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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: December 14, 2010

Title	Agenda Item Type
Jury Instructions: Additions and Revisions to Civil Jury Instructions	Action Required
Rules, Forms, Standards, or Statutes Affected	Effective Date
<i>Judicial Council of California Civil Jury Instructions (CACI)</i>	December 14, 2010
Recommended by	Date of Report
Advisory Committee on Civil Jury Instructions	November 11, 2010
Hon. H. Walter Croskey, Chair	Contact
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Executive Summary

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

Recommendation

The advisory committee recommends that the Judicial Council, effective December 14, 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 published in the 2011 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 44–240.

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 of the California Rules of Court. Since that time, the committee has complied with both rules by regularly proposing to the council additions and changes to *CACI*. This is the 17th release of *CACI*.

The council approved *CACI* release 16 at its June 2010 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. Once the council approves the release, the official publisher, LexisNexis, will publish print, HotDocs document assembly, and online versions of the new and revised instructions on receiving council approval.

The following 59 instructions and verdict forms are included in this proposal: 106, 114, 303, 350, 359, 361, 450A, 450B, 1009B, 1009C, 1240, 1246, 1247, 1400, 2003, 2031, VF-2004, 2100, VF-2514, 3007, 3009, 3010, 3013, 3017, 3704, 3904A, 3904B, 3920, 3926, 3933, 3934, VF-3920, 4304, 4305, 4308, 4309, 4400, 4401, 4406, 4407, 4500, 4501, 4502, 4510, 4511, 4520, 4521, 4522, 4523, 4524, 4530, 4531, 4532, 4540, 4541, 4542, 4543, 4544, and 5018. Of these, 28 are revised, 26 are newly drafted, including a proposed new series on construction contract law (, *CACI* No. 4500 et seq.), and 3 are renumbered. *CACI* No. 1240, which was revoked in release 16, has been restored and revised. *CACI* No. 450, which was also revoked in release 16, has been restored, revised, and renumbered as *CACI* No. 450A.

The committee also proposes two global changes to be made to all verdict forms. These proposed changes are demonstrated for *CACI* No. VF-300, which is attached at page 63. The Judicial Council's Rules and Projects Committee (RUPRO) has also approved 39 additional instructions under a delegation of authority from the council to RUPRO.²

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.

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.

CACI No. 450, *Good Samaritan*, was revoked in June (release 16) because of 2009 legislation amending Health and Safety Code section 1799.³ The amendments made this instruction no longer correct under the law. In light of this legislation, the committee now proposes restoring and revising the instruction and renumbering it as CACI No. 450A. This instruction is now limited to nonemergency situations. New CACI No. 450B now addresses emergency situations under the statute.

CACI No. 1240, *Affirmative Defense to Express Warranty—Not “Basis of Bargain,”* was also revoked in June in response to a footnote in *Weinstat v. Dentsply Internat., Inc.*,⁴ in which the First Appellate District of the Court of Appeal found the instruction to be “misguided.” The committee now proposes restoring this instruction as revised.

In June, CACI No. 1246, *Affirmative Defense—Design Defect—Government Contractor*, was added in response to the opinion of the First Appellate District of the Court of Appeal 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. The committee now proposes adding another related new instruction, CACI No. 1247, *Affirmative Defense—Failure to Warn—Government Contractor*.

Several recent cases from the Ninth Circuit Court of Appeals⁶ led the committee to reconsider and revise its coverage of local governmental liability for civil rights violations under *Monell v. Dept. of Social Services of New York*.⁷ CACI No. 3007, *Local Government Liability—Policy or Custom—Essential Factual Elements*, and CACI No. 3009, *Local Government Liability—Failure to Train—Essential Factual Elements*, have been revised to conform their elements more closely with Ninth Circuit standards. A new third instruction on this subject, CACI No. 3010, *Local*

Under the implementing guidelines that RUPRO approved on December 14, 2006, which were submitted to the council on February 15, 2007, 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 36 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.

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

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

⁵ (2009) 177 Cal.App.4th 700.

⁶ See *Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232; *Edgerly v. City & County of San Francisco* (9th Cir. 2010) 599 F.3d 946; *Burke v. County of Alameda* (9th Cir. 2009) 586 F.3d 725.

⁷ (1978) 436 U.S. 658.

Government Liability—Act or Ratification by Official With Final Policy-Making Authority—Essential Factual Elements, was suggested by Ninth Circuit authority and is proposed for addition. Because the committee wanted to group these three instructions together, it proposes renumbering two current instructions. Current CACI No. 3010, *Violation of Prisoner’s Federal Civil Rights—Eighth Amendment—Excessive Force*, would be renumbered as CACI No. 3013, and current CACI No. 3013, *Supervisor Liability*, would be renumbered as CACI No. 3017.

Some revisions and additions are proposed for the unlawful detainer series in response to a request from a Los Angeles attorney who asked for additional instructions on termination of tenancy for breach other than nonpayment of rent under Code of Civil Procedure section 1161(4). Current CACI No. 4304, *Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements*, addressed all possible grounds under this statute. But some statutory grounds (assignment, sublet, waste) require breach of an express condition in the lease while others (nuisance, illegal activity) do not. The committee proposes revising CACI No. 4304 and CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement*, and adding CACI No. 4308, *Termination for Nuisance or Illegal Activity—Essential Factual Elements*, and CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Illegal Activity*, to account for the two separate statutory situations.

New CACI No. 5018, *Audio or Video Recording and Transcript*, is proposed in response to a request from Justice Stuart R. Pollak of the First Appellate District of the Court of Appeal, a former advisory committee member and current consultant for the *California Judges Benchbook: Civil Proceedings*. The benchbook includes a similar instruction, which Justice Pollak proposed be adopted as an official CACI instruction. CACI No. 5018 is an edited version of that instruction.

Reduction of Future Economic Damages to Present Value: Currently, CACI mentions the need to reduce future economic damages to present value in several instructions⁸ but does not provide any tools to explain to the jury what that means and how to do it. The trial judges on the committee unanimously requested additional help in this area, at least in providing tables from which the jury could take the multiplier to use in calculating present value.

This proposal includes two worksheets to give to the jury in calculating present value. One worksheet is for use if the jury finds that the plaintiff will incur a constant annual amount of damages over a period of future years. The second worksheet is for use if the jury finds that the plaintiff will incur differing amounts of future damages in different years. Present-value factor tables to use with each worksheet are also provided. As a result of this project, CACI No. 359 and CACI No. 3904 (renumbered as CACI No. 3904A) have been revised. CACI No. 3904B, *Use of Present-Value Tables*, is proposed as a new instruction, incorporating the worksheets and tables.

⁸ See CACI No. 359, *Present Cash Value of Future Damages*, and CACI No. 3904, *Present Cash Value*.

Damages on Multiple Counts: Another problem that the committee's trial judges have identified and that has appeared in several recent cases⁹ is that of different damages recoverable on different counts or causes of action. Usually, there will be some items of damages that are recoverable on every count to be presented to the jury. But there may be some additional damages that are recoverable on one or more, but not all, counts. While the jury is usually instructed not to include duplicate damages, the mechanism to achieve this is not always made clear. Different damages tables in different verdict forms may not identify exactly what damages are duplicative and what may be unique to a particular count.

The committee concluded that the best mechanism to achieve clarity is to first instruct the jury as to exactly what damages are recoverable on each count in the case. New CACI No. 3934, *Damages on Multiple Legal Theories*, is proposed for this purpose. The committee also decided that the damages questions in the various verdict forms should be unified into a single table in which each item of damages is identified and the counts on which that item is recoverable are set forth. New CACI No. VF-3920, *Damages on Multiple Legal Theories*, is proposed for this purpose.

The committee proposes further that each verdict form whose Directions for Use suggest combining forms if there are multiple counts cross-refer the user to VF-3920. And because the committee proposes this global change to all verdict forms, it also proposes a minor revision to the final instruction to the jury in each verdict form. Currently, the jury is instructed to deliver the verdict form(s) to the clerk, bailiff, or judge. The proposed revision instructs the jury to notify the clerk, bailiff, or court attendant that it has finished deliberating and is ready to present its verdict. This revision was requested by a retired appellate court justice who is the author of a CACI companion handbook. CACI No. VF-300, *Breach of Contract*, is included at p. 63 as an example of the proposed global changes.

New Construction Law Series: Finally, the committee proposes a new series on construction law (CACI No. 4500 et seq.). This initiative was proposed by Richard Seabolt, a committee member who was also a member of the State Bar litigation section. In the development of the instructions, the committee consulted with other attorneys experienced in construction law.

The series currently covers only the contractual aspects of construction law. Expansion of the series to cover construction defect tort litigation remains under consideration as a future project.

Comments, Alternatives Considered, and Policy Implications

Most of the proposed additions and revisions to CACI circulated for comment from August 2 to September 10, 2010. The proposed new Construction Law series and the proposed new and revised instructions on damages on multiple counts circulated for comment from August 30 to

⁹ See, e.g., *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 701–705; *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 360.

October 8, 2010. Two different comment periods were required because of cases that were decided after the committee's regular meeting in July. The committee evaluated all comments and revised some of the instructions as a result. Comments were received from 19 different commentators. A chart with summaries of all comments received and the committee's responses is attached at pages 7–43.¹⁰

Of the comments received, no particular proposal was the subject of a particularly large number of comments.

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 edition and pay royalties to the Administrative Office of the Courts (AOC). The official publisher will also make the revised content 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. 7–43
2. Full text of new and revised *CACI* instructions at pp. 44–240

¹⁰ Five product liability instructions were posted for comment proposing changes to the requirement that the plaintiff prove that he or she was using the product in a reasonably foreseeable way at the time of injury. Before the comment period ended, a case was published that called into question the proposed revisions. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658). The committee has withdrawn the strict liability instructions at this time and will take up the question once again in its next cycle.

CACI 10-02 and 10-03

New and Revised CACI Instructions

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Response
106. Evidence	State Bar of California, Litigation Section, Jury Instructions Committee	Agree	No response is necessary.
114. Bench Conferences and Conferences in Chambers	Hon. Jacqueline Connor, Superior Court of Los Angeles County	Change “it may become necessary” to “It may be necessary.”	The committee did not view the suggestion as an improvement and did not make the change.
		Replace “The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence” with “The purpose of these conferences is purely procedural and must not have any impact on your view of the evidence that is presented for your consideration.”	The committee did not view the suggestion as an improvement and did not make the change. The meaning of “purely procedural” would not be clear to the jury.
		Add the words “my view of” as follows: “I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of my view of the evidence.”	The committee agreed and made this change.

