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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: June 25, 2010

Title
Jury Instructions: Additions and Revisions to Civil Instructions

Rules, Forms, Standards, or Statutes Affected
Judicial Council Civil Jury Instructions (*CACI*)

Recommended by
Advisory Committee on Civil Jury Instructions
Hon. H. Walter Croskey, Chair

Agenda Item Type
Action Required

Effective Date
June 25, 2010

Date of Report
April 5, 2010

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of the proposed additions, revisions, and revocations to the *Judicial Council of California Civil Jury Instructions (CACI)*.

Recommendation

The advisory committee recommends that the Judicial Council, effective June 25, 2010, approve for publication under rule 2.1050 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the new and revised instructions will be officially published in the June 2010 supplement to the 2010 edition of the *Judicial Council of California Civil Jury Instructions (CACI)*.

A table of contents and the proposed additions and revisions to the civil jury instructions are attached at pages 54–154.

Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted rule 6.58 of the California Rules of Court, subsequently renumbered as rule 10.58, which established the advisory committee's charge.[1] At its August 2003 meeting, the council voted to approve the *CACI* instructions pursuant to rule 855, subsequently renumbered as rule 2.1050. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CACI.* This is for the 16th release of CACI.

The council approved CACI release 15 at its December 2009 meeting.

Rationale for Recommendation

The committee recommends the proposed additions and revisions to *CACI* in compliance with its charge in rule 10.58.

The advisory committee drafted the new and revised instructions in this report and then circulated them for public comment. The official publisher, LexisNexis, is preparing to publish print, HotDocs document assembly, and online versions of the new and revised instructions on receiving council approval.

The following 28 instructions and verdict forms are included in this proposal: CACI Nos. 101, 113, 450, 1001, 1006, 1102, 1123, VF-1101, 1240, 1246, 1800, 1807, 2505, 2508, 2540, 2541, VF-2508, VF-2514, 3010, 3016, 3213, 3221, 3713, 4102, 4304, 4320, 4321, and 4324. Of these, 20 are revised, 6 are newly drafted, and 2 are revoked. Additionally, the Judicial Council's Rules and Projects Committee (RUPRO) has approved 35 additional instructions under a delegation of authority from the council to RUPRO.[2]

The instructions were revised or added based on comments or suggestions from justices, judges, and attorneys, proposals by staff and committee members, and recent developments in the law.

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[1] Rule 10.58(a) states: "The committee regularly reviews case law and statutes affecting jury instructions and makes recommendations to the Judicial Council for updating, amending, and adding topics to the council's civil jury instructions."

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

Under the implementing guidelines that RUPRO approved on December 14, 2006, RUPRO has the final authority to approve (among other things) additional cases and statutes cited in the Sources and Authority and additions or changes to the Directions for Use. RUPRO has already given final approval to 35 instructions that have only these changes. Further, under its delegation of authority from RUPRO, the advisory committee has made other nonsubstantive grammatical, typographical, and technical corrections.

Proposed new CACI No. 113, *Bias,* was added in response to a dialog about juror bias carried on by several judges on the Pattern Jury Instructions listserv maintained by the National Center for State Courts for persons across the country involved in the drafting of jury instructions. A district court judge from Iowa posted his instruction on bias for others to consider. The committee reviewed this instruction, agreed with its premise, and revised it somewhat. The Judicial Council Advisory Committee on Access and Fairness also endorsed this initiative.

CACI No. 450, *Good Samaritan,* was revoked because of 2009 legislation amending Health and Safety Code section 1799.[3] The amendments make this instruction no longer correct under the law. A replacement instruction that conforms to the new law will be considered in the next cycle.

CACI No. 1001, *Basic Duty of Care,* CACI No. 1006, *Landlord's Duty,* and CACI No. 3713, *Nondelegable Duty,* were revised in response to a request from an attorney to add a reference to the nondelegable duty doctrine to CACI No. 1006's Directions for Use. In its comment, the State Bar of California Committee on the Administration of Justice requested that the reference also be added to CACI No. 1001 because the nondelegable duty doctrine is applicable to property owners generally, not just to landlords (see attached comment chart at pp. 14–15). In addition to adding the requested references, the committee also decided to expand the scope of CACI No. 3713. Currently, the instruction is limited to duties created by statute, regulation, or ordinance. The revision extends the instruction to duties created by contract or imposed by operation of law, for example, on property owners.

CACI No. 1102, *Definition of "Dangerous Condition,"* was revised in response to a comment from an attorney that the instruction did not adequately make it clear to the jury that the possible comparative fault of the plaintiff or of a third party was not to be considered in reaching the initial determination as to whether the condition was dangerous. This revision generated several comments from attorneys representing public entities. (See Comments, Alternatives Considered, and Policy Implications, below.)

CACI No. VF-1101, *Dangerous Condition of Public Property—Affirmative Defense—Condition Created by Reasonable Act or Omission,* was revised in response to an attorney who noted a flaw in the existing verdict form. At question 4, the jury must address liability under one or both of two possible theories. Each theory of liability then has a corresponding defense at question 6. If both theories are at issue, but the jury finds liability under only one theory, the defense for the theory on which no liability was found is still in the verdict form at question 6. The committee revised the verdict form to advise the jury not to answer the option for question 6 for which liability was not found at question 4.

[3] Assem. Bill 83; Stats. 2009, ch. 77.

CACI No. 1240, *Affirmative Defense to Express Warranty—Not "Basis of Bargain,"* was revoked in response to a footnote in *Weinstat v. Dentsply Internat., Inc.,*[4] in which the Court of Appeal for the First District found the instruction to be "misguided."

Proposed new CACI No. 1246, *Affirmative Defense—Design Defect—Government Contractor,* was added in response to the First District Court of Appeal's opinion in *Oxford v. Foster Wheeler LLC*.[5] This defense, arising from federal preemption, protects a manufacturer from a design-defect claim under state law if the United States government has provided or approved the specifications for the project or product. This instruction generated several comments from attorneys representing product-liability plaintiffs. (See Comments, Alternatives Considered, and Policy Implications, below.)

CACI No. 1800, *Intrusion Into Private Affairs,* and CACI No. 1807, *Affirmative Defense—Invasion of Privacy Justified,* were revised in response to the California Supreme Court's decision in *Hernandez v. Hillsides, Inc.*[6]

A new instruction and a new verdict form were added to the Fair Employment and Housing Act series in response to a request from a judge of the Superior Court of Los Angeles County. Proposed new CACI No. 2508, *Failure to File Timely Administrative Complaint—Plaintiff Alleges Continuing Violation,* was added to address the effect of a continuing violation on the time period within which an employee must file a claim with the Department of Fair Employment and Housing. The committee had previously considered such an instruction, but had decided not to proceed because the burden of proof is not addressed in any appellate opinion or statute. The judge persuaded the committee that the instruction was needed regardless of the unresolved issue, which could be addressed in the Directions for Use. CACI No. VF-2514, *Failure to Prevent Harassment, Discrimination, or Retaliation,* was added to supplement CACI No. 2527, *Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant*.

Also in the FEHA series, CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements,* and CACI No. VF-2508, *Disability Discrimination—Disparate Treatment,* were revised in response to a request from an attorney from Disability Rights California who believed that the language presenting the employer's perception of an employee disability could be improved. The statutory language protects persons who are "regarded or treated by the employer" as having a physical or mental disability.[7] The attorney was of the view that the current language of the instruction, that the employer "thought

[4] (2010) 180 Cal.App.4th 1213, 1234 fn.12.

[5] (2009) 177 Cal.App.4th 700.

[6] (2009) 47 Cal.4th 272.

[7] Gov. Code, § 12926(i)(4) & (k)(4).

that" the employee had a disability, was insufficient because it is the treatment, not the belief, that is actionable.

Proposed new CACI No. 3016, *Retaliation—Essential Factual Elements* (42 U.S.C. § 1983), was added in response to the Court of Appeal for the Sixth District's opinion in *Tichinin v. City of Morgan Hill*.[8]

Proposed new CACI No. 3213, *Affirmative Defense—Statute of Limitations* (Song-Beverly Consumer Warranty Act), was added in response to *Mexia v. Rinker Boat Co., Inc.,*[9] an opinion of the Fourth District Court of Appeal. This instruction also is the latest effort in the committee's long-term project to add additional instructions on statutes of limitation for various causes of action.

CACI No. 4320, *Affirmative Defense—Implied Warranty of Habitability,* was revised in response to a request from an attorney who wanted the instruction to reflect the holding of the Supreme Court opinion, *Peterson v. Superior Court*,[10] that there is a duty only with regard to conditions that the landlord knew of or should have discovered through reasonable inspections.[11] The committee finds the law on landlord's notice to be somewhat unsettled. Under the Supreme Court opinion *Knight v. Hallsthammar*,[12] there is no requirement that the tenant give notice of the condition to the landlord.[13] The holding of *Peterson* would seem to be an essential corollary to *Knight,* as there must be some reasonable manner for the landlord to become aware of conditions needing attention. But *Peterson* is a civil liability case, not an unlawful detainer case. Therefore, the committee elected to mention *Peterson* in the Directions for Use and include it in the Sources and Authority, rather than to incorporate its rule into the instruction itself at this time.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from February 1, 2010, through March 12, 2010. The committee evaluated all comments and revised some of the instructions as a result. Twenty-nine comments were received. A chart providing summaries of all comments received and the committee's responses is attached at pages 9–53.

[8] (2009) 177 Cal.App.4th 1049.

[9] (2009) 174 Cal.App.4th 1297.

[10] (1995) 10 Cal.4th 1185.

[11] *Id.* at p. 1206.

[12] (1981) 29 Cal.3d 46.

[13] *Id.* at p. 54.

Several commentators expressed agreement with all proposed changes. There were two requests for additional instructions and verdict forms, which are beyond the scope of the proposed revisions. The committee will consider these requests in its next release cycle.

Of the substantive comments, the two instructions that generated the most controversy were CACI No. 1102, *Definition of "Dangerous Condition,"* and proposed new CACI No. 1246, *Affirmative Defense—Design Defect—Government Contractor*.

CACI No. 1102: Definition of "Dangerous Condition"

As noted above, the committee decided to revise CACI No. 1102 to clarify that comparative fault should not be considered in making the initial determination as to whether a condition was dangerous. Attorneys representing several public entities, including the California Departments of Justice and Transportation, objected to this revision and requested that the original language be maintained. There appears to be no difference in the views of the original attorney proponent of the change, the public entities, and the committee. All agree that whether a condition is dangerous is to be determined according to an objective standard of whether it represented a risk to a reasonable user.[14] The fact that this accident happened does not mean the condition was unsafe, and the fact that the plaintiff or a third party was careless does not mean that the condition was safe. The disagreement seems to be only over what words best convey these concepts. The committee revised the language somewhat in response to the comments from the public entities. The committee believes that the original language of the instruction, the revised language posted for public comment, and the revised language now proposed for approval are all legally correct. The committee continues to believe that the instruction is improved by specifically advising the jury that comparative fault is not to be considered in deciding whether the condition was dangerous, and therefore, it did not restore the original language as requested by the public entities. The committee did, however, adopt language proposed by one of the commentators to express this concept.

CACI No. 1246: Affirmative Defense—Design Defect—Government Contractor Defense

The committee received extensive comments from the Consumer Attorneys of California and the law firm of Paul & Hanley objecting to several aspects of proposed new CACI No. 1246, *Affirmative Defense—Design Defect—Government Contractor Defense*.[15] The committee, however, rejected the major premises of the commentators' proposed revisions.

The first issue raised is whether the government contractor defense is limited to military contracts. This issue is unresolved in the federal and state courts.[16] The proposed draft posted for public comment did not include a military-contract limitation. The commentators asked that

[14] See *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131.

[15] The CAOC letter was a mostly verbatim, but slightly shorter, version of the Paul & Hanley letter.

[16] See *Carley v. Wheeled Coach* (3d Cir. 1993) 991 F.2d 1117, 1119, fn. 1.

a military limitation be included. The recent case of *Oxford v. Foster Wheeler LLC,*[17] out of the First District Court of Appeal, rejected the limitation, but it was a military contract case. The committee has found no California case in which the defense was applied to a nonmilitary contract. However, the committee agrees with the court in *Oxford*,[18] that there is no policy reason to limit the defense to military contracts. A contractor who is compelled by the government to follow certain specifications is no less prejudiced if the product is for nonmilitary use. While the committee has added the military limitation to the instruction for now, it has endorsed the potential expansion of the defense in the Directions for Use.

The second issue raised by the commentators is whether the defense applies to contracts for products that are readily available on the commercial market. The commentators propose adding a new element to the instruction stating such a limitation based on a Ninth Circuit case, *In re Hawaii Federal Asbestos Cases,*[19] in which the court stated: "Where the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply."[20] The committee rejected this revision. The committee does not believe that the commercial availability exception from *In re: Hawaii Asbestos* is recognized in California, at least not as broadly as proposed by the commentators. In the First District Court of Appeal opinion, *Jackson v Deft, Inc.,*[21] the court stated: "[I]f a product is produced according to military specifications and used by the military because of particular qualities which serve a military purpose, and is incidentally sold commercially as well, that product may nonetheless still qualify as military equipment under the military contractor defense."[22] While the commentators note that *Jackson* preceded *Hawaii Asbestos,* recently the court in *Oxford* agreed with this aspect of *Jackson*.[23]

The third issue raised by the commentators is that the specifications approved or imposed on the contractor by the government must be related to the design aspect that led to the injury. They would modify the specifications element of the instruction to read: "That the United States approved reasonably precise specifications as to that feature of the product that the plaintiff claims was defective;" (proposed revision underscored). The committee does not dispute this premise, but does not believe that the revision is needed. *Boyle v. United Technologies Corp.,*[24] the United States Supreme Court case that established the defense, expresses the elements as set forth in the committee's draft.[25] The committee doubts that a case would ever get to the jury if

[17] (2009) 177 Cal.App.4th 700.

[18] *Id.* at p. 710.

[19] (9th Cir. 1992) 960 F.2d 806.

[20] *Id.* at p. 811.

[21](1990) 223 Cal.App.3d 1305.

[22] *Id.* at p. 1319.

[23] See *Oxford, supra,* 177 Cal.App.4th at p. 710.

[24] (1988) 487 U.S. 500.

[25] *Id,* at p. 512.

there is no arguable connection between the specifications and the defect. The commentators also seem to recognize this because they state that "this additional language is necessary to assure that the instruction is only given in those cases in which the defense may be invoked." (See attached chart, pp. 29–30). Any concerns that the instruction will be given when the facts do not support it cannot, of course, be addressed within the instruction itself.

Rule 2.1050 of the California Rules of Court requires the committee to update, amend, and add topics to *CACI* on a regular basis and submit its recommendations to the council for approval. The proposed new and revised instructions are necessary to ensure that the instructions remain clear, accurate, and complete; therefore, the advisory committee did not consider any alternative actions.

Implementation Requirements, Costs, and Operational Impacts

No significant implementation costs are associated with this proposal. To the contrary, under the publication agreement, the official publisher, LexisNexis, will print a new supplement and pay royalties to the Administrative Office of the Courts (AOC). The official publisher will also make the supplement available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the AOC will register the copyright in this work and continue to license its publication of the instructions under provisions that govern accuracy, completeness, attribution, copyright, fees and royalties, and other publication matters. To continue to make the instructions freely available for use and reproduction by parties, attorneys, and the public, the AOC will provide a broad public license for their noncommercial use and reproduction.

Attachments

1. Comment chart at pp. 9–53
2. Full text of new and revised CACI instructions at pp. 54–154

CACI 10-01

New and Revised CACI Instructions

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Committee Response
101: Overview of Trial	Hon. Thomas Anderle Superior Court of Santa Barbara County	I recognize that you have made it an option to include "affirmative defenses" in the pretrial instruction. But in my opinion this is a very time consuming and difficult issue that will be just ignored. As a practical matter it cannot be done and should not even be suggested. For many years I have had the issue of which of the affirmative defenses the defendant pleaded but will actually try as a question to be addressed at the pretrial conference on my written "tentative" pretrial conference order. Even with the advance notice, it is always a major chore to get the defendant to recognize what a "real" affirmative defense is. Typically, especially with less experienced counsel, it is very difficult to make them understand, let alone agree, what they have pleaded is not an affirmative defense. Indeed it is always a chore to just get them to distinguish between the equitable defenses and the legal defenses. It is possible of course to make a ruling on all those 33 so-called defenses they are characterizing as an affirmative defense at the pretrial conference to permit the pretrial instruction to be properly worded but that is very time consuming and always is confrontational between the bench and defense counsel. This scenario does not even address the fact that some of the affirmative defenses are dropped as we get deeper into the case. It also does	The committee believes that keeping the reference to affirmative defenses as an option is appropriate. Although this option may not be appropriate for cases that involve the complexities and problems with affirmative defenses that the commentator reports, it may be appropriate for other, possibly, simpler cases.

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New and Revised CACI Instructions
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Instruction	Commentator	Summary of Comment	Committee Response
		not address the fact that the bench can make "informed rulings" on the applicable affirmative defenses to go to the jury after the evidence has been presented.	
	Hon. Elizabeth A. Barron (ret.), Second Appellate District	The amendment to 101 is much needed and is excellent.	No response required.
	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
113: Bias	Hon. Elizabeth A. Barron (ret.), California Court of Appeal, Second Appellate District	I commend the committee for adding 113 to the CACI. However, 113 should include the word "prejudice" in addition to "bias." Bias is a soft word, which can indicate favoritism, but "prejudice" is always associated with dislike or hatred for. Jurors understand exactly what prejudice is and should be warned against it. No need to be wishy-washy.	The committee has expanded the third paragraph to also mention prejudice and public opinion.
	Hon. Jill Fannin Superior Court of Contra Costa County	I believe the proposed bias instruction could be streamlined to make it easier to understand and to give it greater impact. I propose deleting the last two sentences of the first paragraph, the second sentence of the second paragraph, the majority of the first sentence in paragraph 3 and leaving the fourth paragraph as is. The result would be a more concise, single-paragraph instruction.	The committee believes that the parts of the instruction that the commentator would delete emphasize to the jurors more clearly what bias is and where it might come from.
	Gerald H. Genard Attorney (inactive) Danville	The word "critically" is both unnecessary and potentially confusing to many lay persons. Removing the language from the instruction does nothing to change the basic meaning of the instruction. On the other hand, leaving it	The committee agrees and has changed "critically" to "carefully."

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Instruction	Commentator	Summary of Comment	Committee Response
		in may confuse jurors who interpret the word "critically' in its more commonly-used sense of criticism. If some cautionary comment must be added, the word "carefully" would be better that "critically."	
	LaVida Johnson Paralegal Wilson Turner Kosmo San Diego	Good instruction but might be good idea to incorporate the specific types of bias to remind jurors specifically what you are getting at. I was just involved in a jury trial in which the jury said that they couldn't believe that a doctor would risk his reputation (professional bias) to do the things he was accused of. This is an example of holding someone to a different standard based on what they do for a living and not based on the facts of the case.	The committee believes that there are no workable parameters for what specific categories of bias to include. The bias that is of concern is not just the suspect categories of civil rights law; it is all kinds of bias, as the commentator's example demonstrates. There is no law that makes discrimination for or against doctors unlawful. Yet, it is the kind of bias that is within the parameters of what this instruction is designed to address.
	Kevin C. Mayer Attorney Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor Los Angeles	The first sentence of the first paragraph states, "[e]ach one of us has biases about or certain perceptions or stereotypes of other people." This places undue emphasis on individual parties, and makes no mention of companies. Thus, we recommend adding "or companies" at the end of this sentence. For the same reason, we recommend a modification and addition to the end of the first sentence of the second paragraph to state, "towards a person, a company, or a situation."	The committee believes that CACI No. 104, *Nonperson Party*, adequately addresses bias against entities, and that this instruction is best limited to bias against individuals.
		We recommend an addition to the second sentence of the fourth paragraph so that it states, "for or against any party or witness, or for or against any claim or defense submitted	Bias against witness is addressed in CACI No. 107, *Witnesses* .The committee believes that expanding this instruction to address bias against kinds of claims would detract

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Instruction	Commentator	Summary of Comment	Committee Response
		for your determination."	from its purpose, which is to address bias against individuals.
	Orange County Bar Association by Lei Lei-Wang Ekvall President	The language of the proposed Instruction is overly broad, under-inclusive and self – contradictory. The issue of bias is best addressed on a case-by-case basis.	The committee believes that bias is an important issue that needs to be addressed in a separate optional instruction. The commentator cites to no specific examples of overly broad, under inclusive, or self-contradictory language that causes the committee to question its decision that this instruction is of value.
	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
	Unidentified member of the State Bar of California, Litigation Section, Jury Instruction Subcommittee	Although I appreciate the proposed instruction, it seems unnecessary. I prefer to handle bias issues in voir dire. In addition, if there is a need for such an instruction, I believe it may be better suited as a watered down version and addition to the existing CACI 5009, "Predeliberation Instructions."	The committee believes that bias is an important issue that needs to be addressed in a separate instruction.
450: Good Samaritan (revoked)	Hon. Elizabeth A. Barron (ret.), Second Appellate District	When an instruction is revoked I think a reason and citation to case or statutory law should be given.	The committee agrees and has stated why this instruction has been revoked in the instruction.
	State Bar of California, Committee on Administration of Justice	Recommendation: Approve the proposed revocation of the current instruction. Reason: New legislation was enacted in August 2009, in response to the California Supreme Court's decision in Van Horn v. Watson (2008) 45 Cal.4th 322, which construed Health and Safety Code section 1799.102 to apply only to immunize Good Samaritans who provide medical care at the	The committee has added the CAJ's "Reason" in the instruction to address the request above.

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Instruction	Commentator	Summary of Comment	Committee Response
		scene of a medical emergency. The new legislation amended Health and Safety Code section 1799.102. Because CACI 450, as currently written, does not comport with the specific language of the revised statute and the cited authorities no longer apply, revocation is appropriate until a new instruction is drafted.	
	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
1006:Landlord's Duty	Jonathan Bornstein Attorney Bornstein & Bornstein San Francisco	I object to the language "[or on renewal of a lease]" A month-to-month lease renews every 30 days. But according to this instruction, the landlord is required to inspect the premises every 30 days. It will never work. The preceding language "Before giving possession of leased property to a tenant" is adequate and a correct statement. If the lease automatically renews every 30 days (particularly so in rent control jurisdictions) the landlord never has the right to enter the premises without the tenant's consent. In addition, there are some apartment buildings with hundreds of units in them or institutional landlords with hundreds of units who cannot possibly conduct an inspection every 30 days of every unit.	Members of the committee have previously expressed the same concern. However, *Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134, *Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510–511, and *Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781, all cited in the Sources and Authority, state that the duty to inspect arises on renewal. They are all commercial tenancy cases, but do not limit their language to commercial tenancies. The committee does, however, agree with the commentator that there should not be a duty to inspect on every monthly "renewal" of a month-to-month tenancy and has added a reference to this point in the Directions for Use.
	State Bar of California, Committee on Administration of Justice	Recommendation: Approve the proposed revisions with the following additional suggestions: Add additional cross references to other	The committee does not think that these additional cross references are needed. The previous sentence in this paragraph refers to the nondelegable duty doctrine. It makes sense to direct the user to the specific

Instruction	Commentator	Summary of Comment	Committee Response
		instructions to the proposed new paragraph in the Directions for Use. "For additional instructions for use in cases involving injury to employee of independent contractor on owner/lessor's property, see CACI Nos. 1009A, 1009B. For additional instructions for use in cases involving injury to other third parties while on owner/lessor's property because of negligence of employee/agent/contractor, see the Vicarious Responsibility Series (CACI No. 3700 et seq.) For additional instructions for use in cases involving injury to other third parties due to the negligence of an independent contractor hired by owner/lessor, see CACI No. 3708, *Peculiar-Risk Doctrine,* and CACI No. 3713, *Nondelegable Duty*." Reason: The proposed change to this portion of the instruction is not clear or complete as it makes it appear that CACI No. 3713 is the only instruction that deals with a landlord's liability for the acts of an independent contractor.	instruction on nondelegable duties. The committee does not think that it is also necessary to also direct the user to every instruction that might possibly be used in a landlord-contractor situation.
		The proposed inserts concerning nondelegable duty, including the changes suggested above, should also be included in CACI No. 1001, *Basic Duty of Care*. However, under Directions for Use, the citation to *Srithong*, should be replaced with: "Under the doctrine of nondelegable duty, a	The committee agrees and has added the requested language to CACI No. 1001.

