 6 (commencing with Section 2601) and Chapter 7 (commencing with Section 2701) of Division 2 of the Commercial Code, and, in any action brought under such provisions, [Civil Code] Section 1794 … shall apply."

- "The Song-Beverly Act incorporates the provisions of [Commercial Code] sections 2314 and 2315. It 'supplements, rather than supersedes, the provisions of the California Uniform Commercial Code' by broadening a consumer's remedies to include costs, attorney's fees, and civil penalties." (*American Suzuki Motor Corp., supra,* 37 Cal.App.4th at 1295, fn. 2, internal citation omitted.)

- Civil Code section 1794(b) provides, in part:
  The measure of the buyer's damages in an action under this section shall include … the following:
  (1) Where the buyer has rightfully rejected or justifiably revoked acceptance of the goods or has exercised any right to cancel the sale, Sections 2711, 2712, and 2713 of the Commercial Code shall apply.
  (2) Where the buyer has accepted the goods, Sections 2714 and 2715 of the Commercial Code shall apply, and the measure of damages shall include the cost of repairs necessary to make the goods conform.

- Commercial Code section 2714(1) provides: "Where the buyer has accepted goods and given notification (subdivision (3) of Section 2607) he or she may recover, as damages for any nonconformity of tender, the loss resulting in the ordinary course of events from the seller's breach as determined in any manner that is reasonable."

- "The notice requirement of [former Civil Code] section 1769 … is not an appropriate one for the court to adopt in actions by injured consumers against manufacturers with whom they have not dealt. 'As between the immediate parties to the sale [the notice requirement] is a sound commercial rule, designed to protect the seller against unduly delayed claims for damages. As applied to personal injuries, and notice to a remote seller, it becomes a booby-trap for the unwary.' " (*Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 61 [27 Cal.Rptr. 697, 377 P.2d 897], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (9th ed. 1987) Sales, §§ 67–68

1 California UCC Sales & Leases (Cont.Ed.Bar 2002) Warranties, §§ 3.21–3.23, 3.25–3.26

2 California UCC Sales & Leases (Cont.Ed.Bar 2002) Leasing of Goods, §§ 19.31–19.32

California Products Liability Actions, Ch. 2, *Liability for Defective Products,* § 2.31[2][a] (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, Sales: *Warranties,* § 502.51 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, §§ 53:5–53:7, 53:31, pp. 11–13, 38–39

3244. Civil Penalty—Willful Violation (Civ. Code, § 1794(c)) (*Revised*)

[*Name of plaintiff***] claims that [***name of defendant***]'s failure to [***describe violation of Song-Beverly Consumer Warranty Act***] was willful and therefore asks that you impose a civil penalty against [***name of defendant***]. A civil penalty is an award of money in addition to a plaintiff's damages. The purpose of this civil penalty is to punish a defendant or discourage [him/her/it] from committing such violations in the future.**

If [*name of plaintiff***] has proved that [***name of defendant***]'s failure was willful, you may impose a civil penalty against [him/her/it]. "Willful" means that [***name of defendant***] knew what [he/she/it] was doing and intended to do it. However, you may not impose a civil penalty if you find that [***name of defendant***] believed reasonably and in good faith that [***describe facts negating statutory obligation***].**

The penalty may be in any amount you find appropriate, up to a maximum of two times the amount of [*name of plaintiff***]'s actual damages.**

Directions for Use

This instruction is intended for use when the plaintiff requests a civil penalty under Civil Code section 1794(c). The parties will need to draft a separate instruction for cases involving a civil penalty based on the defendant's violation of Civil Code section 1793.2(d)(2).

If there are multiple causes of action, ensure that the jury knows to which claim this instruction applies.

Sources and Authority

- Civil Code section 1794 provides, in part:
  (a) Any buyer of consumer goods who is damaged by a failure to comply with any obligation under this chapter or under an implied or express warranty or service contract may bring an action for the recovery of damages and other legal and equitable relief.
  … .
  (c) If the buyer establishes that the failure to comply was willful, the judgment may include, in addition to the amounts recovered under subdivision (a), a civil penalty which shall not exceed two times the amount of actual damages. This subdivision shall not apply in any class action … or with respect to a claim based solely on a breach of an implied warranty.