CACI 10-02 and 10-03

New and Revised CACI Instructions

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Response
	State Bar of California, Litigation Section, Jury Instructions Committee	Agree	No response is necessary.
350. Introduction to Contract Damages	State Bar of California, Litigation Section, Jury Instructions Committee	The committee agrees with the proposed revisions to the instruction, but believes that the quotation from <i>Resort Video, Ltd. v. Laser Video, Inc.</i> (1995) 35 Cal.App.4th 1679, 1697, in the Sources and Authority should be retained because no other cited authority in the Sources and Authority explains special or consequential damages.	The committee agreed and restored the second sentence of the excerpt from <i>Resort Laser Video</i> that explains special or consequential damages.
359. Present Cash Value of Future Damages	State Bar of California, Litigation Section, Jury Instructions Committee	Proposed new language in the Directions for Use cites <i>Wilson v. Gilbert</i> (1972) 25 Cal.App.3d 607, 613-614, for the proposition that the defendant bears the burden of proof on the discount rate. <i>Wilson</i> held that the trial court did not abuse its discretion by refusing the defendant's proposed jury instruction on present cash value because it was presented too late. (<i>Id.</i> at p. 613.) <i>Wilson</i> also held that the refusal of the instruction was proper because there was no evidence from which the jury could determine the present cash value. (<i>Id.</i> at pp. 613-614.) This appears to be only a specific application of the general rule that the court should not give an instruction absent evidence to support the instruction. Perhaps <i>Wilson</i> suggests that the defendant has the burden to present evidence as to present cash value, but the burden of producing evidence is not the same thing as	The committee expressly considered this point at its July meeting. The committee concluded that regardless of the fact that <i>Wilson</i> could be construed as the commentator suggests, because any reduction to present value favors the defendant, the defendant has the burden of proof. The committee agreed with the commentator's alternative suggestion that the instruction should contain express reference to the defendant's burden of proof.

CACI 10-02 and 10-03

New and Revised CACI Instructions

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Response
		the burden of proof. (See Evid. Code, §§ 110, 115, 550.) Moreover, if the defendant bears the burden of proof on the issue, the jury should be so instructed. (Evid. Code, § 502.)	
361. Plaintiff May Not Recover Duplicative Contract and Tort Damages	State Bar of California, Litigation Section, Jury Instructions Committee	Agree	No response is necessary.
VF-300. Example of Language Proposed to be added to Directions for Use for all verdict forms	State Bar of California, Litigation Section, Jury Instructions Committee	Agree	No response is necessary.
450A. Good Samaritan—Nonemergency	State Bar of California, Litigation Section, Jury Instructions Committee	<p>The Directions for Use state that the instruction should be used for situations other than at the scene of an emergency and that CACI No. 450B should be used if there was an emergency. But whether an emergency existed is a question of fact for the jury under this instruction (and under CACI No. 450B). If there is a question of fact as to whether an emergency existed, the court cannot know the answer to that question before giving the instruction.</p> <p>The committee believes that whether an emergency existed is relevant to the existence of immunity under Health and Safety Code section 1799.102, which is the subject of CACI No. 450B, that the question whether an emergency existed belongs in CACI No.</p>	The committee agreed that element 1 should be deleted because it is the defendant's burden to prove an emergency in order to meet the requirements of Health and Safety Code section 1799.102.

CACI 10-02 and 10-03

New and Revised CACI Instructions

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Response
		450B rather than CACI No. 450A. Element 1 of CACI No. 450A should be deleted. With this change, CACI Nos. 450A and 450B should both be given in appropriate cases, the former to establish liability and the latter to establish immunity as an affirmative defense.	
450B. Good Samaritan—Scene of Emergency	State Bar of California, Litigation Section, Jury Instructions Committee	The committee believes that this is an affirmative defense and should be labeled as such.	The committee did not change the title. Only the first part of the instruction is an affirmative defense. If the defendant proves this defense, the burden shifts to the plaintiff to prove gross negligence or willful or wanton misconduct (and then the common-law elements). Therefore, titling the instruction as an affirmative defense would not be wholly accurate.
		The committee believes that the instruction could more clearly explain the effect of this affirmative defense. Rather than speak in terms of a “claim” that the defendant must “establish,” this instruction could state that the defendant “cannot be held responsible” if the defendant proves the specified items. Alternatively, the instruction could refer to the defendant’s “claim” but then state “To succeed on this defense” (e.g., CACI No. 1245) to make it clear that by establishing these elements the defendant avoids liability.	The committee agreed and revised the instruction to use the standard “to succeed on this defense” language.
		Health and Safety Code section 1799.102 establishes a broader immunity for medical, law enforcement, and emergency personnel (id., subd. (a)) than for others (id., subd. (b)(2)), but the proposed instruction seems to overlook this distinction, as do the Directions for Use.	The committee added a reference to the broader immunity for medical, law enforcement, and emergency personnel in the Directions for Use. The committee will consider whether a separate instruction on these responders would be appropriate in the next release cycle.

CACI 10-02 and 10-03

New and Revised CACI Instructions

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Response
		<p>The immunity applies to persons who “render” emergency medical or nonmedical care or assistance at the scene of an emergency. (Health & Saf. Code, § 1799.102(a) & (b).) The harm need not occur at the scene of an emergency as long as the care or assistance was rendered there. The committee believes that the first enumerated requirement (“That the harm occurred at the scene of an emergency”) should be modified accordingly.</p>	<p>The committee agreed and made the requested change.</p>
		<p>If the plaintiff proves that the defendant (other than medical, law enforcement, and emergency personnel) was grossly negligent or acted willfully or wantonly, the affirmative defense does not apply. In those circumstances, the defendant will be liable if the plaintiff has established liability under CACI No. 450A. The committee therefore believes that both instructions should be given where applicable, and there is no reason to incorporate in CACI No. 450B the requirements to establish liability under CACI No. 450A (i.e., concluding paragraphs 1 and 2 of CACI No. 450B).</p>	<p>The committee did not make this change. If the existence of an emergency is a disputed fact for the jury, then the commentator is correct, that both instructions would have to be given. But if an emergency is found, then CACI No. 450A is no longer applicable. CACI No. 450B would still need to set forth the common-law elements. And most often, an emergency will be undisputed. In that case, only 450B would be given.</p>
		<p>The second paragraph of the Directions for Use states the Advisory Committee’s opinion that the defendant bears the burden of proof to establish the immunity. If the immunity is an affirmative defense, as we believe, it would be appropriate to cite Evidence Code section 500 regarding the defendant’s burden of proof.</p>	<p>The committee agreed and added a citation to Evidence Code section 500.</p>

CACI 10-02 and 10-03

New and Revised CACI Instructions

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Response
1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control	Ruben Ginsberg, Research Attorney, Second Appellate District	Contrary to the proposed revision, I believe that the “affirmative contribution” requirement from <i>Hooker v. Department of Transportation</i> (2002) 27 Cal.4th 198 concerns the element of duty, rather than causation, that a trial court giving this instruction must decide whether the evidence satisfies the “affirmative contribution” requirement so as to establish a duty of care as a matter of law, and that the Directions for Use should alert the trial court to the need to make this determination.	The committee did not make the requested change. Per <i>Hooker</i> , the hirer is liable if it actually exercised its retained control in a way that “affirmatively contributed” to the <i>employee’s injury</i> ; the requirement is not that the hirer “affirmatively increased the risk.” The committee believes that this language cannot be construed as anything other than a statement of causation. To accept the commentator’s position would mean that the court would have to invade the province of the jury and make findings on causation in order to decide the duty issue.
	State Bar of California, Litigation Section, Jury Instructions Committee	Agree	No response is necessary.
1009C. Liability to Employees of Independent Contractors for Unsafe Conditions—Nondelegable Duty	Ruben Ginsberg, Research Attorney, Second Appellate District	Same comment as for CACI No. 1009B	See response to CACI No. 1009B, above.
	State Bar of California, Litigation Section, Jury Instructions Committee	The first sentence of the proposed revision to the Directions for Use states that the hirer’s nondelegable duty must have affirmatively contributed to the plaintiff’s injury. The committee believes that the reference should be to the hirer’s act or omission in breach of that duty, rather than to the duty itself. Accordingly, we would insert the words “breach of a” before “nondelegable duty.”	The committee agreed and made the proposed change.
1240: Affirmative Defense to Express Warranty—Not “Basis of Bargain”	State Bar of California, Litigation Section, Jury Instructions Committee	Agree	No response is necessary.

CACI 10-02 and 10-03

New and Revised CACI Instructions

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Instruction	Commentator	Summary of Comment	Response
1246: Affirmative Defense—Design Defect—Governmental Contractor	Andrew Chew, Brayton Purcell, Novato, forwarded by Consumer Attorneys of California	The burden of proof is on the defendants to establish the threshold fact that the product at issue is military equipment. The fact that the military may order such products does not make them "military equipment." As the court in <i>In re: Hawaii Federal Asbestos Cases</i> (1992 9th Cir.) 960 F.2d 806, 811 makes clear, a defendant must first establish the threshold issue of whether a product is "military equipment" before it can apply the three-part test under <i>Boyle</i> . We would propose that a separate jury instruction regarding whether a product was "military equipment" be submitted to a jury before they considered the three-part <i>Boyle</i> test.	<p>CACI No. 1246 was a new instruction adopted in the previous release (June 2010). Many comments were received and addressed in that release cycle, including comments based on <i>In Re Hawaii</i>. The instruction is included in this release only to add a cross reference to proposed new CACI No. 1247, <i>Affirmative Defense—Failure to Warn—Governmental Contractor</i>.</p> <p>The suggestion of a separate instruction on whether the product is military equipment was not previously presented and considered directly. But the committee does not believe that such an instruction would be appropriate. <i>Oxford v. Foster Wheeler LLC</i> (2009) 177 Cal.App.4th 700, 710 states that the defense is not limited to military equipment or military contracts, albeit arguably in dicta. The committee believes that the issue is not so much whether the product is equipment used by the military, but whether the government dictated the specifications to the contractor.</p>

CACI 10-02 and 10-03

New and Revised CACI Instructions

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Instruction	Commentator	Summary of Comment	Response
		<p>With regards to the first two parts of the three-part <i>Boyle</i> test (elements 2 and 3), the terms "conformed" and "reasonably precise specifications" must somehow be defined for a jury.</p> <p>“When the government merely accepts, without any substantive review or evaluation, decisions made by a government contractor, then the contractor, not the government, is exercising discretion. A rubber stamp is not a discretionary function; therefore, a rubber stamp is not "approval" under <i>Boyle</i>.” (Emphasis in original.) (<i>Trevino v. General Dynamics Corp.</i> (5th Cir. 1989) 865 F.2d 1474, 1480.)</p> <p>"If the contractor were free to deviate from the government’s specifications, then discretion over the design choices would be exercised by the contractor, not by the government." (<i>Trevino, supra</i>, at p. 1481.)</p>	<p>The committee construes the comment as a request to add <i>Trevino</i> to the Sources and Authority. Appellate cases that are not from California or the 9th Circuit are generally not included in the Sources and Authority; the committee therefore did not add <i>Trevino</i>.</p>
		<p>The third prong of the <i>Boyle</i> test (element 4) necessarily requires that the jury consider the comparative knowledge regarding the dangers of the military equipment between the United States Government and the defendant. The defendant must demonstrate what it knew about the dangers associated with the product and whether it knew more or less about the dangers as compared to the United States Government <i>at the time</i> the injured party worked with the military equipment.</p>	<p>This point also was not expressly raised before this instruction was approved in June. The committee does not believe that the proposed revision would be appropriate. It is not a question of comparative knowledge. It’s whether the contractor knew something that the government didn’t know. The committee doubts that the applicable time is the time the injured party worked with military equipment. It is more likely when the contractor provided the product to the government.</p>