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Instruction	Commentator	Summary of Comment	Committee Response
		property owner cannot escape liability for failure to put or maintain property in a safe condition by delegating the duty to an independent contractor. (*Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 260.)" Reason: As the doctrine of nondelegable duty applies not only to landlords but also to property owners in general, the addition of this doctrine would be clearer and more complete if it is also added to the Basic Duty of Care for premises liability at the same time it is added to the Landlord's Duty instruction.	
	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
1102: Definition of Dangerous Condition	Hon. Elizabeth A. Barron (ret.), Second Appellate District	I commend the committee on the amendment to 1102. The amendment will assist jurors to understand the objective test that even if a person acted recklessly, they can still find that the property was in a condition to cause substantial risk of injury. (See *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 992 [101 Cal.Rptr.2d 325]; *Milligan v. Golden Gate Bridge Highway & Transportation District* (2004) 120 Cal.App.4th 1, 7 [15 Cal.Rptr.3rd 25].)	No response required.
	California Department of Justice by Jeff R. Vincent, Deputy Attorney General	The proposed amendment to CACI 1102 *suggests* to the jury that the subject property is dangerous not withstanding plaintiff's lack of due care. An accurate statement of the law is that: public property may be in a dangerous	The committee agrees that the current wording of the instruction could be improved to make it clearer that whether property is in a dangerous condition is a separate issue from whether someone failed

Instruction	Commentator	Summary of Comment	Committee Response
		condition even if plaintiff was not exercising reasonable care or it may not be dangerous regardless of whether plaintiff was exercising reasonable care and the property may be safe whether or not plaintiff was injured. Neither plaintiff's injury, nor his or her lack of reasonable care is a factor to be considered when considering whether property is in a dangerous condition. The current version of CACI 1102, in fact, conveys that meaning by instructing the jury to consider the "risk of injury ***to*** **members of the general public** who are using the property [or adjacent property] with reasonable care."	to use reasonable care. The committee has made some additional minor revisions to the language with the intent of making it clearer that the mere fact that someone was injured does not automatically mean that the property was in a dangerous condition.
		By deleting the phrase: "to members of the general public," and replacing the phrase with the word "public" the proposed amendment invites the jury to consider the injury to plaintiff as a basis for finding that the property is dangerous. In the current version, it is clear that the risk of injury that defines dangerousness is "to members of the general public." By deleting the preposition "to," the proposed version would lead to confusion as to whom the risk is directed as a measure of dangerousness. As recast, the proposed instruction refers to "risk of injury" without reference to who might be injured.	The committee doubts that the proposed minor change in wording will lead to confusion, but nevertheless has restored the reference "to injuries to members of the general public."
	State of California Department of Transportation by Ronald W. Beals, Chief Counsel	Two weeks ago, the Department learned that Mr. Mark Robinson submitted proposed CACI 1102 in August 2009. Mr. Robinson is presently appealing a judgment in favor of the Department to the Fourth Appellate	Mr. Robinson submitted a proposal for revisions to this instruction to the committee. The committee evaluated Mr. Robinson's proposal, agreed with him in some respects, and made some proposed

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		District, Division Three, (*Parent v. State of California* G041842). The basis for Mr. Robinson's argument is that had CACI 1102 been modified as he is now requesting, the jury would have decided the case differently. The briefing on appeal was completed in December 2009, but Mr. Robinson has recently requested the court to take judicial notice of the invitation to comment on proposed CACI 1102. In his request for judicial notice, Mr. Robinson not only fails to identify himself as the author of proposed CACI 1102, but he also states " . . . Plaintiffs argued that CACI 1102 needed clarification, much in the same way that the Advisory Committee now proposes." The Judicial Council should not allow the CACI review process to be manipulated for the purpose of altering a targeted court decision. Such a practice would undermine the usefulness of CACI and would invite legal battles to migrate to the CACI review process. No revisions should be considered unless a more legally accurate and understandable statement of the law has been presented. The Department strongly urges the Committee to reject Mr. Robinson's proposed CACI 1102 (or in the alternative, defer consideration until the appeal is decided), and in doing so, thwart this improper attempt to use the CACI review process to make a collateral attack on a jury verdict on appeal.	revisions to the instruction. The committee is the author of these revisions, not Mr. Robinson. Mr. Robinson, the public-entity commentators, and the committee all seem to agree on what the law is. (1)The fact that the accident happened does not mean that the condition of the property was unsafe; and (2) the fact that someone was careless does not mean that the condition was safe. The differences are only over what words most clearly state the law to the jury. The committee sees no need to await the result of the appeal in *Parent*. Should that case result in a published appellate opinion that provides additional insight into the wording of this instruction, the committee will consider it at that time.

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		The proposal would cause more confusion by calling the jury's attention to the standard of care exercised by a plaintiff as part of the determination of the existence of a dangerous condition. The proposal would do so by including "reasonable care" and "plaintiff"' in the same sentence. If a juror were to read this proposed instruction, he/she could not help but think about the reasonableness of a plaintiff's actions and associate that thought with determining the existence of a dangerous condition. Thus, a jury instruction should not mention "reasonable care" and "plaintiff" in the same sentence unless the jury is intended to consider the reasonableness of the plaintiff as part of the instruction.	The committee does not believe that using "plaintiff" and "reasonable care" in the same sentence will cause confusion. The committee has redrafted the proposed additional sentence to the instruction. See response to commentator William Rentz below. Mr. Rentz's proposed rewrite, however, also includes "plaintiff" and "reasonable care" in the same sentence.
		By replacing "general public" with just "public," proposed CACI 1102 would remove what little indication there is in the instruction that a plaintiff is not a member of the public for the purposes of determining the existence of a dangerous condition. Without including "general public" in the instruction, a jury would have no indication that a plaintiff is not to be treated as a member of the public and would be more likely to determine the level of care to be used by the public based upon a plaintiff's actions. Such a result could lead to circular logic and essentially strict liability for public entities, for example: • The plaintiff was injured while using	Although the committee does not think that replacing "general public" with "public" leads to any circular logic, the committee has restored "general public" to the instruction as suggested by the commentator.

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		reasonable care; and • The plaintiff is a member of the public; therefore • A member of the public was injured while using reasonable care; therefore • There must be a substantial risk of injury to a member of the public when used with reasonable care. This logic is circular because evidence of a plaintiff's injury is the only basis needed to show the existence of a dangerous condition. In essence, this could lead a jury to find strict liability because only evidence of the subject accident is required to demonstrate liability.	
	Consumer Attorneys of California, by Paloma Perez, Associate Legislative Counsel	The proposed revision to Instruction 1102 is a very good change that will clear up a lot of confusion that was often engendered by the old language.	No response required.
	Monterey County Counsel, by William K. Rentz Sr., Deputy County Counsel	Whether public property is in a dangerous condition is to be determined without regard to whether the plaintiff exercised or failed to exercise due care. The property was in a dangerous condition, or it was not in a dangerous condition, for some extended period of time before the actual plaintiff arrived on the scene and suffered his or her injury. It is dangerous when it would present a substantial risk of injury to any member of the public – i.e., to a hypothetical person, not just this real plaintiff -- who exercises due care in the use of the subject property. Therefore, you should not introduce into the	The committee agrees with the commentator's legal analysis, but believes that some revision to the current instruction is appropriate in order to clarify that whether the property is in a dangerous condition is to be determined without consideration of any comparative fault. The committee does, however, like the commentator's proposed language for the new final sentence of the instruction, and has modified this sentence as proposed by the commentator's.

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		definition of "dangerous condition" any element that asks or allows the jury to consider what the actual plaintiff did or did not do. However, if you think there is a need to clarify something here, then I suggest that in place of your last sentence, you write, "Whether the subject public property is in a dangerous condition is to be determined without regard to whether the actual plaintiff in this case exercised or failed to exercise due care in his or her use of the subject property."	
		I think you need to find ways to emphasize that the due care to be considered in this definition is that to be exercised by a hypothetical user, not the actual plaintiff. Referring to the hypothetical user as a member of the "general public" helps to do that. When you eliminate the word, "general," you lose the emphasis on the abstract or hypothetical nature of the person whose due care is at issue.	Although the committee does not think that replacing "general public" with "public" leads to any circular logic, the committee has restored "general public" to the instruction as suggested by the commentator.
		The explanation for adding your last sentence has nothing to do with making the definition clear to a jury. When this instruction is read to a jury without the last sentence, the jury will not have the faintest idea what comparative fault is or whether the instruction would in any way implicate comparative fault. If the comparative fault	The committee has bracketed the last sentence to make it optional. The Directions for Use now note that the last sentence is to be given only if comparative fault is at issue in the case.

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		issue is your real concern, then address it directly in any instruction that introduces the concept of comparative fault to the jury. If there will be no instruction that introduces the concept of comparative fault, then the last sentence will not be needed here or anywhere else.	
	San Francisco City Attorney, by Donald P. Margolis, Deputy City Attorney	We understand that the proposed revision relates to the importance of determining whether the property is dangerous separately from determining whether a particular plaintiff exercised due care. But the instruction, taken from language in *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131, and prior decisions, misleadingly suggests that a public entity may be liable to any plaintiff, regardless of that plaintiff's lack of due care. It would be helpful to include the following additional language, which is the remainder of the very paragraph of *Fredette* from which the proposed language is taken: "If, however, it can be shown that that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not dangerous."	The committee believes that the revision proposed by commentator William K. Rentz addresses this concern and is a better solution than adding the second *Fredette* sentence, which is not in plain English.
		It would also be helpful to include the following language of BAJI 11.54: "The phrase "used with due care" refers to	The committee believes that its proposed language as revised adequately explains what "used with due care" means.

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		whether the condition would result in injuries when used with due care by the public generally. It does not refer to the care used by any person in connection with this particular accident."	
	State Bar of California, Committee on Administration of Justice	Recommendation: Approve the proposed revisions. Reason: The proposed revisions appear clear, accurate, and appropriate.	No response required.
1123: Loss of Design Immunity (*Cornette*)	Hon. Elizabeth A. Barron (ret.), Second Appellate District	The current comment on the role of the judge and jury in design immunity cases is confusing. The proposed comments are useful in clarifying the issue.	No response required.
	Consumer Attorneys of California, by Paloma Perez, Associate Legislative Counsel	The proposed change to Instruction 1123 Directions for Use accurately states the law. But it does not correct a longstanding problem with CACI, which is the fact that CACI contains no instruction on the affirmative defense of design immunity. Even if it is true (as the Directions for Use state) that the parties usually stipulate to the first two elements of the design immunity defense, this is not always the case. It is not that uncommon for a plaintiff to dispute the second element. (See, e.g., *Hernandez v. Dept. of Transportation* (2003) 114 Cal.App.4th 376.) Our members have indicated involvement in a number of cases where the second element was disputed. The lack of a Design Immunity CACI instruction means that the trial judge must fashion his or her own instruction if the parties are disputing that defense. This also	The committee will consider adding a design immunity instruction in the next release cycle.

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		means, however, that the opening sentence of Instruction 1123 is incomplete and therefore misleading. We suggest that Judicial Council consider drafting a new instruction specifically on the defense of design immunity.	
	Reuben Ginsberg Research Attorney Second Appellate District	The first sentence in the Directions for Use has two subordinate clauses ("if the public entity defendant is entitled to design immunity" and "unless the changed-conditions exception can be established"), one immediately after the other, which makes the meaning of the sentence somewhat unclear. I would revise this sentence to read as follows for greater clarity: "Give this instruction if the changed conditions exception to design immunity is at issue."	The committee does not believe that the sentence is unclear. "Give this instruction if the public entity defendant is entitled to design immunity unless the changed-conditions exception can be established."
		The statement in the second paragraph of the Directions for Use, "The first two elements, causation and discretionary approval, may only be resolved as issues of law if the facts are undisputed," is a direct quote from *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536 and *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 940. I would modify this statement for greater clarity to state: "The first two elements of design immunity, causation and discretionary approval, are issues of fact for the jury to decide. (*Cornette v. Department of Transportation*	The committee has made the commentator's proposed change.

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		(2001) 26 Cal.4th 63, 74-75; *Hernandez v. Department of Transportation* (2003) 114 Cal.App.4th 376, 386-388; *Grenier v. City of Irwindale* (1997) 57 Cal.App.4th 931, 940, fn. 5.)" A matter that ordinarily presents an issue of fact for the jury can be decided by the court as a matter of law if reasonable minds could come to only one conclusion or, in other words, if the evidence supports only one reasonable conclusion. (*Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 637; *Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 148.) That the underlying facts are undisputed does not necessarily mean that the issue can be decided as a matter of law. If the undisputed facts could support more than one reasonable conclusion on the ultimate issue, the ultimate issue is one of fact for the jury to decide. (*Mah See v. North American Acc. Ins. Co.* (1923) 190 Cal. 421, 426, overruled on another point in *Zuckerman v. Underwriters at Lloyd's* (1954) 42 Cal.2d 460, 474; see 9 Witkin, Cal. Procedure (5th ed. 2008) §§ 376-377, pp. 434-436.) It appears that the analysis and holding in *Alvis* and *Grenier*, and in the case cited in *Grenier* in support of the quoted language (*Flournoy v. State of California* (1969) 275 Cal.App.2d 806, 813), are consistent with this.	

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		The rule that an issue of fact can be decided by the court as a matter of law if the evidence supports only one reasonable conclusion is a rule of general application and is not unique to design immunity. In my view, there is no need to state the rule in the Directions for Use. But it would be helpful to clearly state that the first two elements of design immunity are issues of fact.	
	San Francisco City Attorney, by Donald P. Margolis, Deputy City Attorney	The proposed revision to the Directions for Use should be modified to correct a misstatement of the standard governing when a court may initially determine the existence of design immunity as a matter of law. With regard to the first two elements, "facts" should be changed to "material facts." Omitting the term "material" misleadingly suggests that the usual standard governing summary judgment does not apply in addressing the defense of design immunity.	This comment has been addressed by the revision of the instruction made in response to the comment from Mr. Ginsberg, referenced directly above.
VF-1101: Dangerous Condition of Public Property—Affirmative Defense—Condition Created by Reasonable Act or Omission and VF-1102: Dangerous Condition of Public Property—	Consumer Attorneys of California, by Paloma Perez, Associate Legislative Counsel	We are opposed to the proposed revision in VF-1101 because we believe it will have the unintended consequence of creating a great deal of confusion and inconsistent findings by the jury. Because the fourth element may be established in either of two ways, the Judicial Council is apparently proposing having two verdict forms which are identical in every respect except for the fourth element. Thus, if the plaintiff seeks to establish both of the disjunctive prongs of element four, the jury will be asked to decide all of the other elements twice. At best this is	VF-1101 currently can be confusing to the jury if both theories of liability must be addressed. If the jury answers "yes" to one theory and "no" to the other at question 4, defenses to both theories will still be in the verdict form at question 6. The defense to the rejected theory should not be considered. However, instead of dividing the verdict form into two separate ones, the committee has added explanation at question 6 that will tell the jury when to consider each option.

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Affirmative Defense—Reasonable Act or Omission to Correct		likely to lead to confusion and questions from the jury and at worst it is apt to lead to inconsistent findings on the duplicated elements. There is nothing particularly complicated or difficult to understand about the existing VF-1101 (which includes both prongs of the fourth element on the same form). It should not be changed.	
	State of California Department of Transportation, by Ronald W. Beals, Chief Counsel	The Department opposes proposed CACI VF-1101 and VF 1102 because splitting VF-1101 into two separate verdict forms is unnecessary and duplicative. CACI VF-1101, as it exists now, is easy to understand, easy to customize (as demonstrated by the proposed changes), and promotes judicial economy. Furthermore, if both affirmative defenses are at issue (for a condition created by a reasonable act or omission and for a reasonable act or omission to correct), it is likely the trial court would find it more convenient to have a single consolidated form than two separate forms. At a minimum, jurors would likely appreciate not having to answer the same questions twice; which could lead to inconsistent verdicts.	See response to Consumer Attorneys of California above.
	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The subcommittee approves of the proposed change to VF-1101, but has no comment on VF-1102 due to time constraints.	No response required
1240: Affirmative Defense to Express Warranty—Not "Basis of Bargain"	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
	John A. Taylor Jr. Attorney	A petition for review in *Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal App 4th 1213,	The committee believes that current CACI No. 1240 should be revoked whether or not

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	Horvitz & Levy Encino	1234, which led to the committee's decision to revoke CACI no. 1240, is before the Supreme Court. If review is denied, then neither *Keith* (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 22 [220 Cal.Rptr. 392].) nor *Weinstat* will be binding on trial courts, which will be free to choose which decision to follow until the conflict is resolved by the California Supreme Court. In that event, we support the revocation of CACI No. 1240 until the conflict between *Keith* and *Weinstat* is resolved. In the interim, a party wishing to assert the affirmative defense currently reflected by CACI No. 1240 can submit a special instruction containing appropriate language drawn from the revoked instruction or directly from Keith. However, if review in *Weinstat* is granted, *Weinstat* will have no further precedential value, and trial courts will be bound to follow the law as stated in *Keith* and in CACI No. 1240. Thus, the current instruction should not be revoked. Given the uncertainty regarding the status of *Weinstat*, we recommend that the CACI Committee defer any action regarding the instruction for just a month or two, until the Supreme Court rules on the pending petition for review.	review is granted in *Weinstat*. *Keith* also notes that there is no reliance requirement under the Commercial Code. (See first excerpt under Sources and Authority).
1246: Affirmative Defense—Design	Hon. Elizabeth A. Barron (ret.), Second Appellate	An excellent addition as it is a frequent defense in asbestos litigation. How about	The committee will consider a verdict form in the next cycle. However, verdict forms

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Defect—Governmental Contractor	District	adding a corresponding verdict form?	for affirmative defenses are usually incorporated into the verdict forms on the elements. The product liability verdict forms are already quite complex, and it may not be possible to integrate this defense into any of them without making the form more difficult to understand.
	Consumer Attorneys of California (CAOC), by Paloma Perez, Associate Legislative Counsel Deborah Rosenthal Attorney Paul & Hanley Berkeley (The CAOC letter is an abridged version, but in most places is identical to the Paul & Hanley letter.)	The commentators both propose a separate instruction for use in failure-to-warn cases stating that the trial courts will be better served by the concurrent adoption of two separate jury instructions addressing application of this defense in the various types of tort actions in which it arises. A complete specific instruction is presented for consideration.	The committee will consider a new instruction for failure to warn in the next cycle. It sees no reason not to proceed with a design defect instruction.
		Add as element 1: "That the [*product*] was not readily available on the commercial market. A product incidentally sold commercially, as well as to the United States government, is not "readily available" on the commercial market." If a manufacturer makes the products that it also sells to the military "readily available" on the commercial market, the concerns that the defense is designed to address do not exist. Thus, in federal courts in the Ninth Circuit, "in respect to products <u>readily available on the commercial market</u>[, t]he fact that the military may order such products does not make them 'military equipment'"	The committee does not believe that the commercial availability exception from *In re: Hawaii Asbestos* is recognized in California. *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 709–711 rejects it. *Jackson v Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319 (cited in the Sources and Authority) states that the test is not how readily available a product is, but whether it is produced according to military specifications and used by the military because of particular qualities which serve a military purpose. The committee believes that *Jackson* presents the California standard. The committee did add an excerpt from *In*

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		subject to the government contractor defense." (*In Re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 811. Therefore, proposed CACI 1246 omits a critical element of the defendant's burden of proof: Whether the instruction may be given depends on whether or not the defendant can prove that the product at issue can be considered "military equipment" in light of the extent to which the product is or is not sold commercially. This threshold test must be included in the instruction; without it, the instruction does not accurately track the U.S. Supreme Court holding in *Boyle*.	*Re: Hawaii Asbestos* on "readily available" to the Sources and Authority.
		Modify element 3 as follows: "3. That the United States approved reasonably precise specifications as to that feature of the product that the plaintiff claims was defective;" A jury instruction on application of the defense in design defect cases should contain within it the limitation inherent in *Boyle* that prevents the defense from applying in failure to warn cases. It should include an explanation that the "reasonably precise specifications" that the U.S. Government approved must be specifications regarding the feature of the product that plaintiff seeks to hold defendant liable for. This additional language is necessary to assure that the instruction is only given in those cases in	If the commentators' concern is that the instruction will be given when it should not be, that concern cannot be addressed within the instruction itself. The committee does agree that the government-approved specifications must be relevant to the defect. But it does not believe that it is necessary to expressly state this in the elements of the instruction. None of the many cases that set forth the elements of the defense include this modification of the approval element.

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		which the defense may be invoked; i.e., where the defendant establishes the threshold requirement that a "significant conflict" exists between federal and state interests.	
		In the Directions for Use, replace: "This instruction is for use if the defendant's product whose design is challenged was provided to the United States government for military use." With "This instruction is for use in lawsuits seeking to impose on the defendant contracting with the government a duty contrary to the duty imposed by the government contract. (*Boyle v.United Technologies Corp.* (1988) 487 U.S. 500, 508-509.)	The committee added the proposed language from *Boyle* to the Directions for Use, but also retained the current language.
		In the Directions for Use, replace: "Different standards and elements apply in a failure-to-warn case. This instruction must be modified for use in such a case. (See *Oxford, supra,* 177 Cal.App.4th at p. 712;" With "Different standards and elements apply in a failure to warn case. (*Butler v. Ingalls Shipbuilding.* (9th Cir. 1996) 89 F.3d 582, 586.) Use CACI No. 1246B and not CACI	The committee believes that even though the government contractor defense is of federal origin, with the exception of opinions of the United States Supreme Court, state court opinions reflect the law that should be applied in California. The committee did add *Butler* to the Directions for Use in addition to, rather than instead of, *Oxford*.

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		No. 1246A." The trial courts and litigants are better served by more explicit guidance than the proposed language. Furthermore, citation to established federal authority on this point is preferable to recent state appellate court authority on this federal defense.	
	Reuben Ginsberg Research Attorney California Court of Appeal, Second Appellate District	This defense ordinarily is known as the "government contractor" defense, rather than the "governmental contractor" defense. (E.g., *Boyle v. United Technologies Corp.* (1988) 487 U.S. 500, 512; *In re Agent Orange Product Liability Litigation* (2d Cir. 2008) 517 F.3d 76, 87 & fn. 11; *Oxford, supra,* 177 Cal.App.4th at p. 708.) I would revise the title to state "Government Contractor" rather than "Governmental Contractor."	The committee made this change.
		Unless appropriate authority can be cited to apply the government contractor defense to products for nonmilitary use, I believe that the instruction itself, rather than only the Directions for Use, should state this limitation. I would revise the first element to read as follows: "1. That [*name of defendant*] contracted with the United States government to provide the [*product*] for military use;"	*Oxford,* though a military case, states that the defense is not limited to military contracts. Further, the committee can discern no policy reason why government specifications should be any less compelling outside of the military context. Nevertheless, because there is no California case that actually applies the defense to a nonmilitary contract, the committee has restored "for military use" to the instruction, while noting the highly questionable state of the limitation in the Directions for Use.
	Deborah Rosenthal Attorney	Whether or not a defendant's product is "military equipment" is a necessary part of	See response to commentator Reuben Ginsberg, above.

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	Paul & Hanley Berkeley	the determination of whether or not a products liability defendant may avoid liability through the *Boyle* defense. (*Boyle v. United Technologies Corp.* (1988) 487 U.S. 500.)	
		The excerpt in the Sources and Authority to *Jackson v Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319 is problematic for several reasons. First, the case was decided two years before the 9th Circuit's decision of *In re Hawaii,* which is authority for the proposition that products manufactured for commercial purposes, which are also used by the military, are not subject to the military contractor defense. (*In re Hawaii, supra,* 960 F.2d at 811-812.) Second, the first sentence is surplusage, criticizing the argument the plaintiff "seem[ed]" to be making in *Jackson* and noting the absence of cited authority in the briefing submitted in that case. The first sentence should be deleted because it is argument, it is outdated, and it serves no analytical function. The balance of this citation is objectionable because it is an incomplete statement of applicable law. *Jackson* notes that a product which has "incidental" commercial uses may still be military equipment. By the same token, equipment which is "substantially similar to goods produced for sale to nonmilitary buyers" is not military equipment. Furthermore, *Jackson* rejects any absolute	Case excerpts in the Sources and Authority are presented as a launching point for further research. Excerpts are included because the committee believes that it is helpful to users to be aware of them. Inclusion does not indicate that the committee agrees with every statement in every excerpt. The committee does believe that the excerpt from *Jackson* is a correct statement of California law. The committee did add an excerpt from *In re: Hawaii Asbestos.* Although the committee does not believe that this case is binding precedent in California, it does believe that users should know of its existence. The committee did delete the first sentence of the excerpt from *Jackson*.

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		bright line between "exclusively" military products and products that may have "incidental" commercial purposes. Products sold and used by the military can range from a can of beans to helicopter escape hatches. (See *Jackson, supra,* at p. 1318.) Authorities finding equipment to be primarily commercial in nature, and thus not subject to the defense should be acknowledged and cited also. E.g., *In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 811-812; *Dorse v. Armstrong, supra,* 513 So.2d at 1269.)	
		The case excerpt from *Oxford* that incorporates *Carley v. Wheeled Coach* (3d Cir. 1993) 991 F.2d 1117, 1119, fn. 1, is misleading, incomplete, and one-sided. It refers to courts that have concluded the defense is "not limited to military contracts" but fails to acknowledge the cases, also cited in footnote 1 of the *Carley* decision that have concluded that the government contractor defense is limited to manufacturers of military products:	The committee modified this excerpt to note that *Carley* cites cases on both sides of the issue. The committee also expanded the excerpt to make it clear that the court in *Oxford* agrees with *Jackson* and rejects *In re: Hawaii Asbestos.*
		The last case excerpt under Sources and Authority references *Tate v. Boeing Helicopters* (6th Cir. 1995) 55 F. 3d 1150, 1156–1157. In this case, the court proposes a modification to the instruction to be used in failure-to-warn cases. However, the proposed modification does not adequately account for circumstances in which the government contractor has omitted a warning that could	The committee believes that the excerpt is appropriate. The excerpt just notes that the 6th Circuit has presented an alternative list of elements for a government contractor defense to failure to warn.

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		have and should have been given, even if the government approved the warnings that were given—in other words, it relieves the defendant of the obligation to establish that a true contfict exists between federal interest and state law. Under the instruction proposed above, a contractor that has failed to warn of a known risk could argue that it is immunized because the warnings that were given "conformed" to approved warnings. However, a defendant's evidence in support of this defense must show a significant conflict between federal contracting requirements and state law. *Jackson, supra,*223 Cal.App.3d at 1317. A defendant does not meet its burden simply by presenting evidence that certain warnings were required by military specifications. *Id.* A defendant must produce evidence that government specifications placed a limitation on any additional information that it could provide to users of its product. *Id.*	
	Unidentified member of the State Bar of California, Litigation Section, Jury Instruction Subcommittee	While I do not like the extension of law providing the defense, it seems to conform to the holdings expressed in *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700. I do like the emphasis placed on the difference between a "design defect" verses "failure to warn" as set forth in the Directions for Use and cited authorities. However, consideration should be given to cross-referencing other applicable CACI instructions for cases dealing with failures to warn. For example:	Because proposed new CACI No. 1246 is not a failure-to-warn instruction, the committee does not believe that cross references to other failure-to-warn instructions are needed.