- "[I]f the trier of fact finds the defendant willfully violated its legal obligations to plaintiff, it has discretion under [Civil Code section 1794,] subdivision (c) to award a penalty against the defendant. Subdivision (c) applies to suits concerning any type of 'consumer goods,' as that term is defined in section 1791 of the Act." (*Suman v. Superior Court* (1995) 39 Cal.App.4th 1309, 1315 [46 Cal.Rptr.2d 507].)

- " 'In civil cases, the word "willful," as ordinarily used in courts of law, does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency, but merely that the thing done or omitted to be done was done or omitted intentionally. It amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.' " (*Ibrahim v. Ford Motor Co.* (1989) 214 Cal.App.3d 878, 894 [263 Cal.Rptr. 64], internal citations omitted.)

- "[A] violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present. This might be the case, for example, if the manufacturer reasonably believed the product did conform to the warranty, or a reasonable number of repair attempts had not been made, or the buyer desired further repair rather than replacement or refund. [¶] Our interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions. Unlike a standard requiring the plaintiff to prove the defendant actually knew of its obligation to refund or replace, which would allow manufacturers to escape the penalty by deliberately remaining ignorant of the facts, the interpretation we espouse will not vitiate the intended deterrent effect of the penalty. And unlike a simple equation of willfulness with volition, which would render 'willful' virtually all cases of refusal to replace or refund, our interpretation preserves the Act's distinction between willful and nonwillful violations." (*Kwan v. Mercedes-Benz of N. America* (1994) 23 Cal.App.4th 174, 185 [28 Cal.Rptr.2d 371].)

- "[T]he penalty under section 1794(c), like other civil penalties, is imposed as punishment or deterrence of the defendant, rather than to compensate the plaintiff. In this, it is akin to punitive damages." (*Kwan, supra,* 23 Cal.App.4th at p. 184.)

Secondary Sources

3 Witkin, Summary of California Law (9th ed. 1987) Sales, § 308

1 California UCC Sales & Leases (Cont.Ed.Bar 2002) Warranties, § 3.90

California Products Liability Actions, Ch. 2, *Liability for Defective Products,* § 2.30 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties,* § 502.53[1][b] (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales* (Matthew Bender)

5 Bancroft-Whitney's California Civil Practice: Business Litigation (1993) Consumer Warranties, § 53:31, pp. 38–39; *id.* (2001 supp.) at § 53:31, p. 41

VF-3203. Breach of Express Warranty—New Motor Vehicle—Civil Penalty Sought (*Revised*)

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [buy/lease] a[n] [***new motor vehicle***] [from/distributed by/manufactured by] [***name of defendant***]?**

   _____Yes _____ No

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

2. **Did [***name of defendant***] give [***name of plaintiff***] a written warranty?**

   _____Yes _____ No

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

3. **Did the vehicle have a defect covered by the warranty that substantially impaired the vehicle's use, value, or safety to a reasonable [buyer/lessee] in [***name of plaintiff***]'s situation?**

   _____Yes _____ No

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

4. **Did [***name of defendant***] or its authorized repair facility fail to repair the ~~defect[s]~~ vehicle to match the written warranty after a reasonable number of opportunities to do so?**

   _____Yes _____ No

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

5. Did [*name of defendant***] fail to promptly replace or repurchase the vehicle as requested by [***name of plaintiff***]?**

_____Yes _____ No

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

6. What are [*name of plaintiff***]'s damages? Calculate as follows:**

Add the following amounts:

a. The purchase price of the vehicle itself: $ _____
b. Charges for transportation and manufacturer-installed options: $ _____
c. Finance charges actually paid by [*name of plaintiff***]: $ _____**
d. Sales tax, license fees, registration fees, and other official fees: $ _____
e. Incidental and consequential damages: $ _____