CACI 10-02 and 10-03

New and Revised CACI Instructions

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Instruction	Commentator	Summary of Comment	Response
		The commentator has submitted a proposed replacement instruction for the government contractor defense.	The committee has previously considered, and either adopted or rejected, all matters raised by the proposed replacement instruction.
	Michael B. Gurien, Waters Kraus and Paul, El Segundo	The first element of CACI No. 1246 states: “That [<i>name of defendant</i>] contracted with the United States Government to provide the [<i>product</i>] for military use.” This language is inaccurate because it allows the government contractor defense to be applied based solely on a showing that the product was supplied to the government “for military use,” without considering whether the product was a military product, <i>i.e.</i> , a product manufactured according to military specifications, or an ordinary or readily available consumer product. The government contractor defense is potentially applicable to the former, but not the latter. (<i>See Jackson v. Deft, Inc.</i> (1990) 223 Cal. App. 4th 1305, 1318-1319; <i>In re Hawaii Federal Asbestos Cases</i> (9th Cir. 1992) 960 F.2d 806, 810-812 (“ <i>Hawaii</i> ”).) Thus, the first element should be revised to state: “That [<i>name of defendant</i>] contracted with the United States Government to provide the [<i>product</i>] as military equipment.”	The committee does not believe that the language is inaccurate. <i>Oxford v. Foster Wheeler LLC</i> (2009) 177 Cal.App.4th 700, 710 states that the defense is not limited to military equipment or military contracts, albeit arguably in dicta. The committee believes that the issue really is not so much whether the product is equipment used by the military, but whether the government dictated the specifications to the contractor.

CACI 10-02 and 10-03

New and Revised CACI Instructions

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Response
		<p>In the Directions for Use, delete:</p> <p>“It has been stated that the defense is not limited to military contracts (see <i>Oxford v. Foster Wheeler LLC</i> (2009) 177 Cal.App.4th 700, 710</p> <p>First, the statement conflicts with the statement in the first sentence of the first use note that “[t]his instruction is for use if the defendant’s product whose design is challenged was provided to the United States government for military use.” It also conflicts with our suggested revision to the first use note, as well as the first element of the instruction, that the phrase “for military use” be replaced with the phrase “as military equipment.”</p> <p>Second, the first sentence of this use note concedes that there is no California authority holding that the defense extends beyond military contracts. Thus, the portion of this sentence stating that “[i]t has been stated that the defense is not limited to military contracts” is potentially misleading and confusing.</p> <p>Third, the citation to <i>Oxford</i> is not helpful because the comments of the <i>Oxford</i> court were <i>dicta</i>, since the boilers at issue in that case were military equipment and were designed specifically for the military according to military specifications. (See</p>	<p>The committee believes that this sentence is an appropriate way to present a potential variation in the law that is not yet settled and that could affect the use of the instruction.</p>

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		<p><i>Oxford, supra</i>, 177 Cal.App.4th at 705, 710.) Thus, the <i>Oxford</i> court had no reason or occasion to decide whether the defense could apply to nonmilitary contracts.</p> <p>Also delete the excerpt from <i>Oxford</i> in the Sources and Authority.</p>	
		<p>Delete this excerpt from the Sources and Authority:</p> <p>“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.” (<i>Jackson v. Deft, Inc.</i> (1990) 223 Cal.App.3d 1305, 1319.)</p> <p>This quotation is objectionable because it is an incomplete statement of the applicable law. While <i>Jackson</i> notes that a product that is “incidentally sold” to commercial users may still be military equipment, it also expressly notes that “ordinary consumer products” are not military equipment, and</p>	<p>The committee believes that this excerpt is an accurate statement of California law. The evolution of the law since <i>Jackson</i> was decided is to expand the defense to government contracts generally. (See <i>Oxford, supra</i>, 177 Cal.App.4th at p. 710.)</p>

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		thus are not subject to the government contractor defense, simply because they are sold to the military. (<i>Jackson, supra</i> , 223 Cal.App.3d at 1318-1319.)	
		The last two case excerpts contain quotations from <i>Butler v. Ingalls Shipbuilding</i> (9th Cir. 1996) 89 F.3d 582 and <i>Oxford</i> addressing the government contractor defense in the context of a failure to warn claim. These excerpts should be omitted because CACI No. 1246 deals with application of the defense to a design claim. Proposed CACI No. 1247 addresses application of the defense to a failure to warn claim.	The committee agrees that these two excerpts should now be deleted from CACI No. 1246.
		The case excerpt in the “Sources and Authority” section of proposed CACI No. 1247 quotes <i>Oxford</i> that to demonstrate government approval, “the government’s involvement must transcend rubber stamping.” (<i>Oxford, supra</i> , 177 Cal.App.4th at 712, quoting <i>Tate v. Boeing Helicopters</i> (6th Cir. 1995) 55 F.3d 1150, 1157.) This principle should also be expressly included in the “Sources and Authority” section of proposed CACI No. 1246.	The committee agreed and added this excerpt to CACI no. 1246.
1247. Affirmative Defense—Failure to Warn—Government Contractor	Michael B. Gurien, Waters Kraus and Paul, El Segundo	The commentator raises the same issue regarding military “use” and military “equipment” that he raised above for CACI No. 1246.	The committee does not believe that such a separate instruction defining “military equipment” would be appropriate. <i>Oxford v. Foster Wheeler LLC</i> (2009) 177 Cal.App.4th 700, 710 states that the defense is not limited to military equipment or military contracts, albeit arguably in dicta. The committee believes that the issue is not whether the product is equipment used by the military,

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			but whether the government dictated the specifications to the contractor.
		The second element of proposed CACI No. 1247, at page 52 of the “Invitation to Comment” packet, states: “That the United States approved reasonably precise specifications regarding the provision of warnings for the [product].” Based on <i>Oxford</i> , this element should be revised to state: “That the United States <i>exercised its discretion and</i> approved reasonably precise specifications regarding the provision of warnings for the [product].” (See <i>Oxford, supra</i> , 177 Cal.App.4th at 712, emphasis added.)	The committee does not believe that “exercised its discretion” is necessary or improves the instruction.
		The commentator raises the same issue as with CACI No. 1246 regarding the suggestion in the Directions for Use that the defense may not be limited to military contracts.	The committee believes that this sentence is an appropriate way to present a potential variation in the law that is not yet settled and that could affect the use of the instruction.
		The commentator raises the same objection as with CACI No. 1246 to the excerpt to <i>Jackson v. Deft, Inc.</i> (1990) 223 Cal.App.3d 1305, 1319.) in the Sources and Authority.	The committee believes that this excerpt is an accurate statement of California law. The evolution of the law since <i>Jackson</i> was decided is to expand the defense to government contracts generally. (See <i>Oxford, supra</i> , 177 Cal.App.4th at p. 710.)
		Add to Sources and Authority: [U]nder <i>Boyle</i> , a contractor who supplies equipment to the government may be relieved of its duty under state tort law, but only when there is a “significant conflict” between the contractor's duty under state law and its duty under the government contract to comply	The first sentence from <i>Boyle</i> is a general principle of the governmental contractor defense. The committee does not believe that it needs to be restated here. The second sentence is not a quote from <i>Jackson</i> . An excerpt from <i>Jackson</i> that makes the point is already included.

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		<p>with government specifications. (<i>Boyle, supra</i>, 487 U.S. 500, 509-512, 108 S.Ct. 2510, 101 L.Ed.2d 442.) At least one California appellate court has indicated that the defense has limited application in failure-to-warn products liability cases, coming into play only if the applicable federal contract includes warning requirements that significantly conflict with those that would be imposed under state law. (<i>Jackson, supra</i>, 223 Cal.App.3d 1305, 1316-1317, 273 Cal.Rptr.214.)</p> <p>Add to Sources and Authority:</p> <p>“It is also well established, however, that a defendant may not defeat a state failure-to-warn claim simply by establishing the elements of the government contractor defense with respect to a plaintiff’s design defect claim.” (<i>Oliver v. Oshkosh Truck Corp.</i> (7th Cir.1996) 96 F.3d 992, 1003; see also <i>Butler v. Ingalls Shipbuilding, Inc.</i> (9th Cir.1996) 89 F.3d 582, 586 [““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, <i>Boyle</i> commands that we defer to the operation of state law.’ (<i>In re Joint E. & S. Dist. New York Asbestos Lit.</i> (2d Cir.1990) 897 F.2d 626, 631.)”].)</p>	<p>The excerpt is from a 2nd Circuit case and the committee therefore declines to include it. The language from <i>Butler</i> is included already.</p>

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	William J. Sayers, McKenna Long & Aldridge, Los Angeles	A citation to <i>Johnson v. American Standard</i> , 43 Cal.4 th 56 (2008) should be added under Directions for Use and Sources and Authority. <i>Johnson</i> was also the basis for the recently adopted CACI 1244. In <i>Johnson</i> , the California Supreme Court held that “[a] manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger.” <i>Johnson</i> , 43 Cal. 4th at 71. <i>Johnson</i> did not involve a military contract, but the principle underlying CACI 1247—that warnings need not be given to a sophisticated entity—was addressed by the California Supreme Court. Indeed, the last requirement in both CACI 1246 and 1247 is that the defendant must warn of hazards that were not known to the United States; warnings of hazards that were known is not necessary.	<i>Johnson</i> is addressed extensively in CACI No. 1244, <i>Affirmative Defense—Sophisticated User</i> . The committee believes that its possible connection to the governmental contractor defense is too conjectural to merit inclusion.
	Sedgwick Detert Moran & Arnold, by Charles T. Sheldon	The fourth citation in the Sources and Authority, to <i>Jackson v. Deft, Inc.</i> (1990) 223 Cal.App.3d 1305, 1317 [273 Cal.Rptr.214] may be good law in California, but the proposition cited in this proposed CACI confuses, rather than clarifies, the law applicable to the government contractor defense in California, and we think it should be removed. The language from <i>Jackson</i> cited in CACI 1247, relating to the evidence a defendant must purportedly submit to prevail on the defense in the failure-to-warn context—that the Government <i>affirmatively</i>	The excerpt is an accurate quotation from the case. The possibility that future courts might not impose an affirmative-limitation requirement does not make it inappropriate to advise users of what the court said in <i>Jackson, supra</i> . The committee notes that contrary to the commentator’s views, the two cases that are the strongest authority, <i>Butler v. Ingalls Shipbuilding</i> (9th Cir. 1996) 89 F.3d 582 and <i>Jackson, supra</i> , both take a quite limited view of the scope of the defense in failure-