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Instruction	Commentator	Summary of Comment	Committee Response
		"See CACI No. 1222, *Negligence—Manufacture or Supplier-Duty to Warn—Essential Factual Elements*.	
1800: Intrusion Into Private Affairs and 1807: Affirmative Defense—Invasion of Privacy Justified	Gerald H. Genard Attorney (inactive) Danville	An appropriate usage note should be added to these instructions to deal with the impact of First Amendment jurisprudence on state law causes of action. The note should indicate that 1800 and 1807 are appropriate for privacy claims based on physical intrusion, but may not be appropriate for privacy claims based upon speech unless and until the court so determines after weighing the impact of the First Amendment on the cause of action. The label placed upon a cause of action does not determine the First Amendment application to the case. If the plaintiff seeks to attach liability based on speech, it does not matter whether the cause of action is denominated defamation, privacy, interference or any other tort-the court must still determine whether the speech was truthful (or in public figure cases , whether it was maliciously false), and which party has the burden of proof on the issue of truth or falsity. If the First Amendment requires that the plaintiff prove the speech was false, then the proposed instructions would not apply as currently written.	The committee does not think that the word "intrusion" connotes intrusion by speech.
	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charges.	No response required.
	Unidentified member of	The proposed changes are mostly fine.	This factor is expanded in the new part of

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Instruction	Commentator	Summary of Comment	Committee Response
	the State Bar of California, Litigation Section, Jury Instruction Subcommittee	However, I suggest leaving in the reference in item (d) "How much privacy the [*name of plaintiff*] could expect in that setting."). This seems consistent with the holdings of *Hernandez v. Hillsides, Inc.* (2009) 47 Cal. 4th 272, at p. 287.	the instruction, which sets forth factors to be considered in determining whether there was a reasonable expectation of privacy.
2505: Retaliation	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
	Unidentified member of the State Bar of California, Litigation Section, Jury Instruction Subcommittee	In light of *Harris v. City of Santa Monica* (2010) 181 Cal.App.4th 1094, the third element should read: "'that plaintiff's protected activity/disability was a motivating factor/reason in discriminating/retaliating/failing to hire/taking of the adverse action and that the employer's nondiscriminatory reasons to take the same actions would have lead the employer to take the same action.	*Harris*, should it become final (petition for review filed), will require the committee's attention. But the holding of *Harris* is that there is a valid affirmative defense of mixed motive. It would not affect the elements of 2505.
2508: Failure to File Timely Administrative Complaint—Plaintiff Alleges Continuing Violation	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
2505, 2508:, and VF-2514	Hon. Alan S. Rosenfield, Superior Court of Los Angeles County	As a proponent of the amendments that have resulted in the new proposed CACI revision to 2505, new 2508, and VF-2514, I can only say, "Well done!" Wrestling with defining "adverse action" and the burden of proof question for continuing violation scenarios in	No response required other than "You're welcome."

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Instruction	Commentator	Summary of Comment	Committee Response
		employment discrimination/retaliation cases is so very fact specific that a pattern instruction was a daunting task. I thought that the expanded Directions for Use as a way to offer guidance to the individual trial judge was an exceptional way of handling it. My sincere thanks to the committee and hard working staff for taking on these modifications. In the "OBTW" column of this message, my review of the other suggested revisions seems very well thought out, too. Thanks again for taking on this project.	
	Hon. Elizabeth A. Barron (ret.), Second Appellate District	I concur with the opinions expressed by Judge Alan Rosenfield.	No response required.
2540: Disability Discrimination—Disparate Treatment—Essential Factual Elements	Christopher Brancart Attorney Brancart & Brancart Pescadero	I believe that the current and proposed instructions regarding disability discrimination contain an error of law. Instruction 2540 at element 8 requires a plaintiff to prove that defendant's conduct was a "substantial factor" in causing harm. But nowhere does FEHA impose a "substantial factor" requirement in the prima facie case or in the elements to state a claim under FEHA. Moreover, to the extent that these instructions are used in FEHA housing cases, the instructions contradict the express provisions of FEHA's fair housing provisions regarding proof of claim. See Gov. Code, section 12955.8.	There are two causation elements in FEHA causes of action that involve ultimate adverse actions. There must be a causal link between the discriminatory or retaliatory animus and the adverse action, and there must be a causal link between the adverse action and damages. (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713.) CACI's standard "substantial factor" causation element is valid under FEHA. As can be seen from the table of contents, the FEHA series is limited to employment-based actions only. As noted by the commentator, housing cases are governed by different provisions of the FEHA. CACI's

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Instruction	Commentator	Summary of Comment	Committee Response
		Please strike item 8 from the proposed instruction 2540 ("substantial factor"). Absent that, please direct courts in the use notes to Gov. Code, section 12955.8 to guide them in instructing in housing discrimination cases, which are governed by different provisions of FEHA than employment cases.	FEHA instructions cannot be modified for use in fair-housing cases.
	Reuben Ginsberg Research Attorney California Court of Appeal, Second Appellate District	FEHA protects both persons who actually have a physical disability, mental disability, or medical condition and those who are perceived to have a physical or mental disability. This is so because the definitions of physical and mental disability extend to persons who are "regarded or treated by the employer" as having a physical or mental disability. (Gov. Code, § 12926(i)(4), (k)(4).) In my view, "regarded or treated by the employer" means believed by the employer (see *Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53) and is not intended to establish "treated by" as a separate basis for liability where the person neither actually has a physical or mental disability nor is believed to have one. The Directions for Use ("For a perceived disability, select 'treated . . .") indicate that the proposed "treated as" language in element 3 is intended to apply to a perceived disability. In my view, the proposed "treated as" language does not adequately convey the notion of a subjective perception or belief. I	The committee revised this instruction in response to a comment received in the previous release. The committee agrees with the earlier commentator that the statutory language "regarded or treated by" is not best expressed by "believed that" or "thought that." While the "treatment" is a result of the belief, it is the treatment that is actionable, not the belief.

Instruction	Commentator	Summary of Comment	Committee Response
		would propose "believed" in lieu of the existing "thought that" or the proposed "treated as." The use of "believed" in element 3 would be consistent with the use of "belief" in the second alternative in element 6. Accordingly, I would revise element 3 to read as follows: "[That [name of defendant] [knew/believed] that [name of plaintiff] had [a history of having] [a] [e.g., physical condition] [that limited [insert major life activity]];]	
		Some of the opinions cited in the Sources and Authority discuss the "regarded as" basis for liability, but there is no prior mention in the Sources and Authority of the statutory basis. It would be helpful to cite Government Code section 12926(i)(4) and (k)(4) in the Sources and Authority.	The committee has added these citations to both CACI No. 2540 and CACI No. 2541.
	Orange County Bar Association by Lei Lei-Wang Ekvall, President	"In the Use Note, add as to what constitutes 'knowledge,' as appropriate to the particular case."	The committee does not understand the comment.
	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
	Unidentified member of the State Bar of California, Litigation Section, Jury Instruction Subcommittee	In light of *Harris v. City of Santa Monica* (2010) 181 Cal. App. 4th 1094, the third element should read: "'that plaintiff's protected activity/disability was a motivating factor/reason in	*Harris*, should it become final (petition for review filed), will require the committee's attention. But the holding of *Harris* is that there is a valid affirmative defense of mixed motive. It would not affect the elements of

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		discriminating/retaliating/failing to hire/taking of the adverse action and that the employer's nondiscriminatory reasons to take the same actions would have lead the employer to take the same action."	2540.
2541: Disability Discrimination—Reasonable Accommodation—Essential Factual Elements	Reuben Ginsberg Research Attorney, California Court of Appeal, Second Appellate District	The use of "believed" instead of "thought that" or "treated as" in element 3 would be consistent with the above recommendation for CACI No. 2540. I would revise element 3 to read as follows: "That [[name of plaintiff had/[name of defendant] believed that [name of plaintiff] had] [a] [e.g., physical condition] [that limited [insert major life activity]];]"	See response above to this commentator's comment to CACI No. 2540.
	Orange County Bar Association by Lei Lei-Wang Ekvall, President	There is no reason or explanation given for the necessity of the proposed changes at Element 3. As these could be seen as substantive, we disagree with the proposal.	The committee's role is to consider substantive changes to the CACI instructions. As the commentator has provided no other reasons for the disagreement, the committee is unable to respond.
	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
VF-2508: Disability Discrimination—Disparate Treatment	Reuben Ginsberg Research Attorney, California Court of Appeal, Second Appellate District	The two sentences in question No. 3 could be restated in a single sentence: "[Did [*name of defendant*] [know/believe] that [*name of plaintiff*] had [a history of having] [a] [*select term to describe basis of limitations, e.g., physical condition*] [that limited [insert major life activity]]?	As noted above, the committee does not think that "believe" is preferable to "treat" to express perceived disability. However, the committee agrees that the two options can be combined into a single question 3 by inserting "[a history of having" into the first option and has made this change.
	State Bar of California,	The Jury Instruction Subcommittee of the	No response required.

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Instruction	Commentator	Summary of Comment	Committee Response
	Litigation Section, Jury Instruction Subcommittee	Litigation Section approves of the proposed charge.	
VF-2514: : Failure to Prevent Harassment, Discrimination, or Retaliation	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
3016: Retaliation—Essential Factual Elements	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
3213 (Song-Beverly) Affirmative Defense—Statute of Limitations	Mark F. Anderson Attorney Anderson, Ogilvie & Brewer, San Francisco, Norman F. Taylor Attorney Taylor & Associates Glendale (the commentators submitted almost the same letter)	I have no objection to the proposed new instruction, which correctly states the law. However, the last paragraph of the Directions for Use regarding shortening the limitation period by agreement confuses Commercial Code applications with those of the Song-Beverly Consumer Warranty Act. When the two are in conflict, Song-Beverly should prevail. It is clear that in commercial transactions, the parties may reduce the statute of limitations to one year, but that is not the case in Song-Beverly cases. Civil Code Section 1790.3, states "where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of this chapter, the provisions of this chapter shall prevail." There is a conflict between giving a manufacturer the right to impose a one year statute of limitations and the buyer's rights under the Song-Beverly Act.	While no case clearly holds that this provision of the Commercial Code does not apply under Song-Beverly, the committee believes that the two statutes cited by the commentator clearly indicate that inapplicability is the highly probable result should a court address the issue. The committee did not take the reference to shortening the limitation period by agreement out entirely, but noted in the Directions for Use that this possibility "presumably" does not apply under Song-Beverly.

Instruction	Commentator	Summary of Comment	Committee Response
		Also, Civil Code section 1790.1 prohibits any waiver by the buyer of consumer goods of the provisions of the Act. Giving the manufacturer the right to reduce the statute of limitations to one year is a waiver of the buyer's rights.	
	Consumer Attorneys of California, by Christopher B. Dolan, President	The proposed new instruction accurately recites that a consumer has four years to bring suit for a claim of breach of warranty under Song-Beverly. However, we are concerned that including language in the Directions for Use regarding shortening the limitation period in the original agreement will have an unintended consequence of shortening the period to one year. This issue might arise if a manufacturer gives a three-year express warranty, but the warranty includes a one-year limitation period. This effectively bars the consumer's ability to enforce his or her rights under the Song-Beverly Act after one year. This is at odds with the spirit and intent of the Song-Beverly Act, which has been recognized to provide more extensive consumer protections than the Uniform Commercial Code. (See *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235, 1240; *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 294, 301.)	See response to commentators Anderson and Taylor above.
	John Jacobs Attorney	I completely agree with Mark Anderson's analysis and concerns regarding the	See response to commentators Anderson and Taylor above.

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Instruction	Commentator	Summary of Comment	Committee Response
	Rocklin	"Directions for Use." He is right that this would likely lead to manufacturers taking advantage of consumers. The protections of the Song-Beverly Act should not be watered down or put at risk. The proposed language is just not acceptable.	
	Orange County Bar Association, by Lei Lei-Wang Ekvall, President	The proposed instruction includes an option requiring the defendant to prove "[the date of delivery occurred before [*insert date four years before filing of complaint*].]" The phrase "the date of delivery" should be replaced with the phrase "the tender of delivery." This change would make the instruction consistent with U. Com. Code, § 2725(2), which states: "A breach of warranty occurs when tender of delivery is made…" The instruction would also be consistent with other commercial statutes that use "tender of delivery" as a distinct term of art. (See, e.g., U. Com. Code, § 2503(1) ["Tender of delivery requires that the seller put and hold conforming goods at the buyer's disposition and give the buyer any notification reasonably necessary to enable him to take delivery"].)	The committee added "[tender of]" as optional language to be added if tender, rather than actual delivery, is alleged. The concept of tender is a technical commercial one, and need not be mentioned to the jury unless some aspect of it is at issue.
	State Bar of California, Committee on Administration of Justice	Recommendation: Approve the proposed revision.	No response required.
	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.

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Instruction	Commentator	Summary of Comment	Committee Response
	Unidentified member of the State Bar of California, Litigation Section, Jury Instruction Subcommittee	The proposed instruction is fine. However, I would add to the end of title "(Cal. U. Com. Code § 2725).	The committee added the citation to the title.
3221: Affirmative Defense—Disclaimer of Implied Warranties	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
3713: Nondelegable Duty	Orange County Bar Association, by Lei Lei-Wang Ekvall, President	The proposed instruction is satisfactory. But in the "Sources and Authority," the *Felmlee* excerpt is ungrammatical. It reads: " 'Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure safety of others,' but concluded [sic] that the municipal ordinance on which the plaintiff worker relied did not give rise to a nondelegable duty because it did not concern specific safeguards. (*Felmlee v. Falcon Cable Co.* (1995) 36 Cal.App.4th 1032, 1039 [43 Cal.Rptr.2d 158].)" It should be revised to read: " 'Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure safety of others,' but not when the relevant statute or ordinance does not concern specific safeguards."	This was an error in the file posted for the Invitation to Comment. It has been fixed. All words after "others" are deleted.
	State Bar of California, Committee on Administration of Justice	There is a need to separate out nondelegable duty based on a relationship with others from nondelegable duty imposed by statute,	The committee does not believe that two separate instructions are needed. The last part of the current instruction is really a

Instruction	Commentator	Summary of Comment	Committee Response
		ordinance, or regulation. Reason: Having separate instructions for the more general nondelegable duty imposed under common law based on the relationship between the parties and the more specific nondelegable duty imposed by statute, ordinance, or regulation would make the instructions clearer and easier to use. It also provides for more specific Sources and Authority concerning the use of each instruction. The commentator then sets forth specific language for both instructions. The first (general) instruction would closely track the committee's proposed revision, but with references to statutes, ordinances, or regulations omitted. The second instruction would include the committee's revised opening paragraph but with only the statutes, etc. part. The four elements from the revised instruction are included. The purported defense at the end of the current instruction with its two elements would be retained.	defense. The second element is that the contractor was not negligent. This is simply a fundamental principle of vicarious liability; a principal cannot be liable for the acts of its agent if the agent has no liability for those acts. So given that this part of the current instruction should be removed, there is little difference left in the commentator's two instructions. The committee believes that its proposed opening paragraph with its options is sufficiently clear. The committee's particular concerns with the commentator's proposed language are addressed in the comments that follow.
		With regard to the proposed instruction based on a contractual or common-law duty, the opening paragraph should read: [*Name of defendant*] has a duty that cannot be delegated to another person arising from [a contract between the parties/*other relationships between the parties, e.g., the*	The committee does not think that the commentator's proposed opening paragraph is clearer than the proposed instruction. Also, there is a disconnection in what is proposed by the commentator between the instruction, which attempts to state the duty broadly, and the Directions for Use, which treats the instruction as limited to

Instruction	Commentator	Summary of Comment	Committee Response
		landlord-tenant relationship]. Under this duty, [*name of defendant*], by contract or other relationship, [e.g. owner/lessor/possessor] owes a nondelegable duty to others to put and maintain it [e.g., the land] in reasonably safe condition. The Directions for Use should read: "Use this instruction with regard to the liability of the hirer for the torts of an independent contractor involving putting or maintaining property in reasonably safe condition. (*Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 260; *Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726.)"	maintaining property in a safe condition.
		The commentator proposes numerous additions to the Sources and Authority for both of its proposed instructions.	The commentator's proposed additions are not case excerpts. They are practice-guide type paragraphs distilling legal principles from cases. This is not the CACI format for Sources and Authority, so they cannot be added. Nevertheless, the committee has considered each proposed addition to see if there are helpful case excerpts that can or should be added. See responses below.
		Add to Sources and Authority: The nondelegable duty rule does not include situations where the independent contractor is not hired to put or maintain the premises in a safe condition and the dangerous condition does not exist until the contractor creates it	*Lopez* is an injury to employee of contractor case, which is CACI No. 1009C. The committee does not see any need to find an excerpt to add to the Sources and Authority for this instruction.

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		by negligently performing the job it was hired to do. (See *Lopez v. University Partners* (1997)54 Cal.App.4th 1117, 1129, fn. 7- employee of independent contractor, hired to excavate storage tanks, injured while doing excavation work on the property because of failure to shore trench.)	
		Add to Sources and Authority: In cases involving injury to employee of independent contractor, even if a safety statute such as OSHA or other safety regulation is nondelegable, the injured party must demonstrate a hirer's affirmative contribution to the injury. (*Millard v. Biosources, Inc*. (2007) 156 Cal.App.4th 1338; *Madden v. Summit View* (2008) 165 Cal.App.4th 1267, 1280; *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 673-674.) Safety statutes, standing alone, do not circumvent the affirmative contribution requirement under *Privette v. Superior Court* (1993) 5 Cal.4th 689.)	These cases are also within the subject of CACI No. 1009C, not 3713.
		Add to Sources and Authority: A homeowner who hires someone who qualifies as an employee under the Labor Code to perform "household domestic service" at his home is not required to comply with Cal-OSHA safety regulations. (See *Cortez v. Abich* (2009) 177 Cal.App.4th 261, 267–269; *Fernandez v. Lawson* (2003) 31 Cal.4th 31.) A household remodel project	Review has been granted in *Cortez* (S177075). *Fernandez* involved an owner's liability for injury to an independent contractor incurred in the course of performing the task. Nondelegable duty was not an issue.

Instruction	Commentator	Summary of Comment	Committee Response
		is a "household domestic service." (*Cortez, supra*, at p. 268.) Tree trimming also qualifies as a "household domestic service." (*Fernandez, supra*, 31 Cal.4th at p. 37.) In determining whether OSHA applies to a home project, the court looks to the status of the hirer. That is, the *Cortez* court found it unlikely the Legislature intended the complex regulatory scheme addressed to commercial enterprises to apply to a homeowner who is not equipped to understand and comply with OSHA requirements. (*Cortez, supra*, at p. 268.) While not every project undertaken by a homeowner is exempt from the application of OSHA regulations, if the purpose is personal—to enhance the owner's enjoyment of his residence—the project is exempt. (*Id*.)	
		Add to Sources and Authority: In cases involving injury to employee of independent contractor, even if a safety statute such as OSHA or other safety regulation is nondelegable, the injured party must demonstrate a hirer's affirmative contribution to the injury. (*Millard v. Biosources, Inc*. (2007) 156 Cal.App.4th 1338; *Madden v. Summit View* (2008) 165 Cal.App.4th 1267, 1280; *Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 673-674.) Safety statutes, standing alone, do not circumvent the affirmative contribution requirement under *Privette v. Superior Court* (1993) 5 Cal.4th 689.) But, non-hirer	These cases are also within the subject of CACI No. 1009C, not 3713.

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Instruction	Commentator	Summary of Comment	Committee Response
		subcontractor may be held liable for injury to employee of general contractor resulting from non-hirer subcontractor's nonfeasance/failure-to-act in violation of OSHA regulation. (*Suarez v. Pacific Northstar Mechanical* (2009) 180 Cal.App.4th 430.)	
	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
4102: Duty of Undivided Loyalty	State Bar of California, Committee on Administration of Justice	Recommendation: Approve the proposed revision.	No response required.
	State Bar of California, Litigation Section, Jury Instruction Subcommittee	The Jury Instruction Subcommittee of the Litigation Section approves of the proposed charge.	No response required.
4304: Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements	Reuben Ginsberg, Research Attorney, Second Appellate District	The proposed revisions to the Directions for Use indicate that the purpose of moving current paragraph 5 to an unnumbered paragraph at the end of the instruction is to remove the substantial violation issue from the plaintiff's burden of proof. In my view, moving the paragraph to the end of the instruction does not accomplish this. Instead, the final paragraph in the revised instruction appears to modify element 4, so the plaintiff must prove not only that the defendant failed to perform the requirements but also that the failure to perform was a substantial violation of an important obligation. I believe that the way to remove the substantial violation issue from the plaintiff's burden of proof is to eliminate that language (current paragraph 5)	The committee believes that substantiality cannot be expressed as or with an element because it is not clear that the landlord has the burden of proof. That would preclude a construction that the last paragraph is somehow a modification of element 4.

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		from the instruction entirely. The Directions for Use could then identify the issue and state that which party has the burden of proof on the issue is unsettled.	
	Unidentified member of the State Bar of California, Litigation Section, Jury Instruction Subcommittee	"I would leave the instruction the way it was with the old element 5 in the instruction rather than optional at the end.	See response to commentator Reuben Ginsberg above.
4320: Affirmative Defense—Implied Warranty of Habitability	Reuben Ginsberg Research Attorney, California Court of Appeal, Second Appellate District	Civil Code section 1942.4(a) makes it clear that the relevant period when rent, in the words of the proposed revision, "was due and not paid," is the time before service of a notice to pay rent or quit. I believe that the instruction should specify the relevant time period rather than refer more generally to the time when rent "was due and not paid." The rent likely was unpaid after the notice was served as well, but the presence of uninhabitable conditions after the notice was served would not justify the nonpayment of rent due before the notice. I would modify the first paragraph of the instruction to read as follows (proposed revisions underlined): "[*Name of defendant*] claims that [he/she] does not owe [any/the full amount of] rent because [*name of plaintiff*] did not maintain the property in a habitable condition <u>before [*name of defendant*] was served a notice to pay rent or quit</u>. To succeed on this defense, [*name of defendant*] must prove that [*name of plaintiff*] substantially failed to provide one or more of the following <u>before [*name of*</u>	The committee agrees that the instruction should foreclose the possibility of asserting a habitability defense for conditions that arose after eviction notice was given. However, the committee thought that the commentator's proposed language was unduly complex. Instead, it simplified the current opening paragraph by removing reference to a time period and then addressed the timing issue in the paragraph that follows the list of factors. The committee also removed "substantially" from the opening paragraph. It is addressed in the later paragraph.

Instruction	Commentator	Summary of Comment	Committee Response
		defendant] was served a notice to pay rent or quit:"	
4321: Affirmative Defense—Retaliatory Eviction—Tenant's Complaint	Reuben Ginsberg, Research Attorney, Second Appellate District	Civil Code section 1942.5(a) states that if the landlord retaliates against the tenant for certain actions, and if the tenant is not in default as to the payment of rent ("if the lessee of a dwelling is not in default as to the payment of his rent"), the landlord may not recover possession in a legal proceeding, or take other specified actions, within 180 days after certain specified events. Thus, the absence of a default as to the payment of rent is an essential element of the affirmative defense on which the defendant asserting the defense should have the burden of proof. (Evid. Code, § 500.) Accordingly, I believe that element 1 should be retained and should not be deleted.	See response to Orange County Bar Association comment below.
	Orange County Bar Association, by Lei Lei-Wang Ekvall, President	The proposal is to remove old element 1 ("That (*name of defendant*) was not in default on payment of (his/her/its rent") as an element of the affirmative defense because apparently it is believed that it is landlord's primary duty to prove the nonpayment in its case-in-chief. However, not all landlords are evicting solely for nonpayment of rent so the payment of rent element must be a part of the defendant's elements pursuant to the plain language of Civil Code 1942.5(a) – if the lessee is not in default of rent payments then the affirmative defense may be available.	The committee agrees with the commentator and has restored element 1 to the instruction, but in brackets because it would only apply if the ground for the unlawful detainer is something other than nonpayment of rent.
	Unidentified member of the State Bar of California,	"I do not agree with all of the proposed changes. Civ. Code, § 1942.5(a) still states:	See response to Orange County Bar Association comment above.

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	Litigation Section, Jury Instruction Subcommittee	" ... if the lessee of a dwelling is not in default as to payment of his rent, ... " Therefore, I would leave element 1 in the instruction.	
		I agree with the added language at the end of the instruction as there may be other legitimate reasons for the landlord's eviction (i.e., failure to maintain premises, having too many occupants, restricted pets, etc.)"	No response required.
4324: Affirmative Defense—Waiver by Acceptance of Rent	Reuben Ginsberg Research Attorney, California Court of Appeal, Second Appellate District	I would modify the proposed language in the Directions for Use to read as follows for greater clarity: "This affirmative defense is a defense to the breach of a covenant prohibiting a sublease or assignment only if the landlord received written notice of the sublease or assignment from the tenant and accepted rent thereafter. (Civ. Code, § 1954.53(d)(4).)"	The committee agrees that the commentator's proposed sentence is an improvement and has revised this sentence.
	Orange County Bar Association, by Lei Lei-Wang Ekvall, President	Agree with all new and revised instructions except as indicated above	No response required
	Superior Court of California County of San Diego by Michael Roddy, Chief Executive Officer	Agree with all new and revised instructions	No response required
	Diana Valenzuela, Operations Manager, Superior Court of California	Agree with all new and revised instructions	No response required

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CIVIL JURY INSTRUCTIONS (CACI 10–01)
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101. Overview of Trial

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

[[*Name of plaintiff***] claims [***insert description of the plaintiff's claim(s)***]. [***Name of defendant***] denies those claims. [[***Name of defendant***] also contends that [***insert description of the defendant's affirmative defense(s)***].]]**

[[*Name of cross-complainant***] has also filed what is called a cross complaint against [***name of cross-defendant***]. [***Name of cross-complainant***] is the defendant, but also is called the cross-complainant. [***Name of cross-defendant***] is called a cross-defendant.]**

[In [his/her/its] cross-complaint, [*name of cross-complainant***] claims [***insert description of the cross-complainant's claim(s)***]. [***Name of cross-defendant***] denies those claims. [[***Name of cross-defendant***] also contends that [***insert description of the cross-defendant's affirmative defense(s) to the cross-complaint***].]]**

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

Next, the jury will hear the evidence. [*Name of plaintiff***] will present ~~[his/her/its]~~ evidence first. When [***name of plaintiff***] is finished, [***name of defendant***] will have an opportunity to present ~~[his/her/its]~~ evidence. [Then [***name of cross-complainant***] will present evidence. Finally, [***name of cross-defendant***] will present evidence.]**

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

Documents or objects referred to during the trial are called exhibits. Exhibits are given a [number/letter] ~~and marked~~ so that they may be clearly identified. Exhibits are not evidence until I admit them into evidence. During your deliberations, you will be able to look at all exhibits admitted into evidence.

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

After the evidence has been presented, I will instruct you on the law that applies to the case

and the attorneys will make closing arguments. What the parties say in closing argument is not evidence. The arguments are offered to help you understand the evidence and how the law applies to it.