[SUBTOTAL/TOTAL DAMAGES:] $ _____

[Calculate the value of the use of the vehicle before it was [brought in/submitted] for repair as follows:

1. Add dollar amounts listed in lines a and b above: $_____

2. Multiply the result in step 1 by the number of miles the vehicle was driven before it was [brought in/ submitted] for repair: $_____

3. Divide the ~~result~~ dollar amount in step 2 by 120,000 and insert result in VALUE OF USE below:

VALUE OF USE $_____

Subtract the VALUE OF USE from the SUBTOTAL above and insert result in TOTAL DAMAGES below~~.~~:

TOTAL DAMAGES: $ _____]

[What is the number of miles that the vehicle was driven between the time when [*name of plaintiff***] took possession of the vehicle and the time when [he/she/it] first delivered the vehicle to [***name of defendant***] or its authorized repair facility to fix the problem?**

Answer: _____ miles]

Answer question 7.

7. Did [*name of defendant***] willfully fail to repurchase or replace the [***new motor vehicle***]?**

____Yes ____No

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

8. What amount, if any, do you impose as a penalty? [You may not exceed two times the "TOTAL DAMAGES" that you entered ~~on the last line of~~ in question 6.]

PENALTY: $ _____

Signed: _____
Presiding Juror

Dated: _____

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

Directions for Use

The special verdict forms in this section are intended only as models. They may need to be modified depending on the facts of the case. Items of damages that do not apply to the facts of the case may be omitted.

If there are multiple causes of action, users may wish to combine the individual forms into one form. This verdict form is based on CACI No. 3201, *Violation of Civil Code Section 1793.2(d)—New Motor Vehicle—Essential Factual Elements,* and CACI No. 3241, *Restitution From Manufacturer—New Motor Vehicle,* and CACI No. 3244, *Civil Penalty—Willful Violation (Civ. Code, § 1794(c).)* See CACI No. VF-3201 for additional questions in the event the plaintiff is claiming consequential damages.

If plaintiff was unable to deliver the vehicle, modify question 4 as in element 4 of CACI No. 3201. In question number 6, users have the option of either allowing the jury to calculate the deduction for value of use~~,~~ or asking the jury for the relevant mileage number only. The bracketed sentence in question 8 is intended to be given only if the jury has been asked to calculate the deduction for value of use.

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

DAMAGES

3921. Wrongful Death (Death of an Adult) (*Revised*)

If you decide that [*name of plaintiff***] has proved [his/her] claim against [***name of defendant***] for the death of [***name of decedent***], you also must decide how much money will reasonably compensate [***name of plaintiff***] for the death of [***name of decedent***]. This compensation is called "damages."**

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

The damages claimed by [*name of plaintiff***] fall into two categories called economic damages and noneconomic damages. You will be asked to state the two categories of damages separately on the verdict form.**

[*Name of plaintiff***] claims the following economic damages:**

1. **The financial support, if any, that [***name of decedent***] would have contributed to the family during either the life expectancy that [***name of decedent***] had before [his/her] death or the life expectancy of [***name of plaintiff***], whichever is shorter;**

2. **The loss of gifts or benefits that [***name of plaintiff***] would have expected to receive from [***name of decedent***];**

3. **Funeral and burial expenses; and**

4. **The ~~amount paid, and reasonably certain to be paid in the future, to obtain~~ reasonable value of household services that [***name of decedent***] would have provided.**

Your award of any future economic damages must be reduced to present cash value.

[*Name of plaintiff***] also claims the following noneconomic damages:**

1. **The loss of [***name of decedent***]'s love, companionship, comfort, care, assistance, protection, affection, society, moral support; [and]**

[2. The loss of the enjoyment of sexual relations.]

[2. The loss of [*name of decedent***]'s training and guidance.]**

No fixed standard exists for deciding the amount of noneconomic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense. [Your award for noneconomic damages should not be reduced to present cash value.]