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		<p><i>limited</i> the information the defendant could supply regarding additional hazards that were NOT required in the specifications—is both inapplicable to most current asbestos defendants, and legally flawed. The contractor does not have to show that the government prohibited the warning. The prevailing “modified” <i>Boyle</i> test for determining whether government contractors are immune from state tort liability in failure-to-warn cases provides for immunity if:</p> <p>(1) The United States exercised discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned about the dangers it knew, but the government did not.</p>	<p>to-warn cases. If the government does not have to have actually prohibited the warnings, it must have at least <i>imposed</i> its own warnings on the contractor. (<i>Butler, supra</i>, at p. 586.) The committee revised element 2 to require that the government have <i>imposed</i> reasonably precise specifications regarding the provision of warnings for the product (instead of “<i>approved</i>” them).</p>
1400. Essential Factual Elements—No Arrest Involved	County Counsel of San Bernardino County, by Jacqueline Carey-Wilson, Deputy County Counsel	<p>Add the words--“unreasonably and without probable cause” to element 1:</p> <p>1. That [<i>name of defendant</i>] <i>unreasonably and without probable cause</i> intentionally deprived [plaintiff] of his/her freedom...” (<i>Terry v. Ohio</i> (1968) 389 U.S. 950, emphasis added.)</p> <p>There must be an absence of probable cause to make it an unlawful arrest or detention—otherwise it’s not an unlawful arrest.</p>	CACI No. 1400 is not an unlawful-arrest instruction. CACI No. 1401 is for an officer’s arrest without a warrant and CACI No. 1402 addresses probable cause.
2003, Damages to Timber—Willful and Malicious Misconduct	Orange County Bar Association, by Lei Lei-Wang Ekvall, President	The trier of fact must first determine the actual amount of damages sustained before the judge can award the doubling/trebling of those damages and enter judgment. Please	The committee agreed with the comment, but decided that the last sentence was unnecessary. The Directions for Use were revised to explain that the jury must find the

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		<p>consider modifying the last sentence of the instruction to read: “If you find that (<i>name of plaintiff</i>) has proved this claim, then you will determine the amount of actual damages to award (<i>name of plaintiff</i>).”</p> <p>Please consider removing the last proposed sentence under Directions for Use [“The court then determines whether to award double or treble damages. (See <i>Ostling, supra</i>, 27 Cal.App.4th at p. 1742)”], or at least change the citation. The <i>Ostling</i> case was a default judgment case and the issue of whether the court or the jury was to determine whether to award double or treble damages was certainly not at issue. Further, in stating the rule (“for willful and malicious trespass the court may impose treble damages but must impose double damages”) the court cited a nonjury case (<i>Drewry v. Welch</i> (1965) 236 Cal.App.2d 159, 181). So, the possibility of a jury determination—versus a judge determination—was not even referenced in those cases. And the governing statutes (Code Civ. Proc., § 733 and Civ. Code § 3346) don’t speak in terms of the court or the jury deciding (but in terms of what the “measure of damages” is).</p> <p>If the sentence is going to remain, then please consider citation to <i>Sweet v. Erickson</i> (1958) 166 Cal.App.2d 598, 601–602, a case with a jury (trial court did not err in submitting the question of whether the logs were taken “willfully and knowingly” to the jury; it was</p>	<p>amount of damages.</p> <p>The fact that <i>Ostling</i> is not a jury case does not make it irrelevant to jury instructions. The committee believes that the rule set forth in it is good authority for how damages to timber are assessed. In contrast, <i>Sweet</i> may have been a jury case, but it contains no language that would be helpful on this point.</p> <p>The committee noticed, however, that the statement of the rule in the Directions for Use suggested that double damages are discretionary, which is not correct if the jury finds wanton and malicious conduct. The committee revised the statement to conform to the language from <i>Ostling</i>.</p>

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Instruction	Commentator	Summary of Comment	Response
		presented as a question of fact to the jury “by the defendants’ own instruction”). Also, please consider reference to the only California case referencing <i>Sweet v. Erickson—Marshall v. Brown</i> (1983) 141 Cal.App.3d 408, 418, a jury case arising in the employment law context: (“Our reading of [<i>Sweet v. Erickson</i>] does not suggest that it was the province of the jury to consider the statutory enhancement of actual damages”).	
2031, Damages for Annoyance and Discomfort – Trespass or Nuisance	Orange County Bar Association, by Lei Lei-Wang Ekvall, President	Please consider removing the word “See” before citing to the <i>Kelly</i> case in the “Directions for Use.” It is unnecessary in that the case (in citing to another case) states exactly what is stated in the Directions for Use: “annoyance and discomfort damages are distinct from general damages for mental and emotional distress.”	The committee agreed and removed “See.”
3007, Local Government Liability—Policy or Custom—Essential Factual Elements	Horvitz & Levy, Encino, by Lisa Perrochet and Jason J. Jarvis	<p>The word “constitutional” should be included in the instruction. The proposed instruction implies that the violation of any rights can be remedied under 42 U.S.C. § 1983. But there are no other rights that can be remedied by § 1983 against a municipality that do not have their basis in the constitution.</p> <p>“A municipality may be liable under § 1983 only if (1) the plaintiff suffered a deprivation of rights secured to him <i>by the constitution and laws of the United States</i> and (2) the violation occurred pursuant to an official policy or custom.” <i>Huskey v. City of San Jose</i> (9th Cir. 2000) 204 F.3d 893, 904 (emphasis added). See also <i>Hart v. Parks</i></p>	The committee did not revise the instruction to add “constitutional.” As noted by the commentator, section 1983 extends to the constitution <i>and laws</i> of the United States. Under appropriate circumstances, a 1983 action may be based on a statutory violation. (See <i>Me. v. Thiboutot</i> (1980), 448 U.S. 1, 4.) While all of the cases cited by the commentator involve constitutional violations, none of them foreclose or discuss the possibility that a local governmental entity could be liable for nonconstitutional violations.

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		(9th Cir. 2006) 450 F.3d 1059, 1071 (“Under <i>Monell</i> , a municipality may be held liable under § 1983 only for <i>constitutional</i> violations occurring pursuant to an official government policy or custom” (emphasis added)).	
	Consumer Attorneys of California	Element 3 of CACI 3007 requires the plaintiff to prove the officer’s or employee's intent to violate the plaintiff's civil rights. We believe that the language here is inaccurate and places an additional burden upon the plaintiff to make an additional factual finding of intent when federal law does not require this. CACI 3007 specifically refers to the municipality's liability, thus there will be a separate instruction for the employee's individual liability. The level of intent that must be proven will vary (reckless, knowing, negligently, etc.) depending on the claims the plaintiff has made against the employee.	Element 3 does not require an intent to violate the plaintiff’s rights. It only requires the applicable mens rea to do the act that constituted the violation. Element 3 provides for whatever the intent requirement is for the violation.
		In the alternative (to removing element 3) we suggest that the language in Element 3 of CACI 3007 should read: "That [<i>plaintiff</i>]'s civil rights were violated by [<i>name of officer, employee, etc.</i>] who was an employee or agent of the municipality."	While the committee does not believe that current element 3 should be removed or replaced, it has added an additional element expressing the employment or agency relationship.
		We also object to the language stated in Element 5 of CACI 3007 for the aforementioned reasons and suggest that the element be stricken because it is redundant from the language in Element 3.	Element 5 (now element 6) expresses that the individual was acting under the official policy or custom. This is a required element, and not redundant from element 3.
		Elements 6 and 7 of CACI 3007 require a finding that a plaintiff was harmed by	The committee agreed with the commentator on this point. Nominal damages are

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		<p>defendant's actions in order to sustain a claim against the defendant municipality. We believe this to be a misstatement of law and should be revised.</p> <p>A plaintiff who brings an action under § 1983 does not need to show that he has sustained harm or injury in order to prove his claim. Under a § 1983 claim, the burden is on the plaintiff to show liability, if the plaintiff is able to meet that threshold, federal law then entitles him to nominal damages if he cannot prove actual harm or injury. (See <i>George v. City of Long Beach</i> (9th Cir. 1992) 973 F.2d 706; <i>Floyd v. Laws</i> (9th Cir.1991) 929 F.2d 1390, 1401.) This has also been federally recognized in the Ninth Circuit Civil Jury Instructions. See 9th Cir. Civ. Jury Instr. 5.6 (2009).</p>	<p>presumed, but more important, a <i>Monell</i> claim does not present the possibility of additional damages apart from those flowing from the underlying violation. (<i>George v. Long Beach</i> (9th Cir. 1992) 973 F.2d 706, 709.) Therefore, the committee removed the harm and substantial-factor elements. The committee will consider adding nominal-damages language to CACI No. 3000, <i>Violation of Federal Civil Rights—In General—Essential Factual Elements</i>, in the next release cycle.</p>
	<p>County Counsel of San Bernardino County, by Jacqueline Carey-Wilson, Deputy County Counsel</p>	<p>Add to element 1: “promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy”</p> <p>1. That the [<i>government</i>] had an official [<i>policy/custom</i>] <i>promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy</i> (<i>Monell v. New York City</i> (1978) 436 U.S. 658, at 694, emphasis added.)</p> <p>In element 5: replace “because of” with “pursuant to.”</p> <p>5. That [<i>the officer</i>] acted pursuant to</p>	<p>What constitutes an official policy or custom is set forth in CACI No. 3008. Further, the proposed language would only address “policy,” not “custom.”</p> <p>“Pursuant to” is not plain English.</p>

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3009. Local Government Liability—Failure to Train—Essential Factual Elements	Consumer Attorneys of California	official policy or custom.... Elements 5 and 6 of CACI 3009 require a finding that a plaintiff was harmed by defendant's actions in order to sustain a claim against the defendant municipality. We believe this to be a misstatement of law and should be revised. (See 3007, above)	As with CACI No. 3007, the committee agreed and removed the harm and substantial-factor elements.
3010. Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements	Consumer Attorneys of California	We believe the language of CACI 3010 itself, is an accurate and fair statement of law. However, one point of clarification can be made to better track the federal language and avoid any potential confusion. Instructions 9.5 and 9.6 both refer to the ratification of the defendant employee's acts, which can be interpreted differently than the language in 3010 which only refers to ratification of the defendant employee's decisions. Thus, we suggest that Element 2 should read: "That [either] [<i>name of official</i>] was the person who [actually made/or later personally ratified] the [decision/acts/conduct] that led to the deprivation of the [<i>name of plaintiff</i>]'s civil rights."	The committee agreed and revised the language of elements 2, 3, and 4 to include the official's acts or conduct as well as decisions.
3017. Supervisor Liability	Consumer Attorneys of California	We believe that the courts would be better served if the language present in 3017 tracks the language in the Ninth Circuit Civil Jury Instructions 9.3 "Section 1983 Claim Against Supervisory Defendant Individual Capacity." Civil Jury Instruction 9.3 is used when the plaintiff alleges a subordinate committed a constitutional violation and there is a casual connection between the violation and the supervisor's wrongful conduct. 9.3 recognizes that supervisorial liability can be found in	CACI No. 3017 is included in this release only because it is being renumbered. The comment raises new points not yet considered by the committee. The committee will consider the comment in its next release cycle.