~~**[In this case, [***name of plaintiff***] claims [***insert description of the elements of plaintiff's claim(s)***].**~~
~~**[***Name of defendant***] claims [***insert description of the elements of defendant's affirmative defense(s) and/or cross-complaint***].]**~~

New September 2003; Revised February 2007, June 2010

Directions for Use

This instruction is intended to provide a "road map" for the jurors. This instruction should be read in conjunction with CACI No. 100, *Preliminary Admonitions*.

The bracketed second, third, and fourth paragraphs are optional. The court may wish to use these paragraphs to provide the jurors with an explanation of the claims and defenses that are at issue in the case. Include the third and fourth paragraphs if a cross-complaint is also being tried. Include the last sentence in the second and fourth paragraphs if affirmative defenses are asserted on the complaint or cross-complaint.

The sixth paragraph presents the order of proof. If there is a cross-complaint, include the last two sentences. Alternatively, the parties may stipulate to a different order of proof—for example, by agreeing that some evidence will apply to both the complaint and the cross-complaint. In this case, customize this paragraph to correspond to the stipulation.
~~Throughout these instructions, the names of the parties should be inserted as indicated. This instruction should be modified to reflect the number of plaintiffs and defendants involved in the suit.~~

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

~~The bracketed last paragraph is optional. At its discretion, the court may wish to use this paragraph to provide jurors with a brief description of the claims and defenses that are at issue in the case.~~

Sources and Authority

- Rule 2.1035 of the California Rules of Court provides: "Immediately after the jury is sworn, the trial judge may, in his or her discretion, preinstruct the jury concerning the elements of the charges or claims, its duties, its conduct, the order of proceedings, the procedure for submitting written questions for witnesses as set forth in rule 2.1033 if questions are allowed, and the legal principles that will govern the proceeding."

- "[W]e can understand that it might not have seemed like [cross-complainants] were

producing much evidence on their cross-complaint at trial. Most of the relevant (and undisputed) facts bearing on the legal question of whether [cross-defendants] had a fiduciary duty and, if so, violated it, had been brought out in plaintiffs' case-in-chief. But just because the undisputed evidence favoring the cross-complaint also happened to come out on plaintiffs' case-in-chief does not mean it was not available to support the cross-complaint." (*Le v. Pham* (2010) 180 Cal.App.4th 1201, 1207 [103 Cal.Rptr.3d 606].)

- Code of Civil Procedure section 607 provides:

  When the jury has been sworn, the trial must proceed in the following order, unless the court, for special reasons otherwise directs:

  1. The plaintiff may state the issue and his case;

  2. The defendant may then state his defense, if he so wishes, or wait until after plaintiff has produced his evidence;

  3. The plaintiff must then produce the evidence on his part;

  4. The defendant may then open his defense, if he has not done so previously;

  5. The defendant may then produce the evidence on his part;

  6. The parties may then respectively offer rebutting evidence only, unless the court, for good reason, in furtherance of justice, permit them to offer evidence upon their original case;

  7. When the evidence is concluded, unless the case is submitted to the jury on either side or on both sides without argument, the plaintiff must commence and may conclude the argument;

  8. If several defendants having separate defenses, appear by different counsel, the court must determine their relative order in the evidence and argument;

  9. The court may then charge the jury.

Secondary Sources

7 Witkin, California Procedure (~~4th~~ 5th ed. ~~1997~~2008) Trial, § ~~161~~147~~, pp. 189–190~~

Wagner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group) ¶¶ 1:427–1:432; 4:460–4:463

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.50 (Matthew Bender)

113. Bias

Each one of us has biases about or certain perceptions or stereotypes of other people. We may be aware of some of our biases, though we may not share them with others. We may not be fully aware of some of our other biases.

Our biases often affect how we act, favorably or unfavorably, toward someone. Bias can affect our thoughts, how we remember, what we see and hear, whom we believe or disbelieve, and how we make important decisions.

As jurors you are being asked to make very important decisions in this case. You must not let bias, prejudice, or public opinion influence your decision.

Your verdict must be based solely on the evidence presented. You must carefully evaluate the evidence and resist any urge to reach a verdict that is influenced by bias for or against any party or witness.

New June 2010

The committee wishes to express its thanks to Judge Mark W. Bennett of the United States District Court for the Northern District of Iowa, for his assistance in the drafting of this instruction.

Sources and Authority

- Standard 10.20(a)(2) of the California Standards of Judicial Administration provides: "In all courtroom proceedings, refrain from engaging in conduct and prohibit others from engaging in conduct that exhibits bias, including but not limited to bias based on disability, gender, race, religion, ethnicity, and sexual orientation, whether that bias is directed toward counsel, court personnel, witnesses, parties, jurors, or any other participants."

- Canon 3(b)(5) of the California Code of Judicial Ethics provides: "A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, engage in speech, gestures, or other conduct that would reasonably be perceived as (1) bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, or (2) sexual harassment." Canon 3(b)(6) requires the judge to impose these standards on attorneys.

Secondary Sources

Witkin, California Procedure (5th ed. 2008) Trial, § 132

1 California Trial Guide, Unit 10, *Voir Dire Examination*, §§ 10.03[1], 10.21[2], 10.50, 10.80, 10.100 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 6, *Jury Selection*, § 6.21

450. Good Samaritan

REVOKED

Legislation amending Health and Safety Code section 1799.102 was enacted in August 2009, in response to the California Supreme Court's decision in *Van Horn v. Watson* (2008) 45 Cal.4th 322, which construed that statute to apply only to immunize good samaritans who provide medical care at the scene of a medical emergency. Because CACI 450, as currently written, does not comport with the specific language of the revised statute and the cited authorities no longer apply, the current instruction must be revoked. A replacement instruction will be considered in the next CACI release cycle.

[*Name of defendant***] claims that [he/she] is not responsible for [***name of plaintiff***]'s harm because [he/she] was voluntarily trying to protect [***name of plaintiff***] from harm. If you decide that [***name of defendant***] was negligent, [he/she] is not responsible unless [***name of plaintiff***] proves both of the following:**

1. [(a) That [*name of defendant***]'s failure to use reasonable care added to the risk of harm;]**

[or]

[(b) That [*name of defendant***]'s conduct caused [***name of plaintiff***] to reasonably rely on [his/her] protection;]**

AND

2. That the [additional risk/reliance] was a substantial factor in causing harm to [*name of plaintiff***].**

New September 2003; Revised December 2007

Directions for Use

This issue would most likely come up in an emergency situation, but not always. For this instruction to be appropriate, the harm must result from either 1(a) or (b) or both. Either or both 1(a) or (b) should be selected, depending on the facts.

Sources and Authority

- "Under well-established common law principles, a person has no duty to come to the aid of another. If, however, a person elects to come to someone's aid, he or she has a duty to exercise due care. Thus, a 'good Samaritan' who attempts to help someone might be liable if he or she does not exercise due care and ends up causing harm." (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 324 [86 Cal.Rptr.3d 350, 197 P.3d 164], internal citations omitted.)

- "A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act. Also pertinent to our discussion is the role of the volunteer who, having no initial duty to do so, undertakes to come to the aid of another—the 'good Samaritan.' ... He is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 [192 Cal.Rptr. 233, 664 P.2d 137], internal citations omitted.)

- Restatement Second of Torts, section 323, provides: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: his failure to exercise such care increases the risk of such harm, or the harm is suffered because of the other's reliance upon the undertaking."

- Cases involving police officers who render assistance in non-law enforcement situations involve "no more than the application of the duty of care attaching to any volunteered assistance." (*Williams, supra*, 34 Cal.3d at pp. 25–26.)

- "An employer generally owes no duty to his prospective employees to ascertain whether they are physically fit for the job they seek, but where he assumes such duty, he is liable if he performs it negligently. The obligation assumed by an employer is derived from the general principle expressed in section 323 of the Restatement Second of Torts, that one who voluntarily undertakes to perform an action must do so with due care." (*Coffee v. McDonnell-Douglas Corp.* (1972) 8 Cal.3d 551, 557 [105 Cal.Rptr. 358, 503 P.2d 1366], internal citations omitted.)

- Statutory exceptions to Good Samaritan liability include immunities under certain circumstances for medical licensees (Bus. & Prof. Code, §§ 2395–2398), nurses (Bus. & Prof. Code, §§ 2727.5, 2861.5), dentists (Bus. & Prof. Code, § 1627.5), rescue teams (Health & Saf. Code, § 1317(f)), persons rendering emergency medical services (Health & Saf. Code, § 1799.102; see *Van Horn, supra*, 45 Cal.4th at p. 324), paramedics (Health & Saf. Code, § 1799.104), and first-aid volunteers (Gov. Code, § 50086).

Secondary Sources

4 Witkin, California Procedure (4th ed. 1996) Pleadings, § 553

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1060–1065

Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group) ¶¶ 2:583.10–2:583.11, 2:876

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.11 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

~~33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[5][c] (Matthew Bender)~~

~~16 California Points and Authorities, Ch. 165, *Negligence*, § 165.150 (Matthew Bender)~~

1001. Basic Duty of Care

A person who [owns/leases/occupies/controls] property is negligent if he or she fails to use reasonable care to keep the property in a reasonably safe condition. A person who [owns/leases/occupies/controls] property must use reasonable care to discover any unsafe conditions and to repair, replace, or give adequate warning of anything that could be reasonably expected to harm others.

In deciding whether [*name of defendant***] used reasonable care, you may consider, among other factors, the following:**

(a) The location of the property;

(b) The likelihood that someone would come on to the property in the same manner as [*name of plaintiff***] did;**

(c) The likelihood of harm;

(d) The probable seriousness of such harm;

(e) Whether [*name of defendant***] knew or should have known of the condition that created the risk of harm;**

(f) The difficulty of protecting against the risk of such harm; [and]

(g) The extent of [*name of defendant***]'s control over the condition that created the risk of harm; [and]**

(h) [*Other relevant factor(s).***]**

New September 2003; Revised June 2010

Directions for Use

Not all of these factors will apply to every case. Select those that are appropriate to the facts of the case.

Under the doctrine of nondelegable duty, a property owner cannot escape liability for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 260 [28 Cal.Rptr.2d 672].) For an instruction for use with regard to a landowner's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

- "Broadly speaking, premises liability alleges a defendant property owner allowed a dangerous condition on its property or failed to take reasonable steps to secure its property against criminal acts by third parties." (*Delgado v. American Multi-Cinema, Inc.* (1999) 72 Cal.App.4th 1403, 1406, fn. 1 [85 Cal.Rptr.2d 838], internal citation omitted.)

- A landowner owes a duty to exercise reasonable care to maintain his or her property in such a manner as to avoid exposing others to an unreasonable risk of injury. (*Alcaraz v. Vece* (1997) 14 Cal.4th 1149, 1156 [60 Cal.Rptr.2d 448, 929 P.2d 1239]; *Scott v. Chevron U.S.A.* (1992) 5 Cal.App.4th 510, 515 [6 Cal.Rptr.2d 810].) The failure to fulfill the duty is negligence. (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 371-372 [178 Cal.Rptr. 783, 636 P.2d 1121].) The existence of a duty of care is an issue of law for the court. (*Alcaraz, supra,* 14 Cal.4th at p. 1162, fn. 4.)

- "It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], internal citations omitted.)

- "The proper test to be applied to the liability of the possessor of land ... is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others ... ." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97, 443 P.2d 561].)

- A visitor's status on the property-as a trespasser, a licensee, or an invitee-no longer establishes the extent of the owner's duties to the visitor, although status may be relevant to the specific nature or scope of those duties or to the foreseeability that the visitor might be harmed. (*Ann M., supra,* 6 Cal.4th at pp. 674-675.)

- "As stated in *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 25 [77 Cal.Rptr. 914], '[t]he term "invitee" has not been abandoned, nor have "trespasser" and "licensee." In the minds of the jury, whether a possessor of the premises has acted as a reasonable man toward a plaintiff, in view of the probability of injury to him, will tend to involve the circumstances under which he came upon defendant's land; and the probability of exposure of plaintiff and others of his class to the risk of injury; as well as whether the condition itself presented an unreasonable risk of harm, in view of the foreseeable use of the property.' Thus, the court concluded, and we agree, *Rowland* 'does not generally abrogate the decisions declaring the substantive duties of the possessor of land to invitees nor those establishing the correlative rights and duties of invitees.' (*Id*., at p. 27.)" (*Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 486-487 [227 Cal.Rptr. 465], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "The distinction between artificial and natural conditions [has been] rejected." (*Sprecher, supra,* 30 Cal.3d at p. 371.)

- "It must also be emphasized that the liability imposed is for negligence. The question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition are among the factors to be considered by the trier of fact in evaluating the reasonableness of a defendant's conduct." (*Sprecher, supra,* 30 Cal.3d at p. 372.)

- "A landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off-site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury off-site." (*Barnes v. Black* (1999) 71 Cal.App.4th 1473, 1478-1479 [84 Cal.Rptr.2d 634], internal citations omitted.)

- "The duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition, irrespective of whether the contractor's negligence lies in his incompetence, carelessness, inattention or delay." (*Brown, supra*, 23 Cal.2d at p. 260.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1086

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.01 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, §§ 170.01, 170.03, 170.20 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.01 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.50 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.11 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.20 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 16:3

1006. Landlord's Duty

A landlord must conduct reasonable periodic inspections of rental property whenever the landlord has the legal right of possession. Before giving possession of leased property to a tenant [or on renewal of a lease] [or after retaking possession from a tenant], a landlord must conduct a reasonable inspection of the property for unsafe conditions and must take reasonable precautions to prevent injury due to the conditions that were or reasonably should have been discovered in the process. The inspection must include common areas under the landlord's control.

After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the landlord's control if the landlord knows or reasonably should have known about it.

[After a tenant has taken possession, a landlord must take reasonable precautions to prevent injury due to any unsafe condition in an area of the premises under the tenant's control if the landlord has actual knowledge of the condition and the right and ability to correct it.]

New September 2003; Revised April 2008, April 2009, December 2009, June 2010

Directions for Use

Give this instruction with CACI No. 1000, *Essential Factual Elements,* CACI No. 1001, *Basic Duty of Care,* and CACI No. 1003, *Unsafe Conditions,* if the injury occurred on rental property and the landlord is alleged to be liable. Include the last paragraph if the property is not within the landlord's immediate control.

Include "or on renewal of a lease" for commercial tenancies. (See *Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669].) While no case appears to have specifically addressed a landlord's duty to inspect on renewal of a residential lease, it would seem impossible to impose such a duty with regard to a month-to-month tenancy. Whether there might be a duty to inspect on renewal of a long-term residential lease appears to be unresolved.

Under the doctrine of nondelegable duty, a landlord cannot escape liability for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 726 [28 Cal.Rptr.2d 672].) For an instruction for use with regard to a landlord's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

- "A landlord owes a duty of care to a tenant to provide and maintain safe conditions on the leased premises. This duty of care also extends to the general public. 'A lessor who leases property for a purpose involving the admission of the public is under a duty to see that it is safe for the purposes intended, and to exercise reasonable care to inspect and repair the premises before possession is

transferred so as to prevent any unreasonable risk of harm to the public who may enter. An agreement to renew a lease or relet the premises ... cannot relieve the lessor of his duty to see that the premises are reasonably safe at that time.' [¶] Where there is a duty to exercise reasonable care in the inspection of premises for dangerous conditions, the lack of awareness of the dangerous condition does not generally preclude liability. 'Although liability might easily be found where the landowner has actual knowledge of the dangerous condition "[t]he landowner's lack of knowledge of the dangerous condition is not a defense. He has an affirmative duty to exercise ordinary care to keep the premises in a reasonably safe condition, and therefore must inspect them or take other proper means to ascertain their condition. And if, by the exercise of reasonable care, he would have discovered the dangerous condition, he is liable." ' " (*Portillo v. Aiassa* (1994) 27 Cal.App.4th 1128, 1134 [32 Cal.Rptr.2d 755], internal citations omitted.)

- "Historically, the public policy of this state generally has precluded a landlord's liability for injuries to his tenant or his tenant's invitees from a dangerous condition on the premises which comes into existence after the tenant has taken possession. This is true even though by the exercise of reasonable diligence the landlord might have discovered the condition. [¶] The rationale for this rule has been that property law regards a lease as equivalent to a sale of the land for the term of the lease. As stated by Prosser: 'In the absence of agreement to the contrary, the lessor surrenders both possession and control of the land to the lessee, retaining only a reversionary interest; and he has no right even to enter without the permission of the lessee. Consequently, it is the general rule that he is under no obligation to anyone to look after the premises or keep them in repair, and is not responsible, either to persons injured on the land or to those outside of it, for conditions which develop or are created by the tenant after possession has been transferred. Neither is he responsible, in general, for the activities which the tenant carries on upon the land after such transfer, even when they create a nuisance.' " (*Uccello v. Laudenslayer* (1975) 44 Cal.App.3d 504, 510–511 [118 Cal.Rptr. 741], internal citations omitted.)

- "To this general rule of nonliability, the law has developed a number of exceptions, such as where the landlord covenants or volunteers to repair a defective condition on the premises, where the landlord has actual knowledge of defects which are unknown and not apparent to the tenant and he fails to disclose them to the tenant, where there is a nuisance existing on the property at the time the lease is made or renewed, when a safety law has been violated, or where the injury occurs on a part of the premises over which the landlord retains control, such as common hallways, stairs, elevators, or roof. [¶] A common element in these exceptions is that either at or after the time possession is given to the tenant the landlord retains or acquires a recognizable degree of control over the dangerous condition with a concomitant right and power to obviate the condition and prevent the injury. In these situations, the law imposes on the landlord a duty to use ordinary care to eliminate the condition with resulting liability for injuries caused by his failure so to act." (*Uccello, supra,* 44 Cal.App.3d at p. 511, internal citations omitted.)

- "[W]here a landlord has relinquished control of property to a tenant, a 'bright line' rule has developed to moderate the landlord's duty of care owed to a third party injured on the property as compared with the tenant who enjoys possession and control. ' "Because a landlord has relinquished possessory interest in the land, his or her duty of care to third parties injured on the land is attenuated as compared with the tenant who enjoys possession and control. Thus, before liability may be thrust on a landlord for a third party's injury due to a dangerous condition on the land, the plaintiff must show

that the landlord had actual knowledge of the dangerous condition in question, plus the right and ability to cure the condition." [¶] Limiting a landlord's obligations releases it from needing to engage in potentially intrusive oversight of the property, thus permitting the tenant to enjoy its tenancy unmolested.' " (*Salinas v. Martin* (2008) 166 Cal.App.4th 404, 412 [82 Cal.Rptr.3d 735], internal citations omitted.)

- "[A] commercial landowner cannot totally abrogate its landowner responsibilities merely by signing a lease. As the owner of property, a lessor out of possession must exercise due care and must act reasonably toward the tenant as well as to unknown third persons. At the time the lease is executed and upon renewal a landlord has a right to reenter the property, has control of the property, and must inspect the premises to make the premises reasonably safe from dangerous conditions. Even if the commercial landlord executes a contract which requires the tenant to maintain the property in a certain condition, the landlord is obligated at the time the lease is executed to take reasonable precautions to avoid unnecessary danger." (*Mora v. Baker Commodities, Inc.* (1989) 210 Cal.App.3d 771, 781 [258 Cal.Rptr. 669], internal citations omitted.)

- "[T]he landlord's responsibility to inspect is limited. Like a residential landlord, the duty to inspect charges the lessor 'only with those matters which would have been disclosed by a reasonable inspection.' The burden of reducing or avoiding the risk and the likelihood of injury will affect the determination of what constitutes a reasonable inspection. The landlord's obligation is only to do what is reasonable under the circumstances. The landlord need not take extraordinary measures or make unreasonable expenditures of time and money in trying to discover hazards unless the circumstances so warrant. When there is a potential serious danger, which is foreseeable, a landlord should anticipate the danger and conduct a reasonable inspection before passing possession to the tenant. However, if no such inspection is warranted, the landlord has no such obligation." (*Mora, supra,* 210 Cal.App.3d at p. 782, internal citations and footnote omitted.)

- "It is one thing for a landlord to leave a tenant alone who is complying with its lease. It is entirely different, however, for a landlord to ignore a defaulting tenant's possible neglect of property. Neglected property endangers the public, and a landlord's detachment frustrates the public policy of keeping property in good repair and safe. To strike the right balance between safety and disfavored self-help, we hold that [the landlord]'s duty to inspect attached upon entry of the judgment of possession in the unlawful detainer action and included reasonable periodic inspections thereafter." (*Stone v. Center Trust Retail Properties, Inc.* (2008) 163 Cal.App.4th 608, 613 [77 Cal.Rptr.3d 556].)

- "[I]t is established that a landlord owes a duty of care to its tenants to take reasonable steps to secure the common areas under its control." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 675 [25 Cal.Rptr.2d 137, 863 P.2d 207].)

- "The reasonableness of a landlord's conduct under all the circumstances is for the jury. A triable issue of fact exists as to whether the defendants' maintenance of a low, open, unguarded window in a common hallway where they knew young children were likely to play constituted a breach of their duty to take reasonable precautions to prevent children falling out of the window." (*Amos v. Alpha Prop. Mgmt.* (1999) 73 Cal.App.4th 895, 904 [87 Cal.Rptr.2d 34], internal citation omitted.)

- "Simply stated, ' "[t]he duty which a possessor of land owes to others to put and maintain it in

> reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition[.]" ' " (*Srithong, supra,* 23 Cal.App.4th at p. 726.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1142, 1143

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.02 (Matthew Bender)

6 California Real Estate Law and Practice, Ch. 170, *The Premises: Duties and Liabilities*, § 170.03 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 334, *Landlord and Tenant: Claims for Damages*, §§ 334.10, 334.53 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, §§ 421.01–421.121 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.23 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 16:12–16:16

1102. Definition of "Dangerous Condition" (Gov. Code, § 830(a))

A "dangerous condition" is a condition of public property that creates a substantial risk of injury to members of the general public ~~who are using~~when the property [or adjacent property] is used with reasonable care and in a reasonably foreseeable manner. A condition that creates only a minor risk of injury is not a dangerous condition. [Whether the property is in a dangerous condition is to be determined without regard to whether [*name of plaintiff***]/ [or] [***name of third party***] exercised or failed to exercise reasonable care in [his/her] use of the property.]**

New September 2003; Revised June 2010

Directions for Use

Give the last sentence if comparative fault is at issue. It clarifies that comparative fault does not negate the possible existence of a dangerous condition. (See *Fredette v. City of Long Beach* (1986) 187 Cal.App.3d 122, 131 [231 Cal.Rptr. 598].)

Sources and Authority

- Government Code section 830(a) provides: " 'Dangerous condition' means a condition of property that creates a substantial (as distinguished from a minor, trivial or insignificant) risk of injury when such property or adjacent property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

- The Government Code permits the court to decide this issue as a matter of law. Section 830.2 provides: "A condition is not a dangerous condition within the meaning of this chapter if the trial or appellate court, viewing the evidence most favorably to the plaintiff, determines as a matter of law that the risk created by the condition was of such a minor, trivial or insignificant nature in view of the surrounding circumstances that no reasonable person would conclude that the condition created a substantial risk of injury when such property or adjacent property was used with due care in a manner in which it was reasonably foreseeable that it would be used."

- "In general, '[whether] a given set of facts and circumstances creates a dangerous condition is usually a question of fact and may only be resolved as a question of law if reasonable minds can come to but one conclusion.' " (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810 [205 Cal.Rptr. 842, 685 P.2d 1193], internal citation omitted.)

- "An initial and essential element of recovery for premises liability under the governing statutes is proof a dangerous condition existed. The law imposes no duty on a landowner—including a public entity—to repair trivial defects, or 'to maintain [its property] in an absolutely perfect condition.' " (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 566 [78 Cal.Rptr.3d 910], internal citations omitted.)

- "The negligence of a plaintiff-user of public property ... is a defense which may be asserted by a

public entity; it has no bearing upon the determination of a 'dangerous condition' in the first instance. So long as a plaintiff-user can establish that a condition of the property creates a substantial risk to any foreseeable user of the public property who uses it with due care, he has successfully alleged the existence of a dangerous condition regardless of his personal lack of due care. If, however, it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." (*Fredette, supra, ~~v. City of Long Beach~~ (1986)* 187 Cal.App.3d ~~122,~~ at p. 131 ~~[231 Cal.Rptr. 598]~~, internal citation omitted.)

- "Even though it is foreseeable that persons may use public property without due care, a public entity may not be held liable for failing to take precautions to protect such persons." (*Fredette, supra,* 187 Cal.App.3d at p. 132, internal citation omitted.)

- "With respect to public streets, courts have observed 'any property can be dangerous if used in a sufficiently improper manner. For this reason, a public entity is only required to provide roads that are safe for reasonably foreseeable careful use. [Citation.] "If [] it can be shown that the property is safe when used with due care and that a risk of harm is created only when foreseeable users fail to exercise due care, then such property is not 'dangerous' within the meaning of section 830, subdivision (a)." [Citation.]' " (*Sun v. City of Oakland* (2008) 166 Cal.App.4th 1177, 1183 [83 Cal.Rptr.3d 372, internal citations omitted.)

- "Although public entities may be held liable for injuries occurring to reasonably foreseeable users of the property, even when the property is used for a purpose for which it is not designed or which is illegal, liability may ensue only if the property creates a substantial risk of injury when it is used with due care. Whether a condition creates a substantial risk of harm depends on how the general public would use the property exercising due care, including children who are held to a lower standard of care. (§ 830.) The standard is an objective one; a plaintiff's particular condition ..., does not alter the standard." (*Schonfeldt v. State of California* (1998) 61 Cal.App.4th 1462, 1466 [72 Cal.Rptr.2d 464], internal citations omitted.)

- "The majority of cases ... have concluded that third party conduct by itself, unrelated to the condition of the property, does not constitute a 'dangerous condition' for which a public entity may be held liable. ... Nothing in the provisions of section 835, however, specifically precludes a finding that a public entity may be under a duty, given special circumstances, to protect against harmful criminal conduct on its property." (*Peterson, supra,* 36 Cal.3d at pp. 810–811, internal citations omitted.)

- "Two points applicable to this case are ... well established: first, that the location of public property, by virtue of which users are subjected to hazards on adjacent property, may constitute a 'dangerous condition' under sections 830 and 835; second, that a physical condition of the public property that increases the risk of injury from third party conduct may be a 'dangerous condition' under the statutes." (*Bonanno v. Central Contra Costa Transit Authority* (2003) 30 Cal.4th 139, 154 [132 Cal.Rptr.2d 341, 65 P.3d 807].)