~~Do not include in your award any compensation for the following~~ In determining [*name of plaintiff*]'s loss, do not consider:

1. [*Name of plaintiff*]'s grief, sorrow, or mental anguish; ~~or~~

2. [*Name of decedent*]'s pain and suffering; or

3. The poverty or wealth of [*name of plaintiff*].

In deciding a person's life expectancy, you may consider, among other factors, the average life expectancy of a person of that age, as well as that person's health, habits, activities, lifestyle, and occupation. According to [*insert source of information*], the average life expectancy of a [*insert number*]-year-old [male/female] is [*insert number*] years, and the average life expectancy of a [*insert number*]-year-old [male/female] is [*insert number*] years. This published information is evidence of how long a person is likely to live but is not conclusive. Some people live longer and others die sooner.

[In computing these damages, consider the losses suffered by all plaintiffs and return a verdict of a single amount for all plaintiffs. I will divide the amount [among/between] the plaintiffs.]

Directions for Use

One of the life-expectancy subjects in the second sentence of the second-to-last paragraph should be the decedent, and the other should be the plaintiff. This definition is intended to apply to the element of damages pertaining to the financial support that the decedent would have provided to the plaintiff.

Sources and Authority

- Code of Civil Procedure section 377.60 provides:
  A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:

  (a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.

  (b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, 'putative spouse' means the surviving

spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

(c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.

(d) This section applies to any cause of action arising on or after January 1, 1993.

(e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.

(f) For the purpose of this section, "domestic partner" has the meaning provided in Section 297 of the Family Code.

- Code of Civil Procedure section 377.61 provides: "In an action under this article, damages may be awarded that, under all the circumstances of the case, may be just, but may not include damages recoverable under Section 377.34. The court shall determine the respective rights in an award of the persons entitled to assert the cause of action."

- "A cause of action for wrongful death is purely statutory in nature, and therefore 'exists only so far and in favor of such person as the legislative power may declare.' " (*Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1184 [272 Cal.Rptr. 304], internal citations omitted.)

- "There are three distinct public policy considerations involved in the legislative creation of a cause of action for wrongful death: '(1) compensation for survivors, (2) deterrence of conduct and (3) limitation, or lack thereof, upon the damages recoverable.' " (*Barrett, supra,* 222 Cal.App.3d at p. 1185, internal citation omitted.)

- "We therefore conclude, on this basis as well, that 'wrongful act' as used in section 377 means any kind of tortious act, including the tortious act of placing defective products into the stream of commerce." (*Barrett, supra,* 222 Cal.App.3d at p. 1191.)

- "In any action for wrongful death resulting from negligence, the complaint must contain allegations as to all the elements of actionable negligence." (*Jacoves v. United Merchandising Corp.* (1992) 9 Cal.App.4th 88, 105 [11 Cal.Rptr.2d 468], internal citation omitted.)

- "Damages for wrongful death are not limited to compensation for losses with 'ascertainable economic value.' Rather, the measure of damages is the value of the

benefits the heirs could reasonably expect to receive from the deceased if she had lived." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

- "The death of a father may also cause a special loss to the children." (*Syah v. Johnson* (1966) 247 Cal.App.2d 534, 547 [55 Cal.Rptr. 741], internal citation omitted.)

- "These benefits include the personal services, advice, and training the heirs would have received from the deceased, and the value of her society and companionship. 'The services of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a substantial "injury" to the family for which just compensation should be paid.' " (*Allen, supra,* 109 Cal.App.3d at p. 423, internal citations omitted.)

- The wrongful death statute "has long allowed the recovery of funeral expenses in California wrongful death actions." (*Vander Lind v. Superior Court* (1983) 146 Cal.App.3d 358, 364 [194 Cal.Rptr. 209].)

- ~~"Thus, the rule remains and we hold damages for wrongful death must be reduced to present value." (*Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87].)~~

- "Where, as here, decedent was a husband and father, a significant element of damages is the loss of financial benefits he was contributing to his family by way of support at the time of his death and that support reasonably expected in the future. The total future lost support must be reduced by appropriate formula to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 520–521 [196 Cal.Rptr. 82], internal citations omitted.)