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		more than one way, and lays out three different theories in which a plaintiff can establish liability.	
3704. Existence of “Employee” Status Disputed	Orange County Bar Association, by Lei Lei-Wang Ekvall, President	Since this is a totality-of-circumstances test, the jury should be advised of the number of factors in the test so they can evaluate how many of all possible factors are in favor of the employee relationship. Otherwise, they may think there are only four factors and the majority weighs in favor of a particular status.	The Directions for Use advise that not all secondary factors need be given. The number of factors will vary according to the facts.
		Insert after (b) “[Name of agent]’s opportunity for profit or loss does not depend on [his/her] skill”	The committee believes that the secondary factors should be set forth as stated in the Restatement Second of Agency without any additional or explanatory information.
		Add clarification after (e) “He/she does not regularly perform any significant work for anyone else in any capacity.”	The committee believes that the secondary factors should be set forth as stated in the Restatement Second of Agency without any additional or explanatory information.
		Add after (h) “[Name of agent] did not make any significant investment in equipment or materials or the employment of helpers”	The committee believes that the secondary factors should be set forth as stated in the Restatement Second of Agency without any additional or explanatory information.
		Change (i) to “whether the parties believed they had an employer/employee relationship”	The factors are all stated in the way that would indicate employment. “Whether” does not adhere to this format.
		Do not delete first sentence of <i>Malloy v. Fong</i> (1951) 37 Cal.2d 356, 370 re: “depends primarily on ... legal right to control...”	New excerpts from the later case of <i>S. G. Borello & Sons, Inc. v. Department of Industrial Relations</i> (1989) 48 Cal.3d 341 have been added that make this point.
	State Bar of California, Litigation Section, Jury Instructions Committee	The quotation from <i>S. G. Borello & Sons</i> in the fifth bullet point in the Sources and Authority describes a six-factor test that can be considered in addition to the Restatement	While the quotation is appropriate as an authority relevant to the instruction, the committee agrees that it is also appropriate to mention the possibility of additional

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		factors set forth in the instruction. “As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee” The quotation is not a source or authority for the traditional Restatement factors. The committee suggests moving the quotation from the Sources and Authority to the Directions for Use to alert users that factors in addition to those listed in the instruction may be relevant.	factors in the Directions for Use and has made this change.
3904A. Present Cash Value	State Bar of California, Litigation Section, Jury Instructions Committee	The committee agrees with the proposed revisions to the instruction with the exception of the paragraph in the Directions for Use citing <i>Wilson v. Gilbert, supra</i> , 25 Cal.App.3d at pp. 613-614. The committee believes that this paragraph should be deleted for the reasons stated above regarding CACI No. 359.	The committee expressly considered this point at its July meeting. The majority felt that regardless of the fact that <i>Wilson</i> could be construed as the commentator suggests, because any reduction to present value favors the defendant, the defendant has the burden of proof. The committee agreed with the commentator’s alternative suggestion that the instruction should contain express reference to the defendant’s burden of proof.
3904B. Use of Present Value Tables	State Bar of California, Litigation Section, Jury Instructions Committee	The committee believes that the instructions for Worksheet A and the worksheet itself are well-written and understandable. The same is true of the instructions for Worksheet B and the worksheet itself, except that the committee recommends a few minor changes to the instructions for Worksheet B for greater clarity and consistency. Change “the loss” to “a loss” in several	Step 1 for column A uses “a loss.” Step 2 refers back to the loss from column A. So the committee thinks that “the loss” is correct at Step 2. Steps 4 and 5, however, refer to each year row. Because there may be different losses for different years, the committee thinks that “a loss” is better in 4 and 5.

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		<p>places.</p> <p>Change “continue” to “occur” in Step 5:</p> <p>“Multiply the amount in Column B by the factor in Column D for each year for which you determined the loss will continue<u>occur</u> and enter these amounts in Column E.”</p> <p>The committee believes that the third sentence of the fourth paragraph of the Directions for Use, referring to the burden of proof on the issue of present cash value, should be deleted for the same reasons stated above with respect to CACI Nos. 359 and 3904A.</p> <p>The committee also suggests revising the fifth paragraph of the Directions for Use as follows for greater clarity and consistency with the discussion of <i>Salgado v. County of L.A.</i> (1998) Cal.4th 629 in the Directions for Use for CACI No. 3904A:</p> <p>“Tables should not be used for future noneconomic damages are not reduced to present cash value, so present value tables should not be used. (See <i>Salgado v. County of L.A.</i> (1998) 19 Cal.4th 629, 646-647 [80 Cal.Rptr.2d 46, 967 P.2d 585]; CACI No. 3904A.)”</p>	<p>The committee agreed and made this change.</p> <p>The committee expressly considered this point. The majority thought that regardless of the fact that <i>Wilson</i> could be construed as the commentator suggests, because any reduction to present value favors the defendant, the defendant has the burden of proof. The committee agreed with the commentator’s alternative suggestion that the instruction should contain express reference to the defendant’s burden of proof.</p> <p>The committee did not find the proposed revision to be an improvement. The cross reference to CACI No. 3904A should not be deleted because that is where it is explained that future noneconomic damages are not to be reduced to present cash value.</p>
3920. Loss of Consortium	State Bar of California, Litigation Section, Jury Instructions Committee	Agree	No response is necessary.

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3926. Settlement Deduction	State Bar of California, Litigation Section, Jury Instructions Committee	Agree	No response is necessary.
3933. Damages From Multiple Defendants	State Bar of California, Litigation Section, Jury Instructions Committee	Agree	No response is necessary.
	Sedgwick Detert Moran & Arnold, by Charles T. Sheldon	<p>We believe additional language regarding the practical effect of Proposition 51 on the jury’s damages calculations will assist the jury in reaching a just decision with respect to those damages, and the apportionment of fault related to them. We propose the following additional language as the final paragraph in the instruction:</p> <p>“If you find the defendants, or any one of them, liable for any percentage of’ fault, any defendant so found will be responsible to pay for its proportionate share of any noneconomic damages you may award. With respect to economic damages, any defendant found liable will be responsible for the full amount of those damages, less a proportionate share of any settlements that may have been made by other defendants.</p>	The committee has on multiple occasions regarding various instructions addressed a request that the jury be instructed on the operation of Proposition 51. The committee continues to believe that any such instruction is unnecessary and would only be confusing.
3934. Damages on Multiple Legal Theories	State Bar of California, Litigation Section, Jury Instructions Committee	The committee agrees with the language of the proposed new instruction, except that we would delete the prefatory language “In this case” as superfluous.	The committee agreed and made this change.
VF-3920. Damages on Multiple Legal Theories	State Bar of California, Litigation Section, Jury Instructions Committee	This proposed new verdict form separates damages from other elements of the causes of action in a manner that is different from typical verdict forms. Verdict forms typically instruct the jury to reach the question of	The committee agrees that the commentator has identified a problem that must be addressed. The committee has added a sentence to each possible item of damages directing the jury to award that item only if

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New and Revised CACI Instructions

All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Response
		<p>damages on each cause of action only if the other elements are satisfied. (E.g., “If your answer to question 3 is yes, then answer question 4. If you answered no, stop here, answer no further questions”) If that language is deleted from the other verdict forms and this verdict form is used instead, as suggested in the Directions for Use, there may be a risk that the jury will not fully understand that only amounts recoverable on theories on which the jury has found liability should be included in the amounts stated in this verdict form.</p> <p>Some language needs to be added either to the verdict form itself or to the other verdict forms (the Directions for Use for this verdict form could suggest modifying the other verdict forms) to ensure that jury will include only the amounts recoverable on theories on which the jury has found liability.</p>	<p>liability has been found under at least one legal theory under which the item may be recovered.</p>
<p>4304, Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements, and 4305, Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement</p>	<p>Orange County Bar Association, by Lei Lei-Wang Ekvall, President</p>	<p>We recommend that the citation to <i>Salton Community Services District vs. Southard</i> (1967) 256 Cal.App. 2d 526, 529 (64 Cal. Rptr. 246) be retained in the Directions for Use as it is still good law and explanatory of the instruction.</p>	<p>The committee agreed and revised both the Directions for Use and the Sources and Authority. There could be incurable breaches other than assignment, sublet, or waste.</p>

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All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Response
4308, Termination for Nuisance or Illegal Activity— Essential Factual Elements (and 4309, Sufficiency and Service of Notice of Termination for Nuisance or Illegal Activity)	California Apartment Association, by Heidi Palutke, Research Counsel	The proposed instruction should be revised so that it more accurately tracks the language of Code of Civil Procedure Section 1161(4). Specifically, the proposed instruction refers to a defendant who has “engaged in illegal activity on the property”, while CCP 1161(4) refers to a tenant who is “using the premises for an unlawful purpose.” While in many cases, such as prostitution or manufacture or sale of illegal drugs on the premises, a tenant’s conduct may fall into both categories, there are many examples where it may not. A tenant who prepares a false tax return at his kitchen table or sells counterfeit designer handbags on E-bay using his home computer, is certainly engaged in illegal activity on the property, however it is unresolved whether mere presence on the property during an illegal act constitutes “use of the premises for an unlawful purpose.” The instruction should be retitled “Termination for Nuisance or Use of Premises for Unlawful Purpose.”	The committee agreed with the comment and revised the instruction to refer to “use” of the property rather than “engaging” in an illegal activity. Conforming changes were made to proposed new CACI No. 4309, <i>Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use</i> .
4400. Misappropriation of Trade Secrets— Introduction	State Bar of California, Litigation Section, Jury Instructions Committee	The last excerpt in the Sources and Authority is from <i>Jasmine Networks, Inc. v. Superior Court</i> (2009) 180 Cal.App.4th 980, 997, in which the Court of Appeal rejected the defendants’ argument that CACI Nos. 4400 and 4401 were authority for a purported “ ‘current ownership rule.’ ” <i>Jasmine Networks</i> rejected the defendants’ reading of the instructions and stated, “Given only these instructions to go on, one would suppose that <i>past</i> ownership—i.e., ownership at the time	The committee believes that the excerpt is appropriate, but added a second excerpt from <i>Jasmine Networks</i> that set forth the exact holding of the case.