- "[T]he absence of other similar accidents is 'relevant to the determination of whether a condition is dangerous.' But the city cites no authority for the proposition that the absence of other similar accidents is dispositive of whether a condition is dangerous, or that it compels a finding of

nondangerousness absent other evidence." (*Lane v. City of Sacramento* (2010) – Cal.App.4th --, --[-- Cal.Rptr.3d --], internal citations omitted.) 2010 Cal. App. LEXIS 528

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 269

2 California Government Tort Liability Practice (Cont.Ed.Bar 4th ed.) § 12.15

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.01[2][a] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Torts Claim Act*, § 464.81 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.11 (Matthew Bender)

1123. Loss of Design Immunity (*Cornette*)

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

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

2. **That [***name of defendant***] had notice of the dangerous condition created because of the change in physical conditions; and**

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

   [or]

   [That [*name of defendant***] was unable to correct the condition due to practical impossibility or lack of funds but did not reasonably attempt to provide adequate warnings of the dangerous condition.]**

New September 2003; Revised June 2010

Directions for Use

Give this instruction if the public entity defendant is entitled to design immunity unless the changed-conditions exception can be established. Read either or both options for element 3 depending on the facts of the case.

A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design before construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1, 26 P.3d 332].) The third element, substantial evidence of reasonableness, must be tried by the court, not the jury. (*Id.* at pp. 66-67; see Gov. Code, § 830.6.) The first two elements, causation and discretionary approval, are issues of fact for the jury to decise. (*Cornette*, *supra*, 26 Cal.4th at pp. 74–75; see also *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 550 [100 Cal.Rptr.3d 494] [elements may only be resolved as issues of law if facts are undisputed].) ~~The judge should make the initial determination establishing design immunity. Two of the elements involved in that determination could potentially become jury issues, b~~But, as a practical matter, these elements are ~~un~~usually stipulated to or otherwise established so they seldom become issues for the jury.

Users should include CACI Nos. 1102, *Definition of "Dangerous Condition"* and 1103, *Notice,* to define "notice" and "dangerous condition" in connection with this instruction. Additionally, the meaning and legal requirements for a "change of physical condition" have been the subject of numerous decisions

involving specific contexts. Appropriate additional instructions to account for these decisions may be necessary.

Sources and Authority

- Government Code section 830.6 provides, in part: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor."

- "~~A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design.~~" ~~(*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1, 26 P.3d 332], internal citations omitted.)~~

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

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

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

jury trial as to the issues involved in loss of design immunity." (*Cornette, supra,* 26 Cal.4th at pp. 66-67.)

Secondary Sources

5 Levy et al., California Torts, Ch. 61, *Particular Liabilities and Immunities of Public Entities and Public Employees*, § 61.03[3][b] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 464, *Public Entities and Officers: California Tort Claims Act*, § 464.85 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.12 (Matthew Bender

VF-1101. Dangerous Condition of Public Property—Affirmative Defense—Reasonable Act or Omission (Gov. Code, § 835.4)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] own [or control] the property?**
   ____ Yes ____ No

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

2. **Was the property in a dangerous condition at the time of the incident?**
   ____ Yes ____ No

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

3. **Did the dangerous condition create a reasonably foreseeable risk that this kind of incident would occur?**
   ____ Yes ____ No

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

4. **[Did negligent or wrongful conduct of [***name of defendant***]'s employee acting within the scope of his or her employment create the dangerous condition?]**
   ____ Yes ____ No

   [or]

   [Did [*name of defendant***] have notice of the dangerous condition for a long enough time to have protected against it?]**
   ____ Yes ____ No

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

5. **Was the dangerous condition a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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

6. **[Answer if you answered yes to the first option for question 4: When you consider the likelihood and seriousness of potential injury, compared with the practicality and cost of either (a) taking alternative action that would not have created the risk of injury, or (b) protecting against the risk of injury, was [***name of defendant***]'s [act/***specify failure to act***] that created the dangerous condition reasonable under the circumstances?]**

____ Yes ____ No

[or]

[Answer if you answered yes to the second option for question 4: When you consider the likelihood and seriousness of potential injury, compared with (a) how much time and opportunity [*name of defendant***] had to take action, and (b) the practicality and cost of protecting against the risk of injury, was [***name of defendant***]'s failure to take sufficient steps to protect against the risk of injury created by the dangerous condition reasonable under the circumstances?]**

____ Yes ____ No

If your answer to [either option for] question 6 is no, then answer question 7. If you answered yes [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

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

[a. Past economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other past economic loss	**$ _____]**

Total Past Economic Damages: $ _____]

[b. Future economic loss

[lost earnings	**$ _____]**
[lost profits	**$ _____]**
[medical expenses	**$ _____]**
[other future economic loss	**$ _____]**

Total Future Economic Damages: $ _____]

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, October 2008

Directions for Use

The special verdict forms in this section 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. 1100, *Dangerous Condition on Public Property—Essential Factual Elements*, CACI No. 1111, *Affirmative Defense—Condition Created by Reasonable Act or Omission,* and CACI No. 1112, *Affirmative Defense—Reasonable Act or Omission to Correct*.

For questions 4 and 6, choose the first bracketed options if liability is alleged because of an employee's negligent conduct under Government Code section 835(a). Use the second bracketed options if liability is alleged for failure to act after actual or constructive notice under Government Code section 835(b). Both options may be given if the plaintiff is proceeding under both theories of liability.

If specificity is not required, users do not have to itemize all the damages listed in question 7. The breakdown is optional depending on the circumstances.

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.

1240. Affirmative Defense to Express Warranty—Not "Basis of Bargain"

REVOKED See *Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal App 4th 1213, 1234

[*Name of defendant*] is not responsible for any harm to [*name of plaintiff*] if [*name of defendant*] proves that [*name of plaintiff*] did not rely on [his/her/its] [statement/description/sample/model] in deciding to [purchase/use] the [*product*].

New September 2003

Sources and Authority

- "Under former provisions of law, a purchaser was required to prove that he or she acted in reliance upon representations made by the seller." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 22 [220 Cal.Rptr. 392].) However, Commercial Code section 2313 does not contain an explicit reliance requirement, leading at least one court to conclude that "[i]t is clear from the new language of this code section that the concept of reliance has been purposefully abandoned." (*Id.* at p. 23.)

- "A warranty statement made by a seller is presumptively part of the basis of the bargain, and the burden is on the seller to prove that the resulting bargain does not rest at all on the representation." (*Keith, supra*, 173 Cal.App.3d at p. 23.)

- "The buyer's actual knowledge of the true condition of the goods prior to the making of the contract may make it plain that the seller's statement was not relied upon as one of the inducements for the purchase, but the burden is on the seller to demonstrate such knowledge on the part of the buyer. Where the buyer inspects the goods before purchase, he may be deemed to have waived the seller's express warranties. But, an examination or inspection by the buyer of the goods does not necessarily discharge the seller from an express warranty if the defect was not actually discovered and waived." (*Keith, supra*, 173 Cal.App.3d at pp. 23-24.)

Secondary Sources

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)

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

1246. Affirmative Defense—Design Defect—Government Contractor

[*Name of defendant***] may not be held liable for design defects in the [***product***] if it proves all of the following:**

1. **That [***name of defendant***] contracted with the United States government to provide the [***product***] for military use;**

2. **That the United States approved reasonably precise specifications for the [***product***];**

3. **That the [***product***] conformed to those specifications; and**

4. **That [***name of defendant***] warned the United States about the dangers in the use of the [***product***] that were known to [***name of defendant***] but not to the United States.**

New June 2010

Directions for Use

This instruction is for use if the defendant's product whose design is challenged was provided to the United States government for military use. The essence of the defense is that the plaintiff should not be able to impose on a government contractor a duty under state law that is contrary to the duty imposed by the government contract. (See *Boyle v.United Technologies Corp.* (1988) 487 U.S. 500, 508–509 [108 S.Ct. 2510, 101 L.Ed.2d 442].) It has been stated that the defense is not limited to military contracts (see *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 710 [99 Cal.Rptr.3d 418]), though no California court has expressly so held. There would appear to be no policy reason why this defense should be limited to military contracts.

Different standards and elements apply in a failure-to-warn case. This instruction must be modified for use in such a case. (See *Oxford, supra,* 177 Cal.App.4th at p. 712; *Butler v. Ingalls Shipbuilding* (9th Cir. 1996) 89 F.3d 582, 586.)

Sources and Authority

- "The [United States] Supreme Court noted that in areas of ' "uniquely federal interests" ' state law may be preempted or displaced by federal law, and that civil liability arising from the performance of federal procurement contracts is such an area. The court further determined that preemption or displacement of state law occurs in an area of uniquely federal interests only where a ' "significant conflict" ' exists between an identifiable federal policy or interest and the operation of state law. The court concluded that 'state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.' " (*Oxford, supra,* 177 Cal.App.4th at p. 708, quoting *Boyle, supra,* 487 U.S. at pp. 500, 504, 507, 512.)

- "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when

(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated—i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision." (*Boyle, supra,* 487 U.S. at pp. 512–513.)

- "[T]he fact that a company supplies goods to the military does not, in and of itself, immunize it from liability for the injuries caused by those goods. Where the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply." (*In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 811.)

- "In our view, if a product is produced according to military specifications and used by the military because of particular qualities which serve a military purpose, and is incidentally sold commercially as well, that product may nonetheless still qualify as military equipment under the military contractor defense." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319 [273 Cal.Rptr. 214].)

- "While courts such as the court in *Hawaii* have sought to confine the government contractor defense to products that are made exclusively for the military, we agree with the court in *Jackson* that this limitation is unduly confining. Though the court in *Boyle* discussed the parameters of the contractor defense in terms of 'military equipment,' use of that term appears to have followed from the facts of that case. Other courts considering this issue have concluded the defense is not limited to military contracts. … [*Boyle's*] application focuses instead on whether the issue or area is one involving 'uniquely federal interests' and, if so, whether the application of state law presents a 'significant conflict' with federal policy." (*Oxford, supra,* 177 Cal.App.4th at p. 710; the split on this issue in the federal and other state courts is noted in *Carley v. Wheeled Coach* (3d Cir. 1993) 991 F.2d 1117, 1119, fn. 1.)

- "[T]he Supreme Court in *Boyle* did not expressly limit its holding to products liability causes of action. Thus, the government contractor defense is applicable to related negligence claims." (*Oxford, supra,* 177 Cal.App.4th at p. 711.)

- "In a failure-to-warn action, where no conflict exists between requirements imposed under a federal contract and a state law duty to warn, regardless of any conflict which may exist between the contract and state law design requirements, *Boyle* commands that we defer to the operation of state law." (*Butler, supra,* 89 F.3d at p. 586.)

- "The appellate court in *Tate* [*Tate v. Boeing Helicopters* (6th Cir. 1995) 55 F.3d 1150, 1156–1157] offered an alternative test for applying the government contractor defense in the context of

failure to warn claims: ‘When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not.’ ” (*Oxford, supra,* 177 Cal.App.4th at p. 712.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1538

1 California Products Liability Actions, Ch. 8, *Defenses*, § 8.05 (Matthew Bender)

2 Levy et al., California Torts, Ch. 21, *Aviation Tort Law*, § 21.02[6] (Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 16, *Airplanes and Airports*, § 16.10[5] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.104[23] (Matthew Bender)

1800. Intrusion Into Private Affairs

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

1. **That [***name of plaintiff***] had a reasonable expectation of privacy in [~~*insert facts regarding the*~~*specify place, conversation, or other circumstance*];**

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

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

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

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

In deciding whether [*name of plaintiff***] had a reasonable expectation of privacy in [***specify place, conversation, or other circumstance***], you should consider, among other factors, the following:**

(a) The identity of [*name of defendant***];**

(b) **The extent to which other persons had access to [***specify place, conversation, or other circumstance***] and could see or hear** [*name of plaintiff*]**; and**

(c) The means by which the intrusion occurred.

In deciding whether an intrusion is highly offensive to a reasonable person, you should consider, among other factors, the following:

(a) The extent of ~~circumstances surrounding~~ the intrusion;

(b) [*Name of defendant*]**'s motives and goals; and**

(c) The setting in which the intrusion occurred.
~~; [and]~~

~~(d) How much privacy [*name of plaintiff*] could expect in that setting; [and]~~

~~(e)~~ ~~[*Insert other applicable factor*]~~**.**

New September 2003; Revised June 2010

Directions for Use

If the plaintiff is asserting more than one privacy right, give an introductory instruction stating that a person's right to privacy can be violated in more than one way and listing the legal theories under which the plaintiff is suing.

Sources and Authority

- "Seventy years after Warren and Brandeis proposed a right to privacy, Dean William L. Prosser analyzed the case law development of the invasion of privacy tort, distilling four distinct kinds of activities violating the privacy protection and giving rise to tort liability: (1) intrusion into private matters; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person's name or likeness. … Prosser's classification was adopted by the Restatement Second of Torts in sections 652A-652E. California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633].)~~The four types of privacy torts are (1) intrusion upon one's physical solitude or seclusion, (2) public disclosure of private facts, (3) false light in the public eye, and (4) appropriation of the plaintiff's name or likeness. (*Forsher v. Bugliosi* (1980) 26 Cal.3d 792, 808 [163 Cal.Rptr. 628, 608 P.2d 716].)~~

- The tort of intrusion "encompasses unconsented-to physical intrusion into the home, hospital room or other place the privacy of which is legally recognized, as well as unwarranted sensory intrusions such as eavesdropping, wiretapping, and visual or photographic spying." (*Shulman v. Group W Productions, Inc.* (1998) 18 Cal.4th 200, 230 [74 Cal.Rptr.2d 843, 955 P.2d 469], internal citation omitted.)

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

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

- ~~California common law has generally followed Prosser's classification of privacy interests as embodied in the Restatement." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 24 [26 Cal.Rptr.2d 834, 865 P.2d 633], internal citation omitted.)~~

- "The foregoing arguments have been framed throughout this action in terms of both the common law and the state Constitution. These two sources of privacy protection 'are not unrelated' under California law. (*Shulman*, *supra*, 18 Cal.4th 200, 227; accord, *Hill*, *supra*, 7 Cal.4th 1, 27; but see *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 313, fn. 13 [127 Cal.Rptr.2d 482, 58 P.3d 339] [suggesting it is an open question whether the state constitutional privacy provision, which is otherwise self-executing and serves as the basis for injunctive relief, can also provide direct and sole support for a damages claim].)" (*Hernandez v. Hillsides, Inc.* (2009) 47

Cal.4th 272, 286 [97 Cal.Rptr.3d 274, 211 P.3d 1063].)

- "[W]e will assess the parties' claims and the undisputed evidence under the rubric of both the common law and constitutional tests for establishing a privacy violation. Borrowing certain shorthand language from *Hill, supra,* 7 Cal.4th 1, which distilled the largely parallel elements of these two causes of action, we consider (1) the nature of any intrusion upon reasonable expectations of privacy, and (2) the offensiveness or seriousness of the intrusion, including any justification and other relevant interests." (*Hernandez, supra*, 47 Cal.4th at p. 288.)

- The element of intrusion "is not met when the plaintiff has merely been observed, or even photographed or recorded, in a public place. Rather, 'the plaintiff must show the defendant penetrated some zone of physical or sensory privacy surrounding, or obtained unwanted access to data about, the plaintiff.' " (*Sanders v. American Broadcasting Co.* (1999) 20 Cal.4th 907, 914-915 [85 Cal.Rptr.2d 909, 978 P.2d 67], internal citations omitted.)

- "As to the first element of the common law tort, the defendant must have 'penetrated some zone of physical or sensory privacy … or obtained unwanted access to data' by electronic or other covert means, in violation of the law or social norms. In either instance, the expectation of privacy must be 'objectively reasonable.' In *Sanders* [*supra*, at p. 978] … , this court linked the reasonableness of privacy expectations to such factors as (1) the identity of the intruder, (2) the extent to which other persons had access to the subject place, and could see or hear the plaintiff, and (3) the means by which the intrusion occurred." (*Hernandez, supra*, 47 Cal.4th at pp. 286–287.)

- The plaintiff does not have to prove that he or she had a "complete expectation of privacy": "Privacy for purposes of the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion." (*Sanders, supra,* 20 Cal.4th at pp. 917-918.)

- "The second common law element essentially involves a 'policy' determination as to whether the alleged intrusion is 'highly offensive' under the particular circumstances. Relevant factors include the degree and setting of the intrusion, and the intruder's motives and objectives. Even in cases involving the use of photographic and electronic recording devices, which can raise difficult questions about covert surveillance, 'California tort law provides no bright line on ["offensiveness"]; each case must be taken on its facts.' " (*Hernandez, supra*, 47 Cal. 4th at p. 287, internal citations omitted.)

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

- "Plaintiffs must show more than an intrusion upon reasonable privacy expectations. Actionable invasions of privacy also must be 'highly offensive' to a reasonable person, and 'sufficiently serious' and unwarranted as to constitute an 'egregious breach of the social norms.' " (*Hernandez, supra*, 47 Cal.4th at p. 295, internal citation omitted.)

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

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

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

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 651, 652, 656–659

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1704

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.02 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.16 (Matthew Bender)

18 California Points and Authorities, Ch. 183, *Privacy: State Constitutional Rights*, § 183.30~~Ch. 185, *Privacy*~~ (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) § 20:8

1807. Affirmative Defense—Invasion of Privacy Justified

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

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

New September 2003; Revised October 2008, June 2010

~~Directions for Use~~

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

Sources and Authority

- "A defendant may prevail in a state constitutional privacy case by negating any of the three elements just discussed or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may rebut a defendant's assertion of countervailing interests by showing there are feasible and effective alternatives to defendant's conduct which have a lesser impact on privacy interests. Of course, a defendant may also plead and prove other available defenses, e.g., consent, unclean hands, etc., that may be appropriate in view of the nature of the claim and the relief requested." (*Hill v. National Collegiate Athletic Assn.* (1994) 7 Cal.4th 1, 40 [26 Cal.Rptr.2d 834, 865 P.2d 633].)

- "The existence of a sufficient countervailing interest or an alternative course of conduct present threshold questions of law for the court. The relative strength of countervailing interests and the feasibility of alternatives present mixed questions of law and fact. Again, in cases where material facts are undisputed, adjudication as a matter of law may be appropriate." (*Hill, supra,* 7 Cal.4th at p. 40.)

- "*Hill* and its progeny further provide that no constitutional violation occurs, i.e., a 'defense' exists, if the intrusion on privacy is justified by one or more competing interests. For purposes of this balancing function—and except in the rare case in which a 'fundamental' right of personal autonomy is involved—the defendant need not present a ' "compelling" ' countervailing interest; only 'general balancing tests are employed.' To the extent the plaintiff raises the issue in response to a claim or defense of competing interests, the defendant may show that less intrusive alternative means were not reasonably available. A relevant inquiry in this regard is whether the intrusion was limited, such that no confidential information was gathered or disclosed." (*Hernandez v. Hillsides, Inc.* (2009) 47

Cal.4th 272, 288 [97 Cal.Rptr.3d 274, 211 P.3d 1063], internal citations omitted.)

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

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 575–603

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.06 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, § 429.16 (Matthew Bender)

18 California Points and Authorities, Ch. 183, *Privacy: State Constitutional Rights*, § 183.20 (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 20:18–20:20

2505. Retaliation (Gov. Code, § 12940(h))

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

1. **That [***name of plaintiff***] [***describe protected activity***];**

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

   [**or**]

   [That [*name of defendant***] engaged in conduct that, taken as a whole, materially and adversely affected the terms and conditions of [***name of plaintiff***]'s employment;]**

3. **That [***name of plaintiff***]'s [***describe protected activity***] was a motivating reason for [***name of defendant***]'s [decision to [discharge/demote/[***specify other adverse employment action***]] [***name of plaintiff***]/conduct];**

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

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

New September 2003; Revised August 2007, April 2008, October 2008, April 2009, June 2010

Directions for Use

In elements 1 and 3, describe the protected activity in question. Government Code section 12940(h) provides that it is unlawful to retaliate against a person "because the person has opposed any practices forbidden under [Government Code sections 12900 through 12966] or because the person has filed a complaint, testified, or assisted in any proceeding under [the FEHA]."

Read the first option for element 2 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option ~~for element 2~~if whether there was an adverse employment action is a question of fact for the jury. ~~in cases involving~~For example, the case may involve a pattern of employer harassment consisting of acts that might not individually be sufficient to constitute retaliation, but taken as a whole establish prohibited conduct. (See *Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1052–1056 [32 Cal.Rptr.3d 436, 116 P.3d 1123].) Or the case may involve acts that, considered alone, would not appear to be adverse, but could be adverse under the particular circumstances of the case. (See *Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1389–1390 [37 Cal.Rptr.3d 113] [lateral transfer can be adverse employment action even if wages, benefits, and duties remain the same].) Give both options if the employee presents evidence supporting liability under both a sufficient-single-act theory or a pattern-of-harassment theory. (See, e.g., *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 423–424 [69 Cal.Rptr.3d 1].)

Also select "conduct" in element 3 if the second option or both options are included for element 2.

Retaliation in violation of the FEHA may be established by constructive discharge; that is, that the employer intentionally created or knowingly permitted working conditions to exist that were so intolerable that a reasonable person in the employee's position would have had no reasonable alternative other than to resign. (See *Steele v. Youthful Offender Parole Bd.* (2008) 162 Cal.App.4th 1241, 1253 [76 Cal.Rptr.3d 632].) If constructive discharge is alleged, replace element 2 with elements 4 and 5 of CACI No. 2402, *Breach of Employment Contract—Unspecified Term—Constructive Discharge—Essential Factual Elements*.

Note that there are two causation elements. There must be a causal link between the retaliatory animus and the adverse action (see element 3), and there must be a causal link between the adverse action and damages (see element 5). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Sources and Authority

- Government Code section 12940(h) provides that it is an unlawful employment practice "[f]or any employer, labor organization, employment agency, or person to discharge, expel, or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part."

- The FEHA defines a "person" as "one or more individuals, partnerships, associations, corporations, limited liability companies, legal representatives, trustees, trustees in bankruptcy, and receivers or other fiduciaries." (Gov. Code, § 12925(d).)

- The Fair Employment and Housing Commission's regulations provide: "It is unlawful for an employer or other covered entity to demote, suspend, reduce, fail to hire or consider for hire, fail to give equal consideration in making employment decisions, fail to treat impartially in the context of any recommendations for subsequent employment which the employer or other covered entity may make, adversely affect working conditions or otherwise deny any employment benefit to an individual because that individual has opposed practices prohibited by the Act or has filed a complaint, testified, assisted or participated in any manner in an investigation, proceeding, or hearing conducted by the Commission or Department or their staffs." (Cal. Code Regs., tit. 2, § 7287.8(a).)

- "Employees may establish a prima facie case of unlawful retaliation by showing that (1) they engaged in activities protected by the FEHA, (2) their employers subsequently took adverse employment action against them, and (3) there was a causal connection between the protected activity and the adverse employment action." (*Miller v. Department of Corr.* (2005) 36 Cal.4th 446, 472 [30 Cal.Rptr.3d 797, 115 P.3d 77]~~, citing *Flait v. North Am. Watch Corp.* (1992) 3 Cal.App.4th 467, 476 [4 Cal.Rptr.2d 522]~~.)

- "It is well established that a plaintiff in a retaliation case need only prove that a retaliatory animus was at least a substantial or motivating factor in the adverse employment decision."(*George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492 [`102 Cal.Rptr.3d

431].)

- "Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim." (*Yanowitz, supra, v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, at p. 1052 [32 Cal.Rptr.3d 436, 116 P.3d 1123].)

- "Appropriately viewed, [section 12940(a)] protects an employee against unlawful discrimination with respect not only to so-called ultimate employment actions such as termination or demotion, but also the entire spectrum of employment actions that are reasonably likely to adversely and materially affect an employee's job performance or opportunity for advancement in his or her career. Although a mere offensive utterance or even a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of section 12940(a) (or give rise to a claim under section 12940(h)), the phrase 'terms, conditions, or privileges' of employment must be interpreted liberally and with a reasonable appreciation of the realities of the workplace in order to afford employees the appropriate and generous protection against employment discrimination that the FEHA was intended to provide." (*Yanowitz, supra,* 36 Cal.4th at pp. 1053–1054, footnotes omitted.)

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

- "Moreover, [defendant]'s actions had a substantial and material impact on the conditions of employment. The refusal to promote [plaintiff] is an adverse employment action under FEHA. There was also a pattern of conduct, the totality of which constitutes an adverse employment action. This includes undeserved negative job reviews, reductions in his staff, ignoring his health concerns and acts which caused him substantial psychological harm." (*Wysinger, supra,* 157 Cal.App.4th at p. 424, internal citations omitted.)

- "A long period between an employer's adverse employment action and the employee's earlier protected activity may lead to the inference that the two events are not causally connected. But if between these events the employer engages in a pattern of conduct consistent with a retaliatory intent, there may be a causal connection." (*Wysinger, supra,* 157 Cal.App.4th at p. 421, internal citation omitted.)

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

omitted.)

- "The employment action must be both detrimental and substantial ... . We must analyze [plaintiff's] complaints of adverse employment actions to determine if they result in a material change in the terms of her employment, impair her employment in some cognizable manner, or show some other employment injury ... . [W]e do not find that [plaintiff's] complaint alleges the necessary material changes in the terms of her employment to cause employment injury. Most of the actions upon which she relies were one time events ... . The other allegations ... are not accompanied by facts which evidence both a substantial and detrimental effect on her employment." (*Thomas v. Department of Corrections* (2000) 77 Cal.App.4th 507, 511–512 [91 Cal.Rptr.2d 770], internal citations omitted.)

- "The retaliatory motive is 'proved by showing that plaintiff engaged in protected activities, that his employer was aware of the protected activities, and that the adverse action followed within a relatively short time thereafter.' 'The causal link may be established by an inference derived from circumstantial evidence, "such as the employer's knowledge that the [employee] engaged in protected activities and the proximity in time between the protected action and allegedly retaliatory employment decision." ' " (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 615 [262 Cal.Rptr. 842], internal citations omitted.)

- "[A]n employer generally can be held liable for the retaliatory actions of its supervisors." (*Wysinger, supra,* 157 Cal.App.4th at p. 420.)