- "The California statutes and decisions … have been interpreted to bar the recovery of punitive damages in a wrongful death action." (*Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 450 [131 Cal.Rptr. 14, 551 P.2d 334], internal citation omitted.) There is an exception to this rule for death by felony homicide for which the defendant has been convicted. (Civ. Code, § 3294(d).)

- "Punitive damages are awardable to the decedent's estate in an action by the estate representative based on the cause of action the decedent would have had if he or she had survived." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 616 [103 Cal.Rptr.2d 492], internal citation omitted.)

- "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action."

(*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)

- "[A] simple instruction excluding considerations of grief and sorrow in wrongful death actions will normally suffice." (*Krouse, supra,* 19 Cal.3d at p. 69.)

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin, supra,* 148 Cal.App.3d at pp. 535–536.)

- "[W]here all statutory plaintiffs properly represented by legal counsel waive judicial apportionment, the trial court should instruct the jury to return separate verdicts unless the remaining considerations enumerated above mandate refusal." (*Canavin, supra,* 148 Cal.App.3d at p. 536.)

- "We note that the court instructed the jury that in determining pecuniary loss they should consider inter alia the age, state of health and respective life expectancies of the deceased and each plaintiff but should be concerned only with 'the shorter of the life expectancies, that of one of the plaintiffs or that of the deceased… .' This was a correct statement of the law." (*Francis v. Sauve* (1963) 222 Cal.App.2d 102, 120–121 [34 Cal.Rptr. 754], internal citation omitted.)

- "It is the shorter expectancy of life that is to be taken into consideration; for example, if, as in the case here, the expectancy of life of the parents is shorter than that of the son, the benefits to be considered are those only which might accrue during the life of the surviving parents." (*Parsons v. Easton* (1921) 184 Cal. 764, 770–771 [195 P. 419], internal citation omitted.)

- "The life expectancy of the deceased is a question of fact for the jury to decide, considering all relevant factors including the deceased's health, lifestyle and occupation. Life expectancy figures from mortality tables are admissible but are not conclusive." (*Allen, supra,* 109 Cal.App.3d at p. 424, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1423–1430, pp. 903–909

4 Levy et al., California Torts, Ch. 55, *Death and Survival Actions*, §§ 55.10–55.13 (Matthew Bender)

California Tort Damages (Cont.Ed.Bar 1988) Wrongful Death, §§ 3.1–3.52

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

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

2 Bancroft-Whitney's California Civil Practice (1992) Torts, § 23:8

DAMAGES

3948. Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (First Phase) (*Revised*)

If you decide that [*name of individual defendant***]'s conduct caused [***name of plaintiff***] harm, you must decide whether that conduct justifies an award of punitive damages against [***name of individual defendant***] and, if so, against [***name of corporate defendant***]. The amount, if any, of punitive damages will be an issue decided later.**

You may award punitive damages against [*name of individual defendant***] only if [***name of plaintiff***] proves by clear and convincing evidence that [***name of individual defendant***] engaged in that conduct with malice, oppression, or fraud.**

"Malice" means that a defendant acted with intent to cause injury or that a defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A defendant acts with knowing disregard when the defendant is aware of the probable dangerous consequences of his, her, or its conduct and deliberately fails to avoid those consequences.