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All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Response
		<p>of the alleged misappropriation—is sufficient to establish this element.” (<i>Ibid.</i>) <i>Jasmine Networks</i> also rejected other arguments in support of the purported “ ‘current ownership rule’ ” (<i>id.</i> at pp. 993-1010) and held that “Jasmine’s sale of the trade secrets in question is not an impediment to its maintenance of this action.” (<i>Id.</i> at p. 1010; see also <i>id.</i> at p.986.) The committee believes that the authority of this opinion is in its holding rather than in its discussion rejecting the defendants’ reading of CACI Nos. 4400 and 4401. The committee suggests citing and briefly describing the holding and deleting this quotation.</p>	
4401.	State Bar of California, Litigation Section, Jury Instructions Committee	<p>The committee suggests that the quotation from <i>Jasmine Networks, Inc. v. Superior Court, supra</i>, 180 Cal.App.4th at page 997, in the Sources and Authority be deleted and replaced with a brief description of its holding, for the reasons stated above in connection with CACI No.4400.</p>	See response to comment immediately above.
		<p>The committee believes that the second quotation from <i>Silvaco Data Systems v. Intel Corp., supra</i>, 184 Cal.App.4th 210, in the Sources and Authority, concerning the need to “ ‘identify the trade secret with reasonable particularity’ ” for purposes of discovery (<i>id.</i>, at p. 221, quoting Code Civ. Proc., § 2019.210), provides no information relevant to submitting these issues to the jury, and should be deleted.</p>	The committee agreed and deleted this excerpt from the Sources and Authority.
4406, Misappropriation by	Orange County Bar Association, by Lei Lei-	In the deleted last paragraph of the Directions for Use, retain the first sentence “Each act of	The committee did not restore the first sentence. While the sentence is legally

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All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Response
Disclosure	Wang Ekvall, President	<p>misappropriation based on improper disclosure requires that the defendant have ‘knowledge of the trade secret.’ (See Civ. Code, § 3426.1(b)(2).)” The law appears to continue to require knowledge.</p> <p>As proposed, delete the second sentence: “No reported California state court decision has interpreted the meaning of “knowledge of the trade secret.” As noted in the proposed amended “Sources and Authority,” the new case of <i>Silvaco Data Systems v. Intel Corp.</i> (2010) 184 Cal.App.4th 210, 225-226 [109 Cal.Rptr.3d 27] discusses and defines “knowledge” in the trade secret context.</p>	correct, the committee does not believe that it is helpful in the Directions for Use because it does not direct anything.
	State Bar of California, Litigation Section, Jury Instructions Committee	Agree	No response is necessary.
4407, Misappropriation by Use	Orange County Bar Association, by Lei Lei-Wang Ekvall, President	<p>In the deleted last paragraph of the Directions for Use, retain the first sentence “Each act of misappropriation based on improper use requires that the defendant have ‘knowledge of the trade secret.’ (See Civ. Code, § 3426.1(b)(2).)” The law appears to continue to require knowledge.</p> <p>As proposed, delete the second sentence: “No reported California state court decision has interpreted the meaning of “knowledge of the trade secret.” As noted in the proposed amended “Sources and Authority,” the new case of <i>Silvaco Data Systems v. Intel Corp.</i> (2010) 184 Cal.App.4th 210, 225-226 [109 Cal.Rptr.3d 27] discusses and defines</p>	See the response to the same comment for CACI No. 4406, above

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Instruction	Commentator	Summary of Comment	Response
	State Bar of California, Litigation Section, Jury Instructions Committee	<p>“knowledge” in the trade secret context.</p> <p>The committee believes that the last of the four quotations from <i>Silvaco Data Systems v. Intel Corp.</i>, <i>supra</i>, 184 Cal.App.4th 210, in the Sources and Authority merely applies the rule stated in the first of those four quotations. This fourth quotation is excessive and unnecessary and should be deleted.</p>	The committee agreed and deleted the fourth excerpt from the Sources and Authority.
4501. Owner’s Liability for Failing to Disclose Important Information Regarding a Construction Project—Essential Factual Elements	Robert C. Hendrickson, DuaneMorris, San Francisco	<p>The authority for this instruction is the recently decided <i>Los Angeles Unified School Dist. v. Great American Ins. Co.</i> (2010) 49 Cal.4th 739, in which the California Supreme Court cited to <i>Warner Constr. Corp. v. L.A.</i> (1970) 2 Cal.3d 285 with approval for the proposition that there are:</p> <p>“at least three instances” in which as contractor may have a cause of action against a public entity for nondisclosure of materials facts: “(1) the defendant [public entity] makes representations but does not disclose facts which materially qualify the facts disclosed, or which render [the] disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known or reasonably discoverable by the plaintiff [contractor]; (3) the defendant actively conceals discovery from the [contractor].” (internal citations omitted.) Although we affirmed a judgment against the city after finding all three instances to be present, <i>we viewed each instance as an independent basis for liability.</i> [emphasis added]</p>	The committee fully considered the views expressed in this comment. The committee believes that the third element as set forth in <i>Los Angeles USD</i> , that the contractor was “misled,” encompasses all three examples set forth in <i>Warner</i> .

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Instruction	Commentator	Summary of Comment	Response
		<p>Instruction 4501 improperly ignores two of the three recognized types of actionable nondisclosure (partial disclosure and active concealment), and therefore improperly limits liability to traditional failure to disclose, apparently based solely on the <i>LAUSD</i> court’s restatement of the rule at the end of its opinion. However, its summary of the rule was applicable only to the one type of actionable nondisclosure before it, and there is no indication that the Court intended to overrule the two other types of nondisclosure described in <i>Warner</i> which it cited with approval earlier in the decision.</p>	
	<p>Oliver L. Holmes, DuaneMorris, San Francisco</p>	<p>The proposed CACI instructions do not address basic misrepresentation claims. At a later date, it would be appropriate to add a CACI instruction spelling out the elements of a contract cause of action against a public agency for misrepresentation.</p>	<p>The commentator’s views were fully considered by the committee. Proposed CACI No. 4500, <i>Breach of Implied Warranty of Correctness of Plans and Specifications—Essential Factual Elements</i>, addresses misrepresentation in the plans and specifications. The commentator believes that 4500 does not extend to misrepresentations that are made after work on the project has commenced. While the commentator’s position is certainly possible, the commentator has not presented, and the committee has not found, any authority that would support a jury instruction for this situation.</p>
	<p>State Bar of California, Litigation Section, Jury Instructions Committee</p>	<p>The committee believes that the instruction could better describe the requirement that a reasonable contractor acting diligently in similar circumstances would not have</p>	<p>While the <i>Los Angeles USD</i> opinion does include the “reasonable contractor” language suggested by the commentator, the committee prefers to not augment the four</p>

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Instruction	Commentator	Summary of Comment	Response
		<p>discovered the information, by modifying the second element and adding a new third element:</p> <p>“2. That [<i>name of defendant</i>] had this information, and was aware that [<i>name of plaintiff</i>] did not know the information;</p> <p>“3. That a reasonable contractor acting diligently in similar circumstances would not have discovered the information.”</p> <p>This proposed new third element is clearer than “had no reason to obtain it” and is consistent with the language from <i>Los Angeles Unified School Dist. v. Great American Ins. Co.</i> (2010) 49 Cal.4th 739, 754, that is quoted in the second sentence of the second bullet point in the Sources and Authority.</p>	<p>elements that the court set out for liability, as set forth in the first case excerpt. The court did not include “reasonable contractor” language in its recitation of the elements.</p>
4510. Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Essential Factual Elements	State Bar of California, Litigation Section, Jury Instructions Committee	<p>The first sentence in the Directions for Use should be modified to refer to the result contemplated under the contract rather than only the result expected by one party to the contract (the owner):</p> <p>“This instruction is for use if an owner claims that the contractor breached the contract by failing to perform the work on the project competently so that the result achieved the owner’s expectations <u>was consistent with what was contemplated under the contract.</u>”</p>	<p>The committee agrees that the language was a bit awkward. It adopted a slightly different revision.</p>
4521. Owner’s Claim That Contract	State Bar of California, Litigation Section, Jury	<p>The committee suggests that language be added to the Directions for Use to make it</p>	<p>The committee believes that the language “several recognized defenses including”</p>

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Instruction	Commentator	Summary of Comment	Response
Procedures Regarding Change Orders Were Not Followed	Instructions Committee	clear that there may be other grounds to relieve the contractor of the requirement to strictly comply with change order requirements apart from those listed in the Directions for Use.	adequately informs that the list is not all-inclusive.
4522. Waiver of Written Approval or Notice Requirements for Changed or Additional Work	Robert C. Hendrickson, DuaneMorris, San Francisco	I do not believe that waiver in this context needs to be shown by clear and convincing evidence. Two of the most often cited cases, <i>Howard White</i> (1960) 178 Cal.App.2d 348 and <i>Healy v. Brewster</i> (1967) 251 Cal.App.2d 541, do not require clear and convincing evidence. I believe that Instruction 4522 improperly imports the “clear and convincing” standard for waiver based on general contract law principles as I do not believe there is any actual authority for that proposition in the construction context.	It is possible that the commentator is correct, but the point is by no means certain. It is true that the two cases cited by the commentator do not mention a clear-and-convincing-evidence requirement. But neither discusses the burden of proof at all. <i>Healy</i> has only a single sentence on waiver. The committee believes that in the absence of clear authority to the contrary, general contract law principles apply to construction contracts. Nevertheless, the committee agrees that the point merits making the requirement optional and mentioning it in the Directions for Use.
	State Bar of California, Litigation Section, Jury Instructions Committee	The committee suggests that language be added to the Directions for Use to make it clear that there may be other grounds to relieve the contractor of written approval or notice requirements for changed or additional work apart from waiver.	The committee believes that this addition is not necessary. The Directions for Use cross refer to CACI No. 4520, which is the contractor’s claim for additional compensation, and 4521, which is the owner’s defense that the contract procedures were not followed. The Directions for Use for 4521 make it clear that there are a number of responses to this affirmative defense, one of which is waiver.
	Hon. Ronald L. Styn, Superior Court of San Diego County	Is this instruction consistent with Bus. & Prof. Code section 7159.6 specifically dealing with the unenforceability of oral change orders? At a minimum this section should be discussed in Directions For Use.	Section 7159.6 applies to “home improvement contractors” as defined in Bus. & Prof. Code, § 7150.1. Subsection (c) provides: “Failure to comply with the requirements of this section does not