- "[T]he employer is liable for retaliation under section 12940, subdivision (h), but nonemployer individuals are not personally liable for their role in that retaliation." (*Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158, 1173 [72 Cal.Rptr.3d 624, 177 P.3d 232].)

- "[U]nder certain circumstances, a retaliation claim may be brought by an employee who has complained of or opposed conduct, even when a court or jury subsequently determines the conduct actually was not prohibited by the FEHA. Indeed, this precept is well settled. An employee is protected against retaliation if the employee reasonably and in good faith believed that what he or she was opposing constituted unlawful employer conduct such as sexual harassment or sexual discrimination." (*Miller, supra,* 36 Cal.4th at pp. 473–474, internal citations omitted.)

- " 'The legislative purpose underlying FEHA's prohibition against retaliation is to prevent employers from deterring employees from asserting good faith discrimination complaints … .' Employer retaliation against employees who are believed to be prospective complainants or witnesses for complainants undermines this legislative purpose just as effectively as retaliation after the filing of a complaint. To limit FEHA in such a way would be to condone 'an absurd result' that is contrary to legislative intent. We agree with the trial court that FEHA protects employees against preemptive retaliation by the employer." (*Steele, supra,* 162 Cal.App.4th at p. 1255, internal citations omitted.)

Secondary Sources

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

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

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.83–2.88

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

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

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

2508. Failure to File Timely Administrative Complaint (Gov. Code, § 12960(d))—Plaintiff Alleges Continuing Violation

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[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit may not proceed because [***name of plaintiff***] did not timely file a complaint with the Department of Fair Employment and Housing. A complaint is timely if it was filed within one year of the date on which [***name of defendant***]'s alleged unlawful practice occurred. [***Name of defendant***]'s alleged unlawful practice is considered as continuing to occur as long as all of the following three conditions continue to exist:**

1. **Conduct occurring within a year of the date on which [***name of plaintiff***] filed [his/her] complaint with the department was similar or related to the conduct that occurred earlier;**

2. **The conduct was reasonably frequent; and**

3. **The conduct had not yet become permanent.**

"Permanent" in this context means that the conduct has stopped, [*name of plaintiff***] has resigned, or [***name of defendant***]'s statements and actions would make it clear to a reasonable employee that any further efforts to resolve the issue internally would be futile.**

The burden is on [*name of plaintiff/name of defendant***] to prove that the complaint [was/was not] filed on time with the department.**

New June 2010

Directions for Use

Give this instruction if the plaintiff relies on the continuing-violation doctrine in order to avoid the bar of the limitation period of one year within which to file an administrative complaint. (See Gov. Code, § 12960(d).) Although the continuing-violation doctrine is labeled an equitable exception to the one-year deadline, it may involve triable issues of fact. (See *Dominguez v. Washington Mutual Bank* (2008) 168 Cal.App.4th 714, 723-724 [85 Cal.Rptr.3d 705].)

No case directly addresses which party has the burden of proof regarding the continuing-violation doctrine. One view is that because the statute of limitations is an affirmative defense, the defendant bears the burden of proving every aspect of the defense including disproving a continuing violation. Another view is that the continuing-violation doctrine is similar to the delayed-discovery rule, on which the plaintiff bears the burden of proof under most circumstances. (See CACI No. 455, *Statute of Limitations—Delayed Discovery*.) Give the last sentence according to how the court determines that the burden of proof should be allocated.

Sources and Authority

- Government Code section 12960 provides:

(a) The provisions of this article govern the procedure for the prevention and elimination of practices made unlawful pursuant to Article 1 (commencing with Section 12940) of Chapter 6.

(b) Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department. The director or his or her authorized representative may in like manner, on his or her own motion, make, sign, and file a complaint.

(c) Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with the provisions of this part may file with the department a verified complaint asking for assistance by conciliation or other remedial action.

(d) No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice or refusal to cooperate occurred, except that this period may be extended as follows:

(1) For a period of time not to exceed 90 days following the expiration of that year, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice after the expiration of one year from the date of their occurrence.

(2) For a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer.

(3) For a period of time, not to exceed one year from the date the person aggrieved by an alleged violation of Section 51.7 of the Civil Code becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation.

(4) For a period of time not to exceed one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority.

- “Under the FEHA, the employee must exhaust the administrative remedy provided by the statute by filing a complaint with the Department of Fair Employment and Housing (Department) and must obtain from the Department a notice of right to sue in order to be entitled to file a civil action in court based on violations of the FEHA. The timely filing of an administrative complaint is a prerequisite to the bringing of a civil action for damages under the FEHA. As for the applicable limitation period, the FEHA provides that no complaint for any violation of its provisions may be filed with the Department ‘after the expiration of one year from the date upon which the alleged *unlawful practice* or refusal to cooperate *occurred*,’ with an exception for delayed discovery not relevant here.” (*Morgan v. Regents of University of California* (2000) 88 Cal.App.4th 52, 63 [105 Cal.Rptr.2d 652], original italics, internal citations omitted.)

- "[Plaintiff] argued below, as she does on appeal, that her DFEH complaint was timely under an equitable exception to the one-year deadline known as the continuing violation doctrine. Under this doctrine, a FEHA complaint is timely if discriminatory practices occurring outside the limitations period continued into that period. A continuing violation exists if (1) the conduct occurring within the limitations period is similar in kind to the conduct that falls outside the period; (2) the conduct was reasonably frequent; and (3) it had not yet acquired a degree of permanence." (*Dominguez, supra,* 168 Cal.App.4th at pp. 720-721, internal citations omitted.)

- " '[P]ermanence' in the context of an ongoing process of accommodation of disability, or ongoing disability harassment, should properly be understood to mean the following: that an employer's statements and actions make clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment will be futile. [¶] Thus, when an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run, not necessarily when the employee first believes that his or her rights may have been violated, but rather, either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain. Accordingly, an employer who is confronted with an employee seeking accommodation of disability or relief from disability harassment may assert control over its legal relationship with the employee either by accommodating the employee's requests, or by making clear to the employee in a definitive manner that it will not be granting any such requests, thereby commencing the running of the statute of limitations." (*Richards v. CH2M Hill, Inc.* (2001) 26 Cal.4th 798, 823–824 [111 Cal.Rptr.2d 87, 29 P.3d 175], internal citations omitted.)

- "A continuing violation may be established by demonstrating 'a company wide policy or practice' or 'a series of related acts against a single individual.' 'The continuing violation theory generally has been applied in the context of a continuing policy and practice of discrimination on a company-wide basis; a plaintiff who shows that a policy and practice operated at least in part within the limitation period satisfies the filing requirements. "[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period. The reason is that the continuing system of discrimination operates against the employee and violates his or her rights up to a point in time that falls within the applicable limitations period. Such continuing violations are most likely to occur in the matter of placements or promotions." ' The plaintiff must demonstrate that at least one act occurred within the filing period and that 'the harassment is "more than the occurrence of isolated or sporadic acts of intentional discrimination." … The relevant distinction is between the occurrence of isolated, intermittent acts of discrimination and a persistent, on-going pattern.' " (*Morgan, supra,* 88 Cal.App.4th at p. 64, internal citations omitted.)

- "[A] continuing violation claim will likely fail if the plaintiff knew, or through the exercise of reasonable diligence would have known, [he] was being discriminated against at the time the earlier events occurred." (*Morgan, supra,* 88 Cal.App.4th at p. 65.)

- "The Supreme Court has extended the continuing violation doctrine to retaliation claims. And the doctrine also applies to racial harassment claims. Indeed, as we observed in *Morgan v. Regents of*

University of California, supra, 88 Cal.App.4th 52, 65: ‘Cases alleging a hostile work environment due to racial or sexual harassment are often found to come within the continuing violations framework.’ ” (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 270 [100 Cal.Rptr.3d 296], internal citations omitted.)

Secondary Sources

7 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 948

3 Witkin, California Procedure (5th ed 2008) Actions, § 564

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 7:561.1, 7:975, 16:85

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[4] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.51[1] (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.59 (Matthew Bender)

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] [perceived] [~~[~~history of~~]~~ [a]] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **[That [***name of defendant***] [knew~~/thought]~~ that [***name of plaintiff***] had/treated [***name of plaintiff***] as if [he/she] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];] [or]**

   [That [*name of defendant***] [knew~~/thought]~~ that [***name of plaintiff***]/treated [***name of plaintiff***] as if [he/she]] had a history of having [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

4. **That [***name of plaintiff***] was able to perform the essential job duties [with reasonable accommodation for [his/her] [***e.g., physical condition***];**

5. **That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];**

6. **[That [***name of plaintiff***]'s [[history of [a]] [***e.g., physical condition***]-] was a motivating reason for the [discharge/refusal to hire/[***other adverse employment action***]];] [or]**

   [That [*name of defendant***]'s belief that [***name of plaintiff***] had [~~[~~a history of [a]] [***e.g., physical condition***]] was a motivating reason for the [discharge/refusal to hire/***other adverse employment action***];]**

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

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

New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a

specific health condition such as "diabetes."

In the introductory paragraph, include "perceived" or "history of" if the claim of discrimination is based on a perceived disability or a history of disability rather than a current actual disability.

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Under element 3, select the claimed basis of discrimination: an actual disability, a history of a disability, ~~or~~ a perceived disability, or a perceived history of a disability. For an actual disability, select "knew that [*name of plaintiff*] had." For a perceived disability, select "treated [*name of plaintiff*] as if [he/she] had." (See Gov. Code, § 12926(i)(4), (k)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) ~~In the introductory paragraph, include "perceived" or "history of" if the claim of discrimination is based on a perceived disability or a history of disability.~~

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(h)) is alleged, omit "that limited [*insert major life activity*]" in element 3. (Compare Gov. Code, § 12926(h) with Gov. Code, § 12926(i), (k) [no requirement that medical condition limit major life activity].)

Regarding element 4, it is now settled that the ability to perform the essential duties of the job is an element of the plaintiff's burden of proof. (See *Green v. State of California* (2007) 42 Cal.4th 254, 257–258 [64 Cal.Rptr.3d 390, 165 P3d 118].)

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(h), (i), (k).)

Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the ... physical disability, mental disability, [or] medical condition ... of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12940(a)(1) also provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability ... where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations, or cannot perform those duties in a manner that would not endanger his or her health or safety or the health or safety of others even with reasonable accommodations."

- For a definition of "medical condition," see Government Code section 12926(h).

- For a definition of "mental disability," see Government Code section 12926(i).

- For a definition of "physical disability," see Government Code section 12926(k).

- Government Code section 12926.1(c) provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act of 1990, a 'substantial limitation.' This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, 'working' is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments."

- "[T]he purpose of the 'regarded-as' prong is to protect individuals rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities. In other words, to find a perceived disability, the perception must stem from a false idea about the existence of or the limiting effect of a disability." (*Diffey v. Riverside County Sheriff's Dept.* (2000) 84 Cal.App.4th 1031, 1037 [101 Cal.Rptr.2d 353], internal citation omitted.)

- "Summary adjudication of the section 12940(a) claim … turns on … whether [plaintiff] could perform the essential functions of the relevant job with or without accommodation. [Plaintiff] does not dispute that she was unable to perform the essential functions of her *former* position as a clothes fitter with or without accommodation. Under federal law, however, when an employee seeks accommodation by being reassigned to a vacant position in the company, the employee satisfies the 'qualified individual with a disability' requirement by showing he or she can perform the essential functions of the *vacant position* with or without accommodation. The position must exist and be vacant, and the employer need not promote the disabled employee. We apply the same rule here. To prevail on summary adjudication of the section 12940(a) claim, [defendant] must show there is no triable issue of fact about [plaintiff]'s ability, with or without accommodation, to perform the essential functions of an available vacant position that would not be a promotion." (*Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 965 [83 Cal.Rptr.3d 190], original italics, internal citations omitted.)

- "[Defendant] asserts the statute's 'regarded as' protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the 'myths, fears or stereotypes' frequently associated with disabilities. … However, the statutory language does not expressly restrict FEHA's protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer's failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the 'regarded as' definition casts a broader net and protects *any* individual 'regarded' or 'treated' by an employer 'as having, or having had, any physical condition that makes achievement of a major life activity difficult' or may do so in the future. We agree most individuals who sue exclusively

under this definitional prong likely are and will continue to be victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], internal citations omitted, original italics.)

- " 'An adverse employment decision cannot be made "because of" a disability, when the disability is not known to the employer. Thus, in order to prove [a discrimination] claim, a plaintiff must prove the employer had knowledge of the employee's disability when the adverse employment decision was made. … While knowledge of the disability can be inferred from the circumstances, knowledge will only be imputed to the employer when the fact of disability is the only reasonable interpretation of the known facts. "Vague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its obligations … ." … ' " (*Scotch v. Art Institute of California* (2009) 173 Cal.App.4th 986, 1008 [93 Cal.Rptr.2d 338].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 936, 937

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 9:2160–9:2241

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.78–2.80

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.32[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.14, 115.23, 115.34, 115.77[3][a] (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:46

2541. Disability Discrimination—Reasonable Accommodation—Essential Factual Elements (Gov. Code, § 12940(m))

[*Name of plaintiff***] claims that [***name of defendant***] failed to reasonably accommodate [his/her] [***select term to describe basis of limitations, e.g., physical condition***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**

2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**

3. **That [[***name of plaintiff***] had/[***name of defendant***] ~~thought that] [name of plaintiff~~]treated [***name of plaintiff***] as if [he/she] had] [a] [***e.g., physical condition***] [that limited [***insert major life activity***]];**

[4. That [*name of defendant***] knew of [***name of plaintiff***]'s [***e.g., physical condition***] [that limited [***insert major life activity***]];]**

5. **That [***name of plaintiff***] was able to perform the essential job duties with reasonable accommodation for [his/her] [***e.g., physical condition***];**

6. **That [***name of defendant***] failed to provide reasonable accommodation for [***name of plaintiff***]'s [***e.g., physical condition***];**

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

8. **That [***name of defendant***]'s failure to provide reasonable accommodation was a substantial factor in causing [***name of plaintiff***]'s harm.**

[In determining whether [*name of plaintiff***]'s [***e.g., physical condition***] limits [***insert major life activity***], you must consider the [***e.g., physical condition***] [in its unmedicated state/without assistive devices/[***describe mitigating measures***]].]**

New September 2003; Revised April 2007, December 2007, April 2009, December 2009, June 2010

Directions for Use

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

For element 1, the court may need to instruct the jury on the statutory definition of "employer" under the

FEHA. Other covered entities under the FEHA include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(h)) is alleged, omit "that limited [*insert major life activity*]" in elements 3 and 4 and do not include the last paragraph. (Compare Gov. Code, § 12926(h) with Gov. Code, § 12926(i), (k) [no requirement that medical condition limit major life activity].)

In a case of perceived disability, include "[*name of defendant*] treated [*name of plaintiff*] as if [he/she] had~~thought that~~" in element 3, and delete optional element 4. (See Gov. Code, § 12926(i)(4), (k)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) In a case of actual disability, ~~do not~~ include "[*name of plaintiff*] had~~[*name of defendant*] thought that~~" in element 3, and give element 4.

If the existence of a qualifying disability is disputed, additional instructions defining "physical disability," "mental disability," and "medical condition" may be required. (See Gov. Code, § 12926(h), (i), (k).)

The California Supreme Court has held that under Government Code section 12940(a), the plaintiff is required to prove that he or she has the ability to perform the essential duties of the job with or without reasonable accommodation. (See *Green v. State of California* (2007) 42 Cal.4th 254, 260 [64 Cal.Rptr.3d 390, 165 P3d 118].) There is apparently some divergence of authority as to whether this rule applies to cases under Government Code section 12940(m), and if so, which party bears the burden of proof. (See *id.* at p. 265; compare *Nadaf-Rahrov v. The Neiman Marcus Group, Inc.* (2008) 166 Cal.App.4th 952, 973–979 [83 Cal.Rptr.3d 190] with *Bagatti v. Department of Rehabilitation* (2002) 97 Cal.App.4th 344, 360–363 [118 Cal.Rptr.2d 443].) If the court decides that the plaintiff does not bear the burden of proof, omit element 5.

If the plaintiff bears the burden of proof, there may also be an issue of how far the employee must go with regard to whether a reasonable accommodation was possible. The rule has been that the employer has an affirmative duty to make known to the employee other suitable job opportunities and to determine whether the employee is interested in, and qualified for, those positions, if the employer can do so without undue hardship or if the employer offers similar assistance or benefit to other disabled or nondisabled employees or has a policy of offering such assistance or benefit to any other employees. (*Prilliman v. United Air Lines, Inc.* (1997) 53 Cal.App.4th 935, 950–951 [62 Cal.Rptr.2d 142]; see also *Claudio v. Regents of the University of California* (2005) 134 Cal.App.4th 224, 243 [35 Cal.Rptr.3d 837]; *Hanson v. Lucky Stores* (1999) 74 Cal.App.4th 215, 226 [87 Cal.Rptr.2d 487].) In contrast, one court has said that it is the employee's burden to prove that a reasonable accommodation could have been made, i.e., that he or she was qualified for a position in light of the potential accommodation. (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at p. 978.) The question of whether the employee has to present evidence of other suitable job descriptions and prove that a vacancy existed for a position that the employee could do with reasonable accommodation may not be fully resolved.

No element has been included that requires the plaintiff to specifically request reasonable accommodation. Unlike Government Code section 12940(n) on the interactive process (see CACI No. 2546, *Disability Discrimination—Reasonable Accommodation—Failure to Engage in Interactive*

Process), section 12940(m) does not specifically require that the employee request reasonable accommodation; it requires only that the employer know of the disability. (See *Prilliman, supra,* 53 Cal.App.4th at pp. 950–951; but see *Avila v. Continental Airlines, Inc.* (2008) 165 Cal.App.4th 1237, 1252 [82 Cal.Rptr.3d 440] [employee must request an accommodation].)

Sources and Authority

- Government Code section 12940(m) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to make reasonable accommodation for the known physical or mental disability of an applicant or employee. Nothing in this subdivision or in ... subdivision (a) shall be construed to require an accommodation that is demonstrated by the employer or other covered entity to produce undue hardship to its operation."

- "Any employer or other covered entity shall make reasonable accommodation to the disability of any individual with a disability if the employer or other covered entity knows of the disability, unless the employer or other covered entity can demonstrate that the accommodation would impose an undue hardship." (Cal. Code Regs., tit. 2, § 7293.9.)

- Government Code section 12926(n) provides:

  "Reasonable accommodation" may include either of the following:

  (1) Making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities.

  (2) Job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

- Government Code section 12940(n) provides that it is an unlawful employment practice "[f]or an employer or other entity covered by this part to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition."

- For a definition of "medical condition," see Government Code section 12926(h).

- For a definition of "mental disability," see Government Code section 12926(i).

- For a definition of "physical disability," see Government Code section 12926(k).

- Government Code section 12926.1(c) provides, in part: "[T]he Legislature has determined that the definitions of 'physical disability' and 'mental disability' under the law of this state require a 'limitation' upon a major life activity, but do not require, as does the Americans with Disabilities Act

of 1990, a ‘substantial limitation.’ This distinction is intended to result in broader coverage under the law of this state than under that federal act. Under the law of this state, whether a condition limits a major life activity shall be determined without respect to any mitigating measures, unless the mitigating measure itself limits a major life activity, regardless of federal law under the Americans with Disabilities Act of 1990. Further, under the law of this state, ‘working’ is a major life activity, regardless of whether the actual or perceived working limitation implicates a particular employment or a class or broad range of employments.”

- “The question now arises whether it is the employees' burden to prove that a reasonable accommodation could have been made, i.e., that they were qualified for a position in light of the potential accommodation, or the employers' burden to prove that no reasonable accommodation was available, i.e., that the employees were not qualified for any position because no reasonable accommodation was available. [¶¶] Applying *Green's* burden of proof analysis to section 12940(m), we conclude that the burden of proving ability to perform the essential functions of a job with accommodation should be placed on the plaintiff under this statute as well. First, … an employee's ability to perform the essential functions of a job is a prerequisite to liability under section 12940(m). Second, the Legislature modeled section 12940(m) on the federal reasonable accommodation requirement (adopting almost verbatim the federal statutory definition of ‘reasonable accommodation’ by way of example). Had the Legislature intended the employer to bear the burden of proving ability to perform the essential functions of the job, contrary to the federal allocation of the burden of proof, … it could have expressly provided for that result, but it did not. Finally, general evidentiary principles support allocating the burden of proof on this issue to the plaintiff.” (*Nadaf-Rahrov, supra,* 166 Cal.App.4th at pp. 977–978, internal citations omitted.)

- “Although no particular form of request is required, ‘ “[t]he duty of an employer reasonably to accommodate an employee's handicap does not arise until the employer is ‘aware of respondent's disability and physical limitations. … ” ’ ‘ “[T]he employee can't expect the employer to read his mind and know he secretly wanted a particular accommodation and sue the employer for not providing it. Nor is an employer ordinarily liable for failing to accommodate a disability of which it had no knowledge. …” … ’ ” (*Avila, supra,* 165 Cal.App.4th at pp. 1252–1253, internal citations omitted.)

- “Employers must make reasonable accommodations to the disability of an individual unless the employer can demonstrate that doing so would impose an ‘undue hardship.’ ” (*Prilliman*, *supra,* 53 Cal.App.4th at p. 947.)

- “ ‘Ordinarily the reasonableness of an accommodation is an issue for the jury.’ ” (*Prilliman*, *supra*, 53 Cal.App.4th at p. 954, internal citation omitted.)

- “[T]he duty of an employer to provide reasonable accommodation for an employee with a disability is broader under the FEHA than under the ADA.” (*Bagatti, supra,* 97 Cal.App.4th at p. 362.)

- “Under the FEHA ... an employer is relieved of the duty to reassign a disabled employee whose limitations cannot be reasonably accommodated in his or her current job only if reassignment would impose an ‘undue hardship’ on its operations or if there is no vacant position for which the employee is qualified.” (*Spitzer v. Good Guys, Inc.* (2000) 80 Cal.App.4th 1376, 1389 [96 Cal.Rptr.2d 236].)

- "On these issues, which are novel to California and on which the federal courts are divided, we conclude that employers must reasonably accommodate individuals falling within any of FEHA's statutorily defined 'disabilities,' including those 'regarded as' disabled, and must engage in an informal, interactive process to determine any effective accommodations." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 55 [43 Cal.Rptr.3d 874].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 762

Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 9:2250–9:2285, 9:2345–9:2347

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.79

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, §§ 41.32[2][c], 41.51[3]~~[a] [b]~~ (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.35, 115.92 (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:50

VF-2508. Disability Discrimination—Disparate Treatment

We answer the questions submitted to us as follows:

1. **Was [***name of defendant***] [an employer/[***other covered entity***]]?**
____ Yes ____ No

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

2. **Was [***name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**
____ Yes ____ No

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

3. **[Did [***name of defendant***] [know~~/think]~~ that [***name of plaintiff***] had/treat [***name of plaintiff***] as if [he/she] had] [a history of having] [a] [***select term to describe basis of limitations, e.g., physical condition***] [that limited [***insert major life activity***]]?**
____ Yes ____ No]

~~[or]~~

~~[Did [*name of defendant***] [know/think] that [***name of plaintiff***] had/treat [***name of plaintiff***] as if [he/she] had] a history of having [a] [***e.g., physical condition***] [that limited [***insert major life activity***]]?~~**
~~____ Yes ____ No]~~

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

4. **Was [***name of plaintiff***] able to perform the essential job duties [with reasonable accommodation for [his/her] [***e.g., physical condition***]?**
____ Yes ____ No

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

5. **Did [***name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

____ Yes ____ No

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

6. Was [*name of plaintiff***]'s [perceived] [~~[~~history of~~]~~ [a]]** *e.g., physical condition***] a motivating reason for [***name of defendant***]'s decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]?**

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

7. Was [*name of defendant***]'s [decision/conduct] a substantial factor in causing harm to [***name of plaintiff***]?**

____ Yes ____ No

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

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

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2007, December 2009, June 2010

Directions for Use

The special verdict forms in this section 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. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements.*

Select a term to use throughout to describe the source of the plaintiff's limitations. It may be a statutory term such as "physical disability," "mental disability," or "medical condition." (See Gov. Code, § 12940(a).) Or it may be a general term such as "condition," "disease," or "disorder." Or it may be a specific health condition such as "diabetes."

Relationships other than employer/employee can be substituted in question 1, as in element 1 of CACI No. 2540. Depending on the facts of the case, other factual scenarios can be substituted in questions 3 and 6, as in elements 3 and 6 of the instruction.

For question 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select "know that [*name of plaintiff*] had." For a perceived disability, select "treat [*name of plaintiff*] as if [he/she] had."

If medical-condition discrimination as defined by statute (see Gov. Code, § 12926(h)) is alleged, omit "that limited **[***insert major life activity***]**" in question 3. (Compare Gov. Code, § 12926(h) with Gov. Code, § 12926(i), (k) [no requirement that medical condition limit major life activity].)

If specificity is not required, users do not have to itemize all the damages listed in question 8 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

VF-2514. Failure to Prevent Harassment, Discrimination, or Retaliation

We answer the questions submitted to us as follows:

1. Was [*name of defendant***] an [employer/[***other covered entity***]]?**
____ Yes ____ No

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

2. Was [*name of plaintiff***] [an employee of [***name of defendant***]/an applicant to [***name of defendant***] for a job/[***other covered relationship to defendant***]]?**
____ Yes ____ No

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

3. Was [*name of plaintiff***] subjected to [***either***]**

[[harassing conduct/discrimination] because [he/she] [was/was believed to be/was associated with a person who was/was associated with a person who was believed to be] [*protected status***]?]**

[*or***]**

[retaliation because [he/she] [opposed [*name of defendant***]'s unlawful and discriminatory employment practices/ [or] [[filed a complaint with/testified before/ [or] assisted in a proceeding before] the Department of Fair Employment and Housing]?]**
____ Yes ____ No

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

4. Did [*name of defendant***] fail to take reasonable steps to prevent the [harassment/discrimination/retaliation]?**
____ Yes ____ No

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

5. Was [*name of defendant***]'s failure to prevent the [harassment/discrimination/retaliation] a substantial factor in causing harm to [***name of plaintiff***]?**

____ Yes ____ No

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

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

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

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

New June 2010

Directions for Use

The special verdict forms in this section 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. 2527, *Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant.*

If specificity is not required, users do not have to itemize all the damages listed in question 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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 before judgment.