"Oppression" means that a defendant's conduct was despicable and subjected [*name of plaintiff***] to cruel and unjust hardship in knowing disregard of [his/her] rights. "Despicable conduct" is conduct that is so 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***].**

You may also award punitive damages against [*name of corporate defendant***] based on [***name of individual***]'s conduct if [***name of plaintiff***] proves [one of] the following by clear and convincing evidence:**

1. **[That [***name of individual defendant***] was an officer, a director, or a managing agent of [***name of corporate defendant***] who was acting on behalf of [***name of corporate defendant***] at the time of the conduct constituting malice oppression or fraud; [or]]**

2. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] had advance knowledge of the unfitness of [***name of individual defendant***] and employed [him/her] with a knowing disregard of the rights or safety of others; [or]]**

3. **[That [***name of individual defendant***]'s conduct constituting malice, oppression, or fraud was authorized by an officer, a director, or a managing agent of [***name of corporate defendant***]; [or]]**

4. **[That an officer, a director, or a managing agent of [***name of corporate defendant***] knew of [***name of individual defendant***]'s conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.]**

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

Directions for Use

Use ~~Instruction~~ CACI No. 3949, *Punitive Damages—Individual and Corporate Defendants (Corporate Liability Based on Acts of Named Individual)—Bifurcated Trial (Second Phase),* for the second phase of a bifurcated trial.

This instruction is intended to apply to cases where punitive damages are sought against both an individual person and a corporate defendant. When damages are sought only against a corporate defendant, use ~~Instruction~~ CACI No. 3944, *Punitive Damages Against Employer or Principal for Conduct of a Specific Agent or Employee—Bifurcated Trial (First Phase),* or ~~Instruction~~ CACI No. 3946, *Punitive Damages—Entity Defendant—Bifurcated Trial (First Phase).* When damages are sought against individual defendants, use ~~Instruction~~ CACI No. 3941, *Punitive Damages—Individual Defendant—Bifurcated Trial (First Phase).*

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

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

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

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."

Sources and Authority

- Civil Code section 3294 provides, in part:
  (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. …

(c) As used in this section, the following definitions shall apply:

(1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.
(2) "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.
(3) "Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

- "[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].)

- Civil Code section 3295(d) provides: "The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud."

- "[Section 3295(d)] affects the order of proof at trial, precluding the admission of evidence of defendants' financial condition until after the jury has returned a verdict for plaintiffs awarding actual damages and found that one or more defendants were guilty of 'oppression, fraud or malice,' in accordance with Civil Code section 3294." (*City of El Monte v. Superior Court* (1994) 29 Cal.App.4th 272, 274–275 [34 Cal.Rptr.2d 490], internal citations omitted.)

- "Evidence of the defendant's financial condition is a prerequisite to an award of punitive damages. In order to protect defendants from the premature disclosure of their financial position when punitive damages are sought, the Legislature enacted Civil Code section 3295." (*City of El Monte, supra,* 29 Cal.App.4th at p. 276, internal citations omitted.)

- "[C]ourts have held it is reversible error to try the punitive damages issue to a new jury after the jury which found liability has been excused." (*Rivera v. Sassoon* (1995) 39 Cal.App.4th 1045, 1048 [46 Cal.Rptr.2d 144], internal citations omitted.)

- "Malice, for purposes of awarding exemplary damages, includes 'despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.' To establish conscious disregard, the plaintiff must show 'that the defendant was aware of the probable dangerous consequences of his conduct, and that he wilfully and deliberately failed to avoid those consequences.' " (*Hoch v. Allied-Signal, Inc.* (1994) 24 Cal.App.4th 48, 61 [29 Cal.Rptr.2d 615], internal citations omitted.)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' As amended to include this word, the statute plainly indicates that absent an intent to injure the plaintiff, 'malice' requires more than a 'willful and conscious' disregard of the plaintiffs' interests. The additional component of 'despicable conduct' must be found." (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894], internal citations omitted.)

- "Section 3294 is no longer silent on who may be responsible for imputing punitive damages to a corporate employer. For corporate punitive damages liability, section 3294, subdivision (b), requires that the wrongful act giving rise to the exemplary damages be committed by an 'officer, director, or managing agent.' " (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 572 [88 Cal.Rptr.2d 19, 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.)

Secondary Sources

6 Witkin, Summary of California Law (9th ed. 1988) Torts, §§ 1344–1348, pp. 807–810

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

California Tort Damages (Cont.Ed.Bar 1988) Punitive Damages, §§ 14.13–14.14, 14.23

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

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