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Instruction	Commentator	Summary of Comment	Response
			preclude the recovery of compensation for work performed based upon legal or equitable remedies designed to prevent unjust enrichment.” The committee believes that this provision encompasses the waiver doctrine set forth in this instruction. The committee has added the statute to the Sources and Authority.
4524. Contractor’s Claim for Compensation Due Under Contract—Substantial Performance	Oliver L. Holmes, DuaneMorris, San Francisco	It may also be appropriate to add an instruction dealing with substantial completion of construction contracts. The terms “substantial performance,” “substantial completion,” and “substantial compliance” are often used interchangeably in construction law. (5 Bruner & O’Connor, Construction Law (2009) § 18:12, p. 892.) CACI No. 312, Substantial performance, is a general instruction regarding substantial performance of contract obligations applicable in most commercial disputes. Proposed CACI No. 4524, sets forth the elements a contractor must prove to establish the defense of substantial compliance when the owner claims particular elements of the project were not finished in compliance with the contract. Neither CACI 312 nor CACI 4524 address the situation where the project as a whole is substantially complete. Substantial completion of a project may limit the owner’s ability to recover liquidated damages for delay in completing the project.	While it is true that the terms “substantial performance” and “substantial completion” are sometimes used interchangeably in California construction law cases, they are two different doctrines. “Substantial performance,” the subject of this instruction, refers to <i>what</i> was done. Did the contractor do enough to get paid? “Substantial completion” refers to <i>when</i> it was done. In California, substantial completion is relevant to when liquidated damages stop accruing. That issue is addressed in the Directions for Use to CACI No. 4532, <i>Owner’s Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay</i> . The committee has found no other application of a rule of substantial completion other than with regard to liquidated damages. Further, no California case sets forth the elements or parameters of what constitutes substantial completion. In absence of such a case, no jury instruction is possible. (The term “substantial compliance” has not been found in any California construction contract case.)
	State Bar of California,	The committee believes that “trivial or	The word “trivial” is used in the cases. One

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Instruction	Commentator	Summary of Comment	Response
	Litigation Section, Jury Instructions Committee	unimportant” in item 3 is potentially misleading, that the failure to perform need only be “unimportant” and need not be so unimportant as to be regarded as “trivial” to allow a recovery on the contract, and that “unimportant” alone would also encompass “trivial.”	says “slight or trivial;” another says “minor and trivial.” The committee has removed the word “unimportant,” which is not used in any supporting case cited.
4532. Owner’s Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay	State Bar of California, Litigation Section, Jury Instructions Committee	It appears that this instruction would be appropriate only with a special verdict in which the jury decides the date of completion (or substantial completion) and the number of days of time extension. The committee believes that either a standard verdict form should be created and cross-referenced in the Directions for Use or the need for a special verdict form should be noted in the Directions for Use.	The committee believes that the last paragraph of the instruction alerts both the court and the jury of the special findings that are required. The committee does not believe that a pattern verdict form is necessary.
4540. Contractor’s Damages for Breach of Construction Contract—Change Orders/Extra Work	State Bar of California, Litigation Section, Jury Instructions Committee	Although the reference to “the parties’ agreed price for” the extra work” at the end of the instruction would encompass a contractual provision or any other form of agreement, the committee believes that a more explicit reference to a contractual provision would make it clear to the jury exactly what is being referenced. Particularly in light of the strong likelihood that the contract will contain a provision on payment for extra work, the committee suggests that the instruction should reference such a provision more explicitly by including within the brackets optional language such as “the contract provisions for.”	The committee agreed and made this change.
4541. Contractor’s Damages for Breach	Hon. Ronald L. Styn, Superior Court of San	Is this instruction consistent with Business and Professions Code section 7159.6	The commentator raised this concern with regard to CACI No. 4522, <i>Waiver of Written</i>

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Instruction	Commentator	Summary of Comment	Response
of Construction Contract—Change Orders/Extra Work—Total Cost Recovery	Diego County	specifically dealing with the unenforceability of oral change orders? At a minimum this section should be discussed in Directions For Use.	<i>Approval or Notice Requirements for Changed or Additional Work</i> , as discussed above. Business and Professions Code section 7159.6 applies only to “home improvement contractors” as defined in Business and Professions Code section 7150.1. CACI No. 4541 is one of several instructions that rest on the assumption that oral change orders are enforceable. Even with regard to home improvement contractors, Business and Professions Code section 7159.6(c) provides: “Failure to comply with the requirements of this section does not preclude the recovery of compensation for work performed based upon legal or equitable remedies designed to prevent unjust enrichment.” The committee believes that this provision would make these instructions applicable even in the case of a home improvement contract.
4542. Contractor’s Damages for Abandoned Construction Contract—Quantum Meruit Recovery	Orange County Bar Association, by Lei Lei-Wang Ekvall, President	There should be some guidance given regarding the legal standard as to what constitutes “abandonment” of the contract. Without such guidance, instruction is confusing to the jury.	The guidance is given in CACI No. 4523, <i>Contractor’s Claim for Additional Compensation—Abandonment of Contract</i> , which is referenced in the Directions for Use.
4544. Contractor’s Damages for Breach of Construction Contract—Inefficiency Because of Owner Conduct	State Bar of California, Litigation Section, Jury Instructions Committee	The committee believes that the words “including damages for lost profits” should be deleted from the end of the first paragraph in the instruction because the second paragraph begins “You may also award damages for lost profits”	The committee agreed and made the suggested revision.
5018. Audio or	Hon. Jacqueline Connor,	Add: “Any such deletions are unrelated to the	The committee does not think that this

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Instruction	Commentator	Summary of Comment	Response
Video Recording and Transcript	Superior Court of Los Angeles County	issues you must decide.”	addition would improve the instruction. Additionally, the use of “such” as a modifier is not favored.
	Hon. Harold Hopp, Superior Court of Riverside County	I suggest that proposed instruction 5018 include in the instructions for use a reference to Cal. Rules of Court 2.1040, which requires that a party offering a recording provide a typewritten transcript.	The committee agreed and added the reference.
	Orange County Bar Association, by Lei Lei-Wang Ekvall, President	Agree with all new and revised instructions except as indicated above	No response necessary
	Superior Court of Los Angeles County, by Janet Garcia, Court Manager, Planning and Research Unit	Agree with all new and revised instructions	No response necessary

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106. Evidence

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

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

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

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

~~There will be times when I need to talk to the attorneys privately. Do not be concerned about our discussions or try to guess what is being said.~~

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

New September 2003; Revised February 2005, December 2010

Directions for Use

This instruction should be given as an introductory instruction.

Sources and Authority

- Evidence Code section 140 defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."
- Evidence Code section 312 provides:
Except as otherwise provided by law, where the trial is by jury:

- (a) All questions of fact are to be decided by the jury.
 - (b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.
- Evidence Code section 353 provides:
 - A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:
 - (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and
 - (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.
- A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141-142 [199 P.2d 952].)
- Courts have held that “attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means.” (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)
- Courts have stated that “[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished.” (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co.* (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial

1A California Trial Guide, Unit 21, *Procedures for Determining Admissibility of Evidence*, §§ 21.01, 21.03 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, §§ 322.56-322.57 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.61, 551.77 (Matthew Bender)

114. Bench Conferences and Conferences in Chambers

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess to discuss matters outside of your presence. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence. Do not be concerned about our discussions or try to guess what is being said.

I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of my view of the evidence.

New December 2010

Directions for Use

This instruction is based on Model Instruction 1.18 of the federal Ninth Circuit Court of Appeals. It may be used to explain to the jury why there may be discussions at the bench that the jury will not be able to hear, and why sometimes the judge will call a recess for discussions outside of the presence of the jury.

Secondary Sources

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, § 551.77 (Matthew Bender)

1 California Trial Guide, Unit 4, *Pretrial Evidentiary Motions*, § 4.10[1] (Matthew Bender)

Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 2, *Public Access to Trials and Records*, 2.05

303. Breach of Contract—Essential Factual Elements

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

1. That [name of plaintiff] and [name of defendant] entered into a contract;
 2. That [name of plaintiff] did all, or substantially all, of the significant things that the contract required [him/her/it] to do [or that [he/she/it] was excused from doing those things];
 3. [That all conditions required by the contract for [name of defendant]’s performance [had occurred/ or were excused];]
 - [4. That [name of defendant] failed to do something that the contract required [him/her/it] to do; and]
 - [or]
 - [4. That [name of defendant] did something that the contract prohibited [him/her/it] from doing; and]
 5. That [name of plaintiff] was harmed by that failure.
-

New September 2003; Revised April 2004, June 2006, December 2010

Directions for Use

Read this instruction in conjunction with CACI No. 300, *Breach of Contract—Introduction*. In many cases, some of the above elements may not be contested. In those cases, users should delete the elements that are not contested so that the jury can focus on the contested issues.

Element 3 is ~~intended for cases in which~~ needed if conditions for performance are at issue. ~~Not every contract has conditions for performance.~~ For reasons that the occurrence of a condition may have been excused, see the Restatement Second of Contracts, section 225, Comment b. See also CACI No. 321, *Existence of Condition Precedent Disputed*, CACI No. 322, *Occurrence of Agreed Condition Precedent*, and CACI No. 323, *Waiver of Condition Precedent*.

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

Equitable remedies are also available for breach. “As a general proposition, ‘[t]he jury trial is a matter of right in a civil action at law, but not in equity. [Citations.]’ ” (*C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 Cal.3d 1, 8 [151 Cal.Rptr. 323, 587 P.2d 1136]; *Selby Constructors v. McCarthy*

(1979) 91 Cal.App.3d 517, 524 [154 Cal.Rptr. 164].) However, juries may render advisory verdicts on these issues. (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 670–671 [111 Cal.Rptr. 693, 517 P.2d 1157].)

Sources and Authority

- Civil Code section 1549 provides: “A contract is an agreement to do or not to do a certain thing.” Courts have defined the term as follows: “A contract is a voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing.” (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)
- A complaint for breach of contract must include the following: (1) the existence of a contract, (2) plaintiff’s performance or excuse for nonperformance, (3) defendant’s breach, and (4) damages to plaintiff therefrom. (*Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913 [92 Cal.Rptr. 723].) Additionally, if the defendant’s duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove that the event transpired. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)
- “Implicit in the element of damage is that the defendant’s breach *caused* the plaintiff’s damage.” (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352 [90 Cal.Rptr.3d 589], original italics.)
- “It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance. Similarly, where defendant’s duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired.” (*Consolidated World Investments, Inc., supra*, 9 Cal.App.4th at p. 380, internal citation omitted.)
- Restatement Second of Contracts, section 1, provides: “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”
- “The wrongful, i.e., the unjustified or unexcused, failure to perform a contract is a breach. Where the nonperformance is legally justified, or excused, there may be a failure of consideration, but not a breach.” (1 Witkin, Summary of California Law (10th ed. 2005) § 847, internal citations omitted.) “Ordinarily, a breach is the result of an intentional act, but negligent performance may also constitute a breach, giving rise to alternative contract and tort actions.” (*Ibid.*)
- The doctrine of substantial performance does not apply to the party accused of the breach. Restatement Second of Contracts, section 235(2), provides: “When performance of a duty under a contract is due any non-performance is a breach.” Comment (b) to section 235 states that “[w]hen performance is due, ... anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial.”