3010. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] used excessive force against [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] used force against [***name of plaintiff***];**

2. **That the force used was excessive;**

3. **That [***name of defendant***] was acting or purporting to act in the performance of [his/her] official duties;**

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

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

Force is excessive if it is used maliciously and sadistically to cause harm. In deciding whether excessive force was used, you should consider, among other factors, the following:

(a) The need for the use of force;

(b) The relationship between the need and the amount of force that was used;

(c) The extent of injury inflicted;

(d) The extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; [and]

(e) Any efforts made to temper the severity of a forceful response; [and]

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

Force is not excessive if it is used in a good-faith effort to protect the safety of inmates, staff, or others, or to maintain or restore discipline.

New September 2003; Revised June 2010

Directions for Use

The "official duties" referred to in element 3 must be duties created pursuant to any state, county, or municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 3.

There is law suggesting that the jury should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. This principle is covered in the final sentence by the term "good faith."

~~De minimis harm is insufficient to satisfy the fourth element. (*Hudson v. McMillian* (1992) 503 U.S. 1, 10-11 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.) If there is conflicting evidence on the issue of harm, the court may need to instruct the jury on the severity of the harm that must be proved.~~

Sources and Authority

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ... ."

- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)

- "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.' In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.' " (*Farmer v. Brennan* (1994) 511 U.S. 825, 832 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)

- "[A]pplication of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, 'the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." ' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 6 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- "[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley:* whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." (*Hudson, supra,* 503 U.S. at pp. 6–7, internal citations omitted.)

- "Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the

principle that 'prison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" (*Hudson, supra,* 503 U.S. at p. 6, internal citations omitted.)

- "[T]his Court rejected the notion that 'significant injury' is a threshold requirement for stating an excessive force claim. … 'When prison officials maliciously and sadistically use force to cause harm,' … 'contemporary standards of decency always are violated . . . whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.' " (*Wilkins v. Gaddy* (2010) __ U.S. __, __ [130 S.Ct. 1175, 175 L.Ed.2d 995, 999].)

- "This is not to say that the 'absence of serious injury' is irrelevant to the Eighth Amendment inquiry. '[T]he extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation.' The extent of injury may also provide some indication of the amount of force applied. … [N]ot 'every malevolent touch by a prison guard gives rise to a federal cause of action.' 'The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition de minimis uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.' An inmate who complains of a 'push or shove' that causes no discernible injury almost certainly fails to state a valid excessive force claim. … [¶] Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts." (*Wilkins, supra,* __ U.S. at p. __ [175 L.Ed.2d at p. 999], internal citations omitted.).

- " '[S]uch factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,' are relevant to that ultimate determination. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." (*Whitley v. Albers* (1986) 475 U.S. 312, 321 [106 S.Ct. 1078, 89 L.Ed.2d 251], internal citations omitted.)

- ~~"The Eighth Amendment's prohibition of 'cruel and unusual' punishment necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort 'repugnant to the conscience of mankind.'" (*Hudson, supra,* 503 U.S. at pp. 9-10, internal citations omitted.)~~

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color

of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

Secondary Sources

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.01 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.70 (Matthew Bender)

3016. Retaliation—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] for exercising a constitutional right. [By [***specify conduct***], [***name of plaintiff***] was exercising [his/her] constitutionally protected right of [***insert right, e.g., privacy***].] To establish retaliation, [***name of plaintiff***] must prove all of the following:**

1. **[That [he/she] was engaged in a constitutionally protected activity;]**
2. **That [***name of defendant***] [***specify alleged retaliatory conduct***];**
3. **That [***name of defendant***]'s acts were motivated, at least in part, by [***name of plaintiff***]'s protected activity;**
4. **That [***name of defendant***]'s acts would likely have deterred a person of ordinary firmness from engaging in that protected activity; and**
5. **That [***name of plaintiff***] was harmed as a result of [***name of defendant***]'s conduct.**

[The law requires that the trial judge, rather than the jury, decide if [*name of plaintiff***] has proven element 1 above. But before I can do so, you must decide whether [***name of plaintiff***] has proven the following:**

[*List all factual disputes that must be resolved by the jury.***]]**

New June 2010

Directions for Use

Give this instruction along with CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements,* if the claimed civil rights violation is retaliation for exercising constitutionally protected rights. The retaliation should be alleged generally in element 1 of CACI No. 3000.

The constitutionally protected activity refers back to the right alleged to have been violated in element 3 of CACI No. 3000. Whether plaintiff was engaged in a constitutionally protected activity will usually have been resolved by the court as a matter of law. If so, include the optional statement in the opening paragraph and omit element 1. If there is a question of fact that the jury must resolve with regard to the constitutionally protected activity, include element 1 and give the last part of the instruction.

There is perhaps some uncertainty with regard to the requirement in element 3 that the retaliatory act may be motivated, *in part,* by the protected activity. While the element is so stated in *Tichinin v. City of Morgan Hill* (2009) 177 Cal.App.4th 1049, 1062–1063 [99 Cal.Rptr.3d 661], the court also was of the view that the defendant may avoid liability by proving that, notwithstanding a retaliatory motive, it also had legitimate reasons for its actions and would have taken the same steps for those reasons alone. (*Id.* at

pp. 1086–1087, finding persuasive *Greenwich Citizens Comm. v. Counties of Warren & Washington Indus. Dev. Agency* (2d Cir. 1996) 77 F.3d 26, 30.) Therefore, the fact that retaliation may have motivated the defendant only in part may not always be sufficient for liability.

Sources and Authority

- "Where, as here, the plaintiff claims retaliation for exercising a constitutional right, the majority of federal courts require the plaintiff to prove that (1) he or she was engaged in constitutionally protected activity, (2) the defendant's retaliatory action caused the plaintiff to suffer an injury that would likely deter a person of ordinary firmness from engaging in that protected activity, and (3) the retaliatory action was motivated, at least in part, by the plaintiff's protected activity." (*Tichinin, supra,* 177 Cal.App.4th at pp. 1062–1063.)

- "[A]ctions that are otherwise proper and lawful may nevertheless be actionable if they are taken in retaliation against a person for exercising his or her constitutional rights." (*Tichinin, supra,* 177 Cal.App.4th at p. 1084.)

- "[T]he evidence of [plaintiff]'s alleged injuries, if believed, is sufficient to support a finding that the retaliatory action against him would deter a person of ordinary firmness from exercising his or her First Amendment rights. [¶] [Defendant] argues that plaintiff did not suffer any injury—i.e., [defendant]'s action did not chill [plaintiff]'s exercise of his rights—because he continued to litigate against [defendant]. However, that [plaintiff] persevered despite [defendant]'s action is not determinative. To reiterate, in the context of a claim of retaliation, the question is not whether the plaintiff was actually deterred but whether the defendant's actions would have deterred a person of ordinary firmness." (*Tichinin, supra,* 177 Cal.App.4th at p. 1082.)

- "Intent to inhibit speech, which 'is an element of the [retaliation] claim,' can be demonstrated either through direct or circumstantial evidence." (*Mendocino Envtl. Ctr. v. Mendocino County* (9th Cir. 1999) 192 F.3d 1283, 1300–1301, internal citation omitted.)

- "While the scope, severity and consequences of [their] actions are belittled by defendants, we have cautioned that 'a government act of retaliation need not be severe . . . [nor] be of a certain kind' to qualify as an adverse action." (*Marez v. Bassett* (9th Cir. 2010), 595 F.3d 1068, 1075.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 820, 885A

3 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Opportunity Laws*, § 40.26 (Matthew Bender)

3 Civil Rights Actions, Ch. 17, *Discrimination in Federally Assisted Programs,* § 17.24B (Matthew Bender)

4 Civil Rights Actions, Ch. 21A, *Employment Discrimination Based on Race, Color, Religion, Sex, or National Origin,* § 21.22(1)(f) (Matthew Bender)

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

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.42 (Matthew Bender)

3213. Affirmative Defense—Statute of Limitations (U. Com. Code, § 2725)

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that**

[the date of [tender of] delivery occurred before [*insert date four years before filing of complaint***].]**

[*or***]**

[any breach was discovered or should have been discovered before [*insert date four years before filing of complaint***].]**

New June 2010

Directions for Use

Use this instruction to assert a limitation defense based on the four-year period of California's Uniform Commercial Code section 2725. (See *Mexia v. Rinker Boat Co., Inc.* (2009) 174 Cal.App.4th 1297, 1305 [95 Cal.Rptr.3d 285] [four-year statute of U. Com. Code, § 2725 applies to warranty claims under Song-Beverly].)

A breach of warranty occurs when tender of delivery is made. (U. Com. Code, § 2725(2).) Include "tender of" if actual delivery was not made or if delivery was made after tender. If whether a proper tender was made is at issue, the jury should be instructed on the meaning of "tender." (See U. Com. Code, § 2503.)

Under the statute, a breach of warranty occurs when tender of delivery is made regardless of the aggrieved party's knowledge of the breach—that is, there is no delayed-discovery rule. However, if an express warranty explicitly extends to future performance of the goods (for example, a warranty to repair defects for three years or 30,000 miles) and discovery of the breach must await the time of the performance, the cause of action accrues when the breach is or should have been discovered. (U. Com. Code, § 2725(2).) In such a case, give the second option in the second sentence. If delayed discovery is alleged, CACI No. 455, *Statute of Limitations—Delayed Discovery,* may be adapted for use. (See *Krieger v. Nick Alexander Imports, Inc.* (1991) 234 Cal.App.3d 205, 215–220 [285 Cal.Rptr. 717].)

Under the Uniform Commercial Code, by the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it. (U. Com. Code, § 2725(1).) Presumably, this provision does not apply to claims under the Song-Beverly Act. (See Civ. Code, §§ 1790.1 [buyer's waiver of rights under Song-Beverly Act is unenforceable], 1790.3 [in case of conflict, provisions of Song-Beverly Act control over U. Com. Code].)

Sources and Authority

- Uniform Commercial Code section 2725 provides:

  (1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

  (2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

  (3) Where an action commenced within the time limited by subdivision (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

  (4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this code becomes effective.

- Civil Code section 1790.1 provides: "Any waiver by the buyer of consumer goods of the provisions of this chapter, except as expressly provided in this chapter, shall be deemed contrary to public policy and shall be unenforceable and void."

- Civil Code section 1790.3 provides: "The provisions of this chapter 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 this chapter, the provisions of this chapter shall prevail."

- "The [Song Beverly] Act was intended to supplement the provisions of the California Uniform Commercial Code, rather than to supersede the rights and obligations created by that statutory scheme. (See Civ. Code, § 1790.3.) California Uniform Commercial Code section 2725 specifically governs actions for breach of warranty in a sales context. We conclude that this special statute of limitations controls rather than the general provision of Code of Civil Procedure section 338, subdivision (a) for liabilities created by statute." (*Krieger, supra,* 234 Cal.App.3d at p. 215.)

- "[Defendants] now concede that the statute of limitations for an action for breach of warranty under the Song-Beverly Act is four years pursuant to section 2725 of the California Uniform Commercial Code. Under that statute, a cause of action for breach of warranty accrues, at the earliest, upon tender of delivery. Thus, the earliest date the implied warranty of merchantability regarding [plaintiff]'s boat could have accrued was the date [plaintiff] purchased it … . Because he filed this action three years seven months after that date, he did

so within the four-year limitations period. Therefore, [plaintiff]'s action is not barred by a statute of limitations." (*Mexia, supra,* 174 Cal.App.4th at p. 1306.)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 213

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 474, 519, 962

1 California Products Liability Actions, Ch. 8, *Statute of Limitations* § 8.021 (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 500, *Sales Under the Commercial Code*, § 500.78 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, §§ 206.38, 206.61, 206.62 (Matthew Bender)

1 Crompton et al., Matthew Bender Practice Guide: California Contract Litigation, Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.05

3221. Affirmative Defense—Disclaimer of Implied Warranties

[*Name of defendant***] claims that it did not breach any implied warranties because the [***consumer good***] was sold on an "as is" or "with all faults" basis. To succeed, [***name of defendant***] must prove both of the following:**

1. **That at the time of sale a clearly visible written notice was attached to the [***consumer good***]; and**

2. **That the written notice, in clear and simple language, told the buyer each of the following:**

   a. **That the [***consumer good***] was being sold on an "as is" or "with all faults" basis;**

   b. **That the buyer accepted the entire risk of the quality and performance of the [***consumer good***]; and**

   c. **That if the [***consumer good***] were defective, the buyer would be responsible for the cost of all necessary servicing or repair.**

New September 2003; Revised June 2010

Directions for Use

If the consumer goods in question were sold by means of a mail-order catalog, the instruction must be modified in accordance with Civil Code section 1792.4(b).

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

If at the time of sale, or within 90 days thereafter, the defendant sold the plaintiff a service contract that applied to the product, the federal Magnuson-Moss Warranty--Federal Trade Commission Improvement Act preempts use of this defense. (See 15 U.S.C. § 2308.)

Sources and Authority

- Civil Code section 1792.3 provides: "No implied warranty of merchantability and, where applicable, no implied warranty of fitness shall be waived, except in the case of a sale of consumer goods on an 'as is' or 'with all faults' basis where the provisions of this chapter affecting 'as is' or 'with all faults' sales are strictly complied with."

- ~~"Unless specific disclaimer methods are followed, an implied warranty of merchantability~~

~~accompanies every retail sale of consumer goods in the state." (*Music Acceptance Corp. v. Lofing* (1995) 32 Cal.App.4th 610, 619 [39 Cal.Rptr.2d 159].)~~

- Civil Code section 1791.3 provides: "[A] sale 'as is' or 'with all faults' means that the manufacturer, distributor, and retailer disclaim all implied warranties that would otherwise attach to the sale of consumer goods under the provisions of this [act]."

- Civil Code section 1792.4 provides:

    (a) No sale of goods, governed by the provisions of this [act], on an "as is" or "with all faults" basis, shall be effective to disclaim the implied warranty of merchantability or, where applicable, the implied warranty of fitness, unless a conspicuous writing is attached to the goods which clearly informs the buyer, prior to the sale, in simple and concise language of each of the following:

    (1) The goods are being sold on an "as is" or "with all faults" basis.

    (2) The entire risk as to the quality and performance of the goods is with the buyer.

    (3) Should the goods prove defective following their purchase, the buyer and not the manufacturer, distributor, or retailer assumes the entire cost of all necessary servicing or repair.

    (b) In the event of sale of consumer goods by means of a mail order catalog, the catalog offering such goods shall contain the required writing as to each item so offered in lieu of the requirement of notification prior to the sale.

- Civil Code section 1793 provides, in part: "[A] manufacturer, distributor, or retailer, in transacting a sale in which express warranties are given, may not limit, modify, or disclaim the implied warranties guaranteed by this chapter to the sale of consumer goods."

- Civil Code section 1792.5 provides: "Every sale of goods that are governed by the provisions of this [act], on an 'as is' or 'with all faults' basis, made in compliance with the provisions of this [act], shall constitute a waiver by the buyer of the implied warranty of merchantability and, where applicable, of the implied warranty of fitness."

- Civil Code section 1795.4(e) provides: "A lessor who re-leases goods to a new lessee and does not retake possession of the goods prior to consummation of the re-lease may, notwithstanding the provisions of Section 1793, disclaim as to that lessee any and all warranties created by this chapter by conspicuously disclosing in the lease that these warranties are disclaimed."

- Title 15 United States Code section 2308 provides:

- (a) Restrictions on disclaimers or modifications. No supplier may disclaim or modify (except as provided in subsection (b)) any implied warranty to a consumer with respect to such consumer

product if (1) such supplier makes any written warranty to the consumer with respect to such consumer product, or (2) at the time of sale, or within 90 days thereafter, such supplier enters into a service contract with the consumer which applies to such consumer product.

(b) Limitation on duration. For purposes of this title [15 USCS §§ 2301 et seq.] (other than section 104(a)(2)) [15 USCS § 2304(a)(2)] implied warranties may be limited in duration to the duration of a written warranty of reasonable duration, if such limitation is conscionable and is set forth in clear and unmistakable language and prominently displayed on the face of the warranty.

(c) Effectiveness of disclaimers, modifications, or limitations. A disclaimer, modification, or limitation made in violation of this section shall be ineffective for purposes of this title [15 USCS § 2304(a)] and State law.

- "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].)

Secondary Sources

4 Witkin, Summary of California Law (10th ed. 2005) Sales, § 90

1 California UCC Sales & Leases (Cont.Ed.Bar) Warranties, §§ 3.53-3.61

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.34[3], Ch. 8, *Defenses*, § 8.07[5][c] (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*, § 206.72 et seq. (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) §§ 53:8–53:9, 53.58

3713. Nondelegable Duty

[*Name of defendant***] has a duty that cannot be delegated to another person arising from [***~~Insert~~ insert name, popular name, or number of regulation, statute, or ordinance***/a contract between the parties/***other, e.g., the landlord-tenant relationship***]. Under this duty, ~~states:~~**

[*~~Insert~~ insert requirements of regulation, statute, or ordinance or otherwise describe duty~~.~~***].**

[*Name of plaintiff***] claims that [he/she] was harmed by the conduct of [***name of independent contractor***] and that [***name of defendant***] is responsible for this harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] hired [***name of independent contractor***] to [***describe job involving nondelegable duty, e.g., repair the roof***];**

2. **That [***name of independent contractor***] [***specify wrongful conduct in breach of duty, e.g., did not comply with this law***];**

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

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

~~If [*name of plaintiff***] proves that [***name of independent contractor***] did not comply with this law, then [***name of defendant***] is responsible for any harm caused by this failure unless [***name of defendant***] proves both of the following:~~**

1. **~~That [he/she/it] did what would be expected of a reasonably careful person acting under similar circumstances who wanted to comply with this law; and~~**

2. **~~That the failure to comply with this law was not due to [***name of independent contractor***]'s negligence.~~**

New October 2004; Revised June 2010

Directions for Use

Use this instruction with regard to the liability of the hirer for the torts of an independent contractor if a nondelegable duty is imposed on the hirer by statute, regulation, ordinance, contract, or common law. (See *Barry v. Raskov* (1991) 232 Cal.App.3d 447, 455 [283 Cal.Rptr. 463].)

Sources and Authority

- Restatement Second of Torts, section 424, provides: "One who by statute or by administrative

regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions."

- "~~A nondelegable duty is a definite affirmative duty the law imposes on one by reason of his or her relationship with others. One cannot escape this duty by entrusting it to an independent contractor." (*Felmlee v. Falcon Cable Co.* (1995) 36 Cal.App.4th 1032, 1036 [43 Cal.Rptr.2d 158], internal citation omitted.)~~As a general rule, a hirer of an independent contractor is not liable for physical harm caused to others by the act or omission of the independent contractor. There are multiple exceptions to the rule, however, one being the doctrine of nondelegable duties. … ' "A nondelegable duty is a definite affirmative duty the law imposes on one by reason of his or her relationship with others. One cannot escape this duty by entrusting it to an independent contractor." A nondelegable duty may arise when a statute or regulation requires specific safeguards or precautions to ensure others' safety. [Citation.] … ' " (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 400 [99 Cal.Rptr.3d 5], internal citations omitted.)

- ~~"The law has long recognized one party may owe a duty to another which, for public policy reasons, cannot be delegated. Such nondelegable duties derive from statutes, contracts, and common law precedents. Courts have held a party owing such a duty cannot escape liability for its breach simply by hiring an independent contractor to perform it." (*Barry v. Raskov* (1991) 232 Cal.App.3d 447, 455 [283 Cal.Rptr. 463], internal citations omitted.)~~

- "The rationale of the nondelegable duty rule is 'to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm[.]' The 'recognition of nondelegable duties tends to insure that there will be a financially responsible defendant available to compensate for the negligent harms caused by that defendant's activity[.]' Thus, the nondelegable duty rule advances the same purposes as other forms of vicarious liability." (*Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 727 [28 Cal.Rptr.2d 672], internal citations and footnote omitted.)

- "Simply stated, ' "[t]he duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition[.]" ' " (*Srithong, supra*, 23 Cal.App.4th at p. 726.)

- ~~*Felmlee* noted~~ "~~[n]~~Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure the safety of others~~[,]" but concluded that the municipal ordinance on which the plaintiff worker relied did not give rise to a nondelegable duty because it did not concern specific safeguards~~." (*Felmlee v. Falcon Cable Co.* (1995) 36 Cal.App.4th 1032, 1039 [43 Cal.Rptr.2d 158]~~*Felmlee, supra*, 36 Cal.App.4th at p. 1039~~.)

- "Unlike strict liability, a nondelegable duty operates, not as a substitute for liability based on negligence, but to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm and who may therefore properly be held liable for the negligence of his agent, whether his agent was an employee or an independent

contractor." (*Maloney v. Rath* (1968) 69 Cal. 2d 442, 446 [71 Cal.Rptr. 897, 445 P.2d 513].)

- A California public agency is subject to the imposition of a nondelegable duty in the same manner as any private individual. (Gov. Code, § 815.4; *Jordy v. County of Humboldt* (1992) 11 Cal.App.4th 735, 742 [14 Cal.Rptr.2d 553].)

- "It is undisputable that '[t]he question of duty is ... a legal question to be determined by the court.' " (*Summers v. A.L. Gilbert Co*. (1999) 69 Cal.App.4th 1155, 1184 [82 Cal.Rptr.2d 162] internal citation omitted.) "When a court finds that a defendant has a nondelegable duty as a matter of law, the instruction given by the court should specifically inform the jurors of that fact and not leave them to speculate on the subject." (*Id*. at p. 1187, fn. 5.)

- ~~Restatement Second of Torts, section 424, provides: "One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions."~~

- " 'Where the law imposes a definite, affirmative duty upon one by reason of his relationship with others, whether as an owner or proprietor of land or chattels or in some other capacity, such persons can not escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor. ... It is immaterial whether the duty thus regarded as "nondelegable" be imposed by statute, charter or by common law.' " (*Snyder v. Southern California Edison Co*. (1955) 44 Cal.2d 793, 800 [285 P.2d 912], internal citation omitted.)

- "[T]o establish a defense to liability for damages caused by a brake failure, the owner and operator must establish not only that " 'he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law' " but also that the failure was not owing to the negligence of any agent, whether employee or independent contractor, employed by him to inspect or repair the brakes." (*Clark v. Dziabas* (1968) 69 Cal.2d 449, 451 [71 Cal.Rptr. 901, 445 P.2d 517], internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1247

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.05[3][d] (Matthew Bender)

2 California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.10[2][d] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, § 248.22[2][c] (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent* (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, §

100A.42 (Matthew Bender)

4102. Duty of Undivided Loyalty—Essential Factual Elements

[*Name of plaintiff***] claims that [he/she/it] was harmed by [***name of defendant***]'s breach of the fiduciary duty of loyalty. [A/An] [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]] owes [his/her/its] [principal/client/corporation/partner/[***insert other fiduciary relationship***]] undivided loyalty. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [agent/stockbroker/real estate agent/real estate broker/corporate officer/partner/[***insert other fiduciary relationship***]];**

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

   [knowingly acted against [*name of plaintiff***]'s interests in connection with [***insert description of transaction, e.g., "purchasing a residential property"***];]**

   [acted on behalf of a party whose interests were adverse to [*name of plaintiff***] in connection with [***insert description of transaction, e.g., "purchasing a residential property"***];]**

3. **That [***name of plaintiff***] did not give informed consent to [***name of defendant***]'s conduct;**

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

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

New June 2006; Revised June 2010

Directions for Use

The instructions in this series are intended for lawsuits brought by or on behalf of the principal. They also assume that the plaintiff is bringing a legal cause of action, not an action in equity. (See *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819 [251 Cal.Rptr. 530].)

For a breach of fiduciary duty instruction in cases involving attorney defendants, see CACI No. 4106, *Breach of Fiduciary Duty by Attorney—Essential Factual Elements.*

While the advisory committee has not included "employee" as an option for identifying the defendant agent in element 1, there may be cases in which certain employees qualify as "agents," thereby subjecting them to liability for breach of fiduciary duty.

If the parties dispute whether the plaintiff gave informed consent (element 3), the court may wish to add explanatory language or a separate instruction on what constitutes informed consent. (See, e.g., Rest. 3d Agency, § 8.06(1).)

Sources and Authority

- ~~Restatement Second of Agency, section 387, states: "Unless otherwise agreed, an agent is subject to a duty to his principal to act solely for the benefit of the principal in all matters connected with his agency."~~

- ~~Restatement Second of Agency, section 391, states: "Unless otherwise agreed, an agent is subject to a duty to his principal not to act on behalf of an adverse party in a transaction connected with his agency without the principal's knowledge."~~

- ~~Restatement Second of Agency, section 393, states: "Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency."~~

- ~~Restatement Second of Agency, section 394, states: "Unless otherwise agreed, an agent is subject to a duty not to act or to agree to act during the period of his agency for persons whose interests conflict with those of the principal in matters in which the agent is employed."~~

- ~~Restatement Second of Agency, section 396, extends the duty even after the agency's termination "unless otherwise agreed."~~

- Restatement Third of Agency, section 8.01, states: "An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship."

- Restatement Third of Agency, section 8.02, states: "An agent has a duty not to acquire a material benefit from a third party in connection with transactions conducted or other actions taken on behalf of the principal or otherwise through the agent's use of the agent's position."

- Restatement Third of Agency, section 8.03, states: "An agent has a duty not to deal with the principal as or on behalf of an adverse party in a transaction connected with the agency relationship."

- Restatement Third of Agency, section 8.04, states: "Throughout the duration of an agency relationship, an agent has a duty to refrain from competing with the principal and from taking action on behalf of or otherwise assisting the principal's competitors. During that time, an agent may take action, not otherwise wrongful, to prepare for competition following termination of the agency relationship."

- Restatement Third of Agency, section 8.05, states:

  An agent has a duty

  (1) not to use property of the principal for the agent's own purposes or those of a third party; and

  (2) not to use or communicate confidential information of the principal for the agent's own purposes or those of a third party.

- Restatement Third of Agency, section 8.06, states:

(1) Conduct by an agent that would otherwise constitute a breach of duty as stated in §§ 8.01, 8.02, 8.03, 8.04, and 8.05 does not constitute a breach of duty if the principal consents to the conduct, provided that
  (a) in obtaining the principal's consent, the agent
    (i) acts in good faith,
    (ii) discloses all material facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and
    (iii) otherwise deals fairly with the principal; and
  (b) the principal's consent concerns either a specific act or transaction, or acts or transactions of a specified type that could reasonably be expected to occur in the ordinary course of the agency relationship.
(2) An agent who acts for more than one principal in a transaction between or among them has a duty
  (a) to deal in good faith with each principal,
  (b) to disclose to each principal
    (i) the fact that the agent acts for the other principal or principals, and
    (ii) all other facts that the agent knows, has reason to know, or should know would reasonably affect the principal's judgment unless the principal has manifested that such facts are already known by the principal or that the principal does not wish to know them, and
  (c) otherwise to deal fairly with each principal.

- "Every agent owes his principal the duty of undivided loyalty. During the course of his agency, he may not undertake or participate in activities adverse to the interests of his principal. In the absence of an agreement to the contrary, an agent is free to engage in competition with his principal after termination of his employment but he may plan and develop his competitive enterprise during the course of his agency only where the particular activity engaged in is not against the best interests of his principal." (*Sequoia Vacuum Systems v. Stransky* (1964) 229 Cal.App.2d 281, 287 [40 Cal.Rptr. 203].)

- "The determination of the particular factual circumstances and the application of the ethical standards of fairness and good faith required of a fiduciary in a given situation are for the trier of facts." (*Sequoia Vacuum Systems, supra,* 229 Cal.App.2d at p. 288, internal citation omitted.)

- "[T]he protection of the principal's interest requires a full disclosure of acts undertaken in preparation of entering into competition." (*Sequoia Vacuum Systems, supra,* 229 Cal.App.2d at p. 287, internal citation omitted.)

- "It is settled that a director or officer of a corporation may not enter into a competing enterprise which cripples or injures the business of the corporation of which he is an officer or director. An officer or director may not seize for himself, to the detriment of his company, business opportunities in the company's line of activities which his company has an interest and prior claim to obtain. In the event that he does seize such opportunities in violation of his fiduciary duty, the corporation may claim for

itself all benefits so obtained." (*Xum Speegle, Inc. v. Fields* (1963) 216 Cal.App.2d 546, 554 [31 Cal.Rptr. 104], internal citations omitted.)

- "A fiduciary relationship is ' "any relation existing between parties to a transaction wherein one of the parties is in duty bound to act with the utmost good faith for the benefit of the other party. Such a relation ordinarily arises where a confidence is reposed by one person in the integrity of another, and in such a relation the party in whom the confidence is reposed, if he voluntarily accepts or assumes to accept the confidence, can take no advantage from his acts relating to the interest of the other party without the latter's knowledge or consent." ' " (*Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 29 [130 Cal.Rptr.2d 860].)

- "Inherent in each of these relationships is the duty of undivided loyalty the fiduciary owes to its beneficiary, imposing on the fiduciary obligations far more stringent than those required of ordinary contractors. As Justice Cardozo observed, 'Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive is then the standard of behavior.' " (*Wolf, supra, ~~v. Superior Court~~ (2003)* 107 Cal.App.4th at p. ~~25,~~ 30 ~~[130 Cal.Rptr.2d 860]~~, internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 65–84

35 California Forms of Pleading and Practice, Ch. 401, *Partnerships: Actions Between General Partners and Partnership*, § 401.20 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, § 427.23 (Matthew Bender)

UNLAWFUL DETAINER

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

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

1. **That [***name of plaintiff***] [owns/leases] the property;**

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***];**

3. **That under the [lease/rental agreement/sublease], [***name of defendant***] agreed [***insert required condition(s) that were not performed***];**

4. **That [***name of defendant***] failed to perform [that/those] requirement(s) by [***insert description of alleged failure to perform***];**

~~5. That [*name of defendant*]'s failure to perform [that/those] requirement(s) was not trivial, but was a substantial violation of [an] important obligation[s] under the [lease/rental agreement/sublease];~~

~~6~~5. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to [either [***describe action to correct failure to perform***] or] vacate the property[, or that [***name of defendant***] actually received this notice at least three days before [***date on which action was filed***]]; [and]**

[~~7~~6. That [*name of defendant***] did not [***describe action to correct failure to perform***]; and]**

[7~~/8~~]. That [*name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

[[*Name of defendant***]'s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not be trivial, but must be a substantial violation of [an] important obligation(s).]**

New August 2007; Revised June 2010

Directions for Use

Uncontested elements may be deleted from this instruction.

Include the bracketed references to a subtenancy in the opening paragraph, in element ~~6~~5, and in the last element if persons other than the tenant-defendant are in occupancy of the premises.

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

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

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element ~~6~~5. Defective service is waived if defendant admits timely receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96].)

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element ~~6~~5.

If the violation of the condition or covenant involves waste, nuisance, or illegal activity and cannot be cured (see Code Civ. Proc., § 1161(4)), omit the bracketed language in element ~~6~~ 5 and element ~~7~~6. If a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action. (*Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246], internal citation omitted.)

Include the last paragraph if the tenant alleges that the violation was trivial. It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479].)

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

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

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

Sources and Authority

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

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

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

- Civil Code section 1952.3(a) provides, in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action … ."

- "[Code of Civil Procedure section 1161(3)] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord's claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of this statute is to speedily permit a landlord to obtain possession of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law otherwise would accord him under the proceeding." (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449].)

- "The law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as 'material,' 'substantial,' or 'total.' " (*Superior Motels, Inc.*, *supra*, ~~*v. Rinn Motor Hotels, Inc.* (1987)~~ 195 Cal.App.3d ~~1032,~~at p. 1051 ~~[241 Cal.Rptr. 487]~~, internal citations omitted.)

- "California too accepts that '[whether] a breach is so material as to constitute cause for the injured party to terminate a contract is ordinarily a question for the trier of fact.' " (*Superior Motels, Inc., supra*, 195 Cal.App.3d at pp. 1051-1052, internal citations omitted.)

- "As to the substantiality of the violation, the evidence shows that the violation was wilful. Therefore, the court will not measure the extent of the violation." (*Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 66 [202 P.2d 378].)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

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

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

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

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

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

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

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

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:201

4320. Affirmative Defense—Implied Warranty of Habitability

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

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

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

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

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

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

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

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

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

i. [*Insert other applicable standard relating to habitability***.]**

[*Name of plaintiff***]'s failure to meet these requirements does not necessarily mean that the property was not habitable. The failure must be substantial. A condition that occurred only after [***name of defendant***] failed or refused to pay rent and was served with a notice to pay rent or quit cannot be a defense to the previous nonpayment.**

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

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

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

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

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

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

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

New August 2007; Revised June 2010

Directions for Use

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

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

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

There is no requirement that the tenant give notice of the condition to the landlord (See *Knight, supra*, 29 Cal.3d at p. 54). In a case not involving unlawful detainer and the failure to pay rent, the California Supreme Court has stated that the warranty of habitability extends only to conditions of which the landlord knew or should have discovered through reasonable inspections. (See *Peterson v. Superior Court* (1995) 10 Cal.4th 1185, 1206 [43 Cal.Rptr.2d 836, 899 P.2d 905].)

Sources and Authority

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

- Code of Civil Procedure section 1174.2 provides:

  (a) In an unlawful detainer proceeding involving residential premises after default in payment of rent and in which the tenant has raised as an affirmative defense a breach of the landlord's obligations under Section 1941 of the Civil Code or of any warranty of habitability, the court shall determine whether a substantial breach of these obligations has occurred. If the court finds that a substantial breach has occurred, the court (1) shall determine the reasonable rental value of the premises in its untenantable state to the date of trial, (2) shall deny possession to the landlord and adjudge the tenant to be the prevailing party, conditioned upon the payment by the tenant of the rent that has accrued to the date of the trial as adjusted pursuant to this subdivision within a reasonable period of time not exceeding five days, from the date of the court's judgment or, if service of the court's judgment is made by mail, the payment shall be made within the time set forth in Section 1013, (3) may order the landlord to make repairs and correct the conditions which constitute a breach of the landlord's obligations, (4) shall order that the monthly rent be limited to the reasonable rental value of the premises as determined pursuant to this subdivision until repairs are completed, and (5) except as otherwise provided in subdivision (b), shall award the tenant costs and attorneys' fees if provided by, and pursuant to, any statute or the contract of the parties. If the court orders repairs or corrections, or both, pursuant to paragraph (3), the court's jurisdiction continues over the matter for the purpose of ensuring compliance. The court shall, however, award possession of the premises to the landlord if the tenant fails to pay all rent accrued to the date of trial, as determined due in the judgment, within the period prescribed by the court pursuant to this subdivision. The tenant shall, however, retain any rights conferred by Section 1174.

  (b) If the court determines that there has been no substantial breach of Section 1941 of the Civil Code or of any warranty of habitability by the landlord or if the tenant fails to pay all rent accrued to the date of trial, as required by the court pursuant to subdivision (a), then judgment shall be entered in favor of the landlord, and the landlord shall be the prevailing party for the purposes of awarding costs or attorneys' fees pursuant to any statute or the contract of the parties.

  (c) As used in this section, "substantial breach" means the failure of the landlord to comply with applicable building and housing code standards which materially affect health and safety.

  (d) Nothing in this section is intended to deny the tenant the right to a trial by jury. Nothing in this section shall limit or supersede any provision of Chapter 12.75 (commencing with Section 7060) of Division 7 of Title 1 of the Government Code.

- Civil Code section 1941.1 provides:

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

  (a) Effective waterproofing and weather protection of roof and exterior walls, including unbroken windows and doors.
  (b) Plumbing or gas facilities that conformed to applicable law in effect at the time of installation, maintained in good working order.
  (c) A water supply approved under applicable law that is under the control of the tenant, capable of producing hot and cold running water, or a system that is under the control of the landlord, that produces hot and cold running water, furnished to appropriate fixtures, and connected to a sewage disposal system approved under applicable law.
  (d) Heating facilities that conformed with applicable law at the time of installation, maintained in good working order.
  (e) Electrical lighting, with wiring and electrical equipment that conformed with applicable law at the time of installation, maintained in good working order.
  (f) Building, grounds, and appurtenances at the time of the commencement of the lease or rental agreement, and all areas under control of the landlord, kept in every part clean, sanitary, and free from all accumulations of debris, filth, rubbish, garbage, rodents, and vermin.
  (g) An adequate number of appropriate receptacles for garbage and rubbish, in clean condition and good repair at the time of the commencement of the lease or rental agreement, with the landlord providing appropriate serviceable receptacles thereafter and being responsible for the clean condition and good repair of the receptacles under his or her control.
  (h) Floors, stairways, and railings maintained in good repair.

- Civil Code section 1941.2 provides:

  (a) No duty on the part of the landlord to repair a dilapidation shall arise under Section 1941 or 1942 if the tenant is in substantial violation of any of the following affirmative obligations, provided the tenant's violation contributes substantially to the existence of the dilapidation or interferes substantially with the landlord’s obligation under Section 1941 to effect the necessary repairs:

    (1) To keep that part of the premises which he occupies and uses clean and sanitary as the condition of the premises permits.
    (2) To dispose from his dwelling unit of all rubbish, garbage and other waste, in a clean and sanitary manner.
    (3) To properly use and operate all electrical, gas and plumbing fixtures and keep them as clean and sanitary as their condition permits.
    (4) Not to permit any person on the premises, with his permission, to willfully or wantonly destroy, deface, damage, impair or remove any part of the structure or

dwelling unit or the facilities, equipment, or appurtenances thereto, nor himself do any such thing.

(5) To occupy the premises as his abode, utilizing portions thereof for living, sleeping, cooking or dining purposes only which were respectively designed or intended to be used for such occupancies.

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

- Civil Code section 1942.4(a) provides:

(a) A landlord of a dwelling may not demand rent, collect rent, issue a notice of a rent increase, or issue a three-day notice to pay rent or quit pursuant to subdivision (2) of Section 1161 of the Code of Civil Procedure, if all of the following conditions exist prior to the landlord's demand or notice:

(1) The dwelling substantially lacks any of the affirmative standard characteristics listed in Section 1941.1 or violates Section 17920.10 of the Health and Safety Code, or is deemed and declared substandard as set forth in Section 17920.3 of the Health and Safety Code because conditions listed in that section exist to an extent that endangers the life, limb, health, property, safety, or welfare of the public or the occupants of the dwelling.

(2) A public officer or employee who is responsible for the enforcement of any housing law, after inspecting the premises, has notified the landlord or the landlord's agent in writing of his or her obligations to abate the nuisance or repair the substandard conditions.

(3) The conditions have existed and have not been abated 35 days beyond the date of service of the notice specified in paragraph (2) and the delay is without good cause. For purposes of this subdivision, service shall be complete at the time of deposit in the United States mail.

(4) The conditions were not caused by an act or omission of the tenant or lessee in violation of Section 1929 or 1941.2.

- "Once we recognize that the tenant's obligation to pay rent and the landlord's warranty of habitability are mutually dependent, it becomes clear that the landlord's breach of such warranty may be directly relevant to the issue of possession. If the tenant can prove such a breach by the landlord, he may demonstrate that his nonpayment of rent was justified and that no rent is in fact 'due and owing' to the landlord. Under such circumstances, of course, the landlord would not be entitled to possession of the premises." (*Green v. Superior Court* (1974) 10 Cal.3d 616, 635 [111 Cal.Rptr. 704, 517 P.2d 1168].)

- "We have concluded that a warranty of habitability is implied by law in residential leases in this state and that the breach of such a warranty may be raised as a defense in an unlawful

detainer action. Under the implied warranty which we recognize, a residential landlord covenants that premises he leases for living quarters will be maintained in a habitable state for the duration of the lease. This implied warranty of habitability does not require that a landlord ensure that leased premises are in perfect, aesthetically pleasing condition, but it does mean that 'bare living requirements' must be maintained. In most cases substantial compliance with those applicable building and housing code standards which materially affect health and safety will suffice to meet the landlord's obligations under the common law implied warranty of habitability we now recognize." (*Green, supra,* 10 Cal.3d at p. 637, footnotes omitted.)

- "[U]nder *Green,* a tenant may assert the habitability warranty as a defense in an unlawful detainer action. The plaintiff, of course, is not required to plead negative facts to anticipate a defense." (*De La Vara v. Municipal Court* (1979) 98 Cal.App.3d 638, 641 [159 Cal.Rptr. 648], internal citations omitted.)

- "[T]he fact that a tenant was or was not aware of specific defects is not determinative of the duty of a landlord to maintain premises which are habitable. The same reasons which imply the existence of the warranty of habitability—the inequality of bargaining power, the shortage of housing, and the impracticability of imposing upon tenants a duty of inspection—also compel the conclusion that a tenant's lack of knowledge of defects is not a prerequisite to the landlord's breach of the warranty." (*Knight, supra,* 29 Cal.3d at p. 54.)

- "The implied warranty of habitability recognized in *Green* gives a tenant a reasonable expectation that the landlord has inspected the rental dwelling and corrected any defects disclosed by that inspection that would render the dwelling uninhabitable. The tenant further reasonably can expect that the landlord will maintain the property in a habitable condition by repairing promptly any conditions, of which the landlord has actual or constructive notice, that arise during the tenancy and render the dwelling uninhabitable. A tenant injured by a defect in the premises, therefore, may bring a negligence action if the landlord breached its duty to exercise reasonable care. But a tenant cannot reasonably expect that the landlord will have eliminated defects in a rented dwelling of which the landlord was unaware and which would not have been disclosed by a reasonable inspection." (*Peterson, supra,* 10 Cal.4th at pp. 1205–1206, footnotes omitted.)

- "At least in a situation where, as here, a landlord has notice of alleged uninhabitable conditions not caused by the tenants themselves, a landlord's breach of the implied warranty of habitability exists whether or not he has had a 'reasonable' time to repair. Otherwise, the mutual dependence of a landlord's obligation to maintain habitable premises, and of a tenant's duty to pay rent, would make no sense." (*Knight, supra,* 29 Cal.3d at p. 55, footnote omitted.)

- "[A] tenant may defend an unlawful detainer action against a current owner, at least with respect to rent currently being claimed due, despite the fact that the uninhabitable conditions first existed under a former owner." (*Knight, supra,* 29 Cal.3d at p. 57.)

- "Without evaluating the propriety of instructing the jury on each item included in the defendants' requested instruction, it is clear that, where appropriate under the facts of a given case, tenants are entitled to instructions based upon relevant standards set forth in Civil Code section 1941.1 whether or not the 'repair and deduct' remedy has been used." (*Knight, supra,* 29 Cal.3d at p. 58.)

- "The defense of implied warranty of habitability is not applicable to unlawful detainer actions involving commercial tenancies." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174], internal citation omitted.)

- "In defending against a 30-day notice, the sole purpose of the [breach of the warranty of habitability] defense is to reduce the amount of daily damages for the period of time after the notice expires." (*N. 7th St. Assocs. v. Constante* (2001) 92 Cal.App.4th Supp. 7, 11, fn. 1 [111 Cal.Rptr.2d 815].)

Secondary Sources

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

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

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

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

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

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

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

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

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:224

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

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

[1. That [*name of defendant***] was not in default in the payment of [his/her/its] rent;]**

2. That [*name of plaintiff***] filed this lawsuit in retaliation because [***name of defendant***] had complained about the condition of the property to [[***name of plaintiff***]/[***name of appropriate agency***]]; and**

3. That [*name of plaintiff***] filed this lawsuit within 180 days after**

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

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

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

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

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

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

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

New August 2007; Revised June 2010

Directions for Use

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

Include element 1 only if the landord's asserted ground for eviction is something other than nonpayment of rent. If nonpayment is the ground, the landlord has the burden to prove that the tenant is in default. (See CACI No. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*.)

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

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

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

Sources and Authority

- Civil Code section 1942.5(a) provides:

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

  (1) After the date upon which the lessee, in good faith, has given notice pursuant to Section 1942, or has made an oral complaint to the lessor regarding tenantability.

(2) After the date upon which the lessee, in good faith, has filed a written complaint, or an oral complaint which is registered or otherwise recorded in writing, with an appropriate agency, of which the lessor has notice, for the purpose of obtaining correction of a condition relating to tenantability.
(3) After the date of an inspection or issuance of a citation, resulting from a complaint described in paragraph (2) of which the lessor did not have notice.
(4) After the filing of appropriate documents commencing a judicial or arbitration proceeding involving the issue of tenantability.
(5) After entry of judgment or the signing of an arbitration award, if any, when in the judicial proceeding or arbitration the issue of tenantability is determined adversely to the lessor.

- Civil Code section 1942.5(d) provides: "Nothing in this section shall be construed as limiting in any way the exercise by the lessor of his or her rights under any lease or agreement or any law pertaining to the hiring of property or his or her right to do any of the acts described in subdivision (a) or (c) for any lawful cause. Any waiver by a lessee of his or her rights under this section is void as contrary to public policy."

- Civil Code section 1942.5(e) provides: "Notwithstanding subdivisions (a) to (d), inclusive, a lessor may recover possession of a dwelling and do any of the other acts described in subdivision (a) within the period or periods prescribed therein, or within subdivision (c), if the notice of termination, rent increase, or other act, and any pleading or statement of issues in an arbitration, if any, states the ground upon which the lessor, in good faith, seeks to recover possession, increase rent, or do any of the other acts described in subdivision (a) or (c). If the statement is controverted, the lessor shall establish its truth at the trial or other hearing."

- "The defense of 'retaliatory eviction' has been firmly ensconced in this state's statutory law and judicial decisions for many years. 'It is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer proceeding.' The retaliatory eviction doctrine is founded on the premise that '[a] landlord may normally evict a tenant for any reason or for no reason at all, but he may not evict for an improper reason … .' " (*Barela, supra,* 30 Cal.3d at p. 249, internal citations omitted.)

- "Thus, California has two parallel and independent sources for the doctrine of retaliatory eviction. This court must decide whether petitioner raised a legally cognizable defense of retaliatory eviction under the statutory scheme and/or the common law doctrine." (*Barela, supra,* 30 Cal.3d at p. 251.)

- "Retaliatory eviction occurs, as Witkin observes, '[When] a landlord exercises his legal right to terminate a residential tenancy in an authorized manner, but with the motive of retaliating against a tenant who is not in default but has exercised his legal right to obtain compliance with requirements of habitability.' It is recognized as an affirmative defense in California; and as appellant correctly argues, it extends beyond warranties of habitability into the area of

First Amendment rights." (*Four Seas Inv. Corp. v. International Hotel Tenants' Assn.* (1978) 81 Cal.App.3d 604, 610 [146 Cal.Rptr. 531], internal citations omitted.)

- "If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. … 'If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all. ~~The question of permissible or impermissible purpose is one of fact for the court or jury.~~' " (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97], internal citations omitted.)

- "The existence or nonexistence of a landlord's retaliatory motive is ordinarily a question of fact." (*W. Land Office v. Cervantes* (1985) 175 Cal.App.3d 724, 731 [220 Cal.Rptr. 784].)

- "[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith--i.e., a bona fide--intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence." (*Drouet supra,* 31 Cal.4th at p. 596.)

Secondary Sources

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

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

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

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

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

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

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

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

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

4324. Affirmative Defense—Waiver by Acceptance of Rent

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

[1]. That [*name of plaintiff***] accepted a [partial] payment of rent after [the three-day notice period had expired/[***name of plaintiff***] knew that [***name of defendant***] had violated the [lease/rental agreement]] [./; and]**

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

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

[1. That even though [*name of plaintiff***] received [***name of defendant***]'s [***specify noncash form of payment, e.g., check***], [he/she/it] rejected the rent payment because [***e.g., it never cashed the check***]][./; or]**

[2. That the lease contained a provision stating that acceptance of [late rent/rent after knowing of a violation of the [lease/rental agreement]] would not affect [his/her/its] right to evict [*name of defendant***][./; or]**

[3. That [*name of plaintiff***] clearly and continuously objected to the violation of the [lease/rental agreement].]**

New August 2007; Revised April 2008, June 2010

Directions for Use

The affirmative defense in this instruction applies to an unlawful detainer for nonpayment of rent or breach of another condition of the lease if either the landlord accepts a rent payment after the three-day period to cure or quit has expired or the landlord waived a breach of a condition by accepting rent after the breach and then subsequently served a notice of forfeiture and filed an unlawful detainer. This defense is available for breach of a covenant prohibiting a sublease or assignment only if the landlord received written notice of the sublease or assignment from the tenant and accepted rent thereafter. (See Civ. Code, § 1954.53(d)(4).)

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

With regard to the landlord plaintiff's burden, give option 3 if there is evidence that the landlord at all times made it clear that acceptance of rent was not a waiver of the breach. (See *Thriftmart, Inc. v. Me & Tex* (1981) 123 Cal.App.3d 751, 754 [177 Cal.Rptr. 24] [accepting rent for five years was not a waiver].)

Sources and Authority

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

- Civil Code section 1954.53(d)(4) provides: "Acceptance of rent by the owner does not operate as a waiver or otherwise prevent enforcement of a covenant prohibiting sublease or assignment or as a waiver of an owner's rights to establish the initial rental rate, unless the owner has received written notice from the tenant that is party to the agreement and thereafter accepted rent."

- "It is a general rule that the right of a lessor to declare a forfeiture of the lease arising from some breach by the lessee is waived when the lessor, with knowledge of the breach, accepts the rent specified in the lease. While waiver is a question of intent, the cases have required some positive evidence of rejection on the landlord's part or a specific reservation of rights in the lease to overcome the presumption that tender and acceptance of rent creates." (*EDC Assocs. v. Gutierrez* (1984) 153 Cal.App.3d 167, 170 [200 Cal.Rptr. 333], internal citations omitted.)

- "The acceptance of rent by the landlord from the tenant, after the breach of a condition of the lease, with full knowledge of all the facts, is a waiver of the breach and precludes the landlord from declaring a forfeiture of the lease by reason of said breach. This is the general rule and is supported by ample authority. … 'The most familiar instance of the waiver of the forfeiture of a lease arises from the acceptance of rent by the landlord after condition broken, and it is a universal rule that if the landlord accepts rent from his tenant after full notice or knowledge of a breach of a covenant or condition in his lease for which a forfeiture might have been demanded, this constitutes a waiver of forfeiture which cannot afterward be asserted for that particular breach or any other breach which occurred prior to the acceptance of the rent. In other words, the acceptance by a landlord of the rents, with full knowledge of a breach in the conditions of the lease, and of all of the circumstances, is an affirmation by him that the contract of lease is still in force, and he is thereby estopped from setting up a breach in any of the conditions of the lease, and demanding a forfeiture thereof.' " (*Kern Sunset Oil*

Co. v. Good Roads Oil Co. (1931) 214 Cal. 435, 440-441 [6 P.2d 71], internal citations omitted.)

- "Here the lessor not only relied upon the express agreement in the contract of the lease against waiver of its right to assert a forfeiture for the acceptance of rent after knowledge of the breach of covenant prohibiting assignment of the lease without its written consent first obtained, but it also gave notice that its acceptance of the rent after the breach of covenant became known was not to be construed as a consent to the assignment of the lease or a waiver of its right to assert a forfeiture." (*Karbelnig v. Brothwell* (1966) 244 Cal.App.2d 333, 342 [53 Cal.Rptr. 335].)

- "The landlord had the obligation of going forward with the evidence in order to prove that the money orders were not negotiated or that it took other action to insure that there was no waiver. 'Although a plaintiff ordinarily has the burden of proving every allegation of the complaint and a defendant of proving any affirmative defense, fairness and policy may sometimes require a different allocation. Where the evidence necessary to establish a fact essential to a claim lies peculiarly within the knowledge and competence of one of the parties, that party has the burden of going forward with the evidence on the issue although it is not the party asserting the claim.' " (*EDC Assocs., supra,* 153 Cal.App.3d at p. 171, internal citations omitted.)

- "Waiver is a matter of intent. Here plaintiff, from the start, evidenced, not a willingness to waive -- which would have kept the original lease in force at the contractual rent -- but a willingness to lease the land encroached upon and, if that extended lease were arrived at, to continue the lease on the original parcel. We cannot impose on plaintiff a penalty for a reasonable effort to achieve an amicable adjustment of the breach." (*Thriftmart, Inc., supra,* 123 Cal.App.3d at p. 754.)

Secondary Sources

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

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

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

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

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

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

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

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:205