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 847

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.50 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.10 et seq. (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.03–22.50

350. Introduction to Contract Damages

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

To recover damages for any harm, *[name of plaintiff]* must prove **that when the contract was made, both parties knew or could reasonably have foreseen that :**

~~1. That the harm was likely to arise-occur in the ordinary course of events from-as result of the breach of the contract.;~~ ~~or~~

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

[Name of plaintiff] also must prove the amount of *[his/her/its]* damages according to the following instructions. *[He/She/It]* does not have to prove the exact amount of damages. You must not speculate or guess in awarding damages.

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

New September 2003; Revised October 2004, December 2010

Directions for Use

This instruction should always be read before any of the following specific damages instructions. (See CACI Nos. 351–360.)

Sources and Authority

- ~~• Civil Code section 3281 provides: “Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages.”~~
- ~~• Civil Code section 3282 provides: “Detriment is a loss or harm suffered in person or property.”~~
- Civil Code section 3300 provides: “For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.”
- ~~• “The detriment that is ‘likely to result therefrom’ is that which is foreseeable to the breaching party at~~

~~the time the contract is entered into.” (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)~~

- Civil Code section 3301 provides: “No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin.”
- Civil Code section 3358 provides: “Except as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides.”
- Civil Code section 3359 provides: “Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.”
- ~~Restatement Second of Contracts, section 351, provides:~~
 - ~~(1) — Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.~~
 - ~~(2) — Loss may be foreseeable as a probable result of a breach because it follows from the breach~~
 - ~~(a) — in the ordinary course of events, or~~
 - ~~(b) — as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.~~
 - ~~(3) — A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.~~
- “The basic object of damages is compensation, and in the law of contracts the theory is that the party injured by a breach should receive as nearly as possible the equivalent of the benefits of performance. The aim is to put the injured party in as good a position as he would have been had performance been rendered as promised. This aim can never be exactly attained yet that is the problem the trial court is required to resolve.” (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)
- “The damages awarded should, insofar as possible, place the injured party in the same position it would have held had the contract properly been performed, but such damage may not exceed the benefit which it would have received had the promisor performed.” (*Brandon & Tibbs, supra*, 226 Cal.App.3d at p. 468, internal citations omitted.)
- “The rules of law governing the recovery of damages for breach of contract are very flexible. Their application in the infinite number of situations that arise is beyond question variable and uncertain.

Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case.’ ” (*Brandon & Tibbs, supra*, 226 Cal.App.3d at p. 455, internal citation omitted.)

- “Contractual damages are of two types—general damages (sometimes called direct damages) and special damages (sometimes called consequential damages).” (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 968 [22 Cal.Rptr.3d 340, 102 P.3d 257].)
- “General damages are often characterized as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. Because general damages are a natural and necessary consequence of a contract breach, they are often said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable the parties at the time of contracting are ‘deemed’ to have contemplated them.” (*Lewis Jorge Construction Management, Inc., supra*, 34 Cal.4th at p. 968, internal citations omitted.)
- “ ‘Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.’ ‘In contrast, tort damages are awarded to [fully] compensate the victim for [all] injury suffered.’ ” (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 [87 Cal.Rptr.2d 886, 981 P.2d 978], internal citations omitted.)
- ~~“California case law has long held the correct measure of damages to be as follows: ‘Damages are awarded in an action for breach of contract to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract. Damages must be reasonable, however, and the promisor is not required to compensate the injured party for injuries that he had no reason to foresee as the probable result of his breach when he made the contract.’ ” (*Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396, 409 [251 Cal.Rptr. 17], internal citations omitted.)~~
- ~~“‘It is often said that damages must be “foreseeable” to be recoverable for breach of contract. The seminal case announcing this doctrine, still generally accepted as a limitation on damages recoverable for breach of contract, is *Hadley v. Baxendale*. First, general damages are ordinarily confined to those which would naturally arise from the breach, or which might have been reasonably contemplated or foreseen by both parties, at the time they made the contract, as the probable result of the breach. Second, i[]f special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract.’ ” (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697 [42 Cal.Rptr.2d 136], internal citations omitted.)~~
- “The detriment that is ‘likely to result therefrom’ is that which is foreseeable to the breaching party at the time the contract is entered into.” (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)

- “Where the fact of damages is certain, as here, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation.” (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398 [112 Cal.Rptr.2d 99], footnotes and internal citations omitted.)
- ~~“It is well settled that the party claiming the damage must prove that he has suffered damage and prove the elements thereof with reasonable certainty.” (*Mendoyoma, Inc. v. County of Mendocino* (1970) 8 Cal.App.3d 873, 880-881 [87 Cal.Rptr. 740], internal citation omitted.)~~
- ~~“Whether the theory of recovery is breach of contract or tort, damages are limited to those proximately caused by their wrong.” (*State Farm Mutual Automobile Insurance Co. v. Allstate Insurance Co.* (1970) 9 Cal.App.3d 508, 528 [88 Cal.Rptr. 246], internal citation omitted.)~~
- “Under contract principles, the nonbreaching party is entitled to recover only those damages, including lost future profits, which are ‘proximately caused’ by the specific breach. Or, to put it another way, the breaching party is only liable to place the nonbreaching party in the same position as if the specific breach had not occurred. Or, to phrase it still a third way, the breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain.” (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1709 [51 Cal.Rptr.2d 365], internal citations omitted.)
- “[D]amages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California.” (*Erlich, supra*, 21 Cal.4th 543 at p. 558, internal citations omitted.)
- “Cases permitting recovery for emotional distress typically involve mental anguish stemming from more personal undertakings the traumatic results of which were unavoidable. Thus, when the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may give rise to damages for mental suffering or emotional distress.” (*Erlich, supra*, 21 Cal.4th at p. 559, internal citations omitted.)
- “The right to recover damages for emotional distress for breach of mortuary and crematorium contracts has been well established in California for many years.” (*Saari v. Jongordon Corp.* (1992) 5 Cal.App.4th 797, 803 [7 Cal.Rptr.2d 82], internal citation omitted.)
- Restatement Second of Contracts, section 351, provides:
 - (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
 - (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
 - (a) in the ordinary course of events, or
 - (b) as a result of special circumstances, beyond the ordinary course of events.

that the party in breach had reason to know.

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

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 869–878

California Breach of Contract Remedies (Cont.Ed.Bar 1980; 2001 supp.) Recovery of Money Damages, §§ 4.1–4.9

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.55–140.56, 140.100–140.106 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.70 et seq. (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.10–50.11 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.20 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.03 et seq.

359. Present Cash Value of Future Damages

To recover for future harm, [name of plaintiff] must prove that ~~such~~the harm is reasonably certain to occur and must prove the amount of those future damages. The amount of damages for future harm must be reduced to present cash value. This is necessary because money received now will, through investment, grow to a larger amount in the future. [Name of defendant] must prove the amount by which future damages should be reduced to present value.

To find present cash value, you must determine the amount of money ~~which~~that, if reasonably invested today, will provide [name of plaintiff] with the amount of [his/her/its] future damages.

[You may consider expert testimony in determining the present cash value of future damages.] [You must use [the interest rate of ___ percent/ [and] [specify other stipulated information]] agreed to by the parties in determining the present cash value of future damages.]

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

New September 2003; Revised December 2010

Directions for Use

Give this instruction if future damages are sought. Give the next-to-last sentence if there has been expert testimony on reduction to present value. Expert testimony will usually be required to accurately establish present values for future losses. Give the last sentence if there has been a stipulation as to the interest rate to use or any other facts related to present cash value.

It would appear that because reduction to present value benefits the defendant, the defendant bears the burden of proof on the discount rate. (See *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613–614 [102 Cal.Rptr. 31] [no error to refuse instruction on reduction to present value when defendant presented no evidence].)

Present-value tables may assist the jury in making its determination of present cash value. Tables, worksheets, and an instruction on how to use them are provided in CACI No. 3904B, *Use of Present-Value Tables*.

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

~~Give the second bracketed option if parties have stipulated to a discount rate or evidence has been presented from which the jury can determine an appropriate discount rate. A table appropriate to this calculation should be provided. (See *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716].)~~

Sources and Authority

- Civil Code section 3283 provides: “Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future.”
- “In an action for damages for such a breach, the plaintiff in that one action recovers all his damages, past and prospective. A judgment for the plaintiff in such an action absolves the defendant from any duty, continuing or otherwise, to perform the contract. The judgment for damages is substituted for the wrongdoer’s duty to perform the contract.” (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 598 [262 P.2d 305], internal citations omitted.)
- “If the breach is partial only, the injured party may recover damages for non-performance only to the time of trial and may not recover damages for anticipated future non-performance. Furthermore, even if a breach is total, the injured party may treat it as partial, unless the wrongdoer has repudiated the contract. The circumstances of each case determine whether an injured party may treat a breach of contract as total.” (*Coughlin, supra*, 41 Cal.2d at pp. 598-599, internal citations omitted.)

Secondary Sources

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.09[3]

361. Plaintiff May Not Recover Duplicate Contract and Tort Damages

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

New September 2003; Revised December 2010

Directions for Use

This instruction may be used only with a general verdict. (See *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 360–361 [112 Cal.Rptr.3d 455].) For an instruction to be used with a special verdict and special verdict form, see CACI No. 3934, *Damages on Multiple Legal Theories*, and CACI No. VF-3920.

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

Sources and Authority

- “Here the jury was properly instructed that it could not award damages under both contract and tort theories, but must select which theory, if either, was substantiated by the evidence, and that punitive damages could be assessed if defendant committed a tort with malice or intent to oppress plaintiffs, but that such damages could not be allowed in an action based on breach of contract, even though the breach was wilful.” (*Acadia, California, Ltd. v. Herbert* (1960) 54 Cal.2d 328, 336-337 [5 Cal.Rptr. 686, 353 P.2d 294].)
- “Ordinarily, a plaintiff asserting both a contract and tort theory arising from the same factual setting cannot recover damages under both theories, and the jury should be so instructed. Here, the court did not specifically instruct that damages could be awarded on only one theory, but did direct that punitive damages could be awarded only if the jury first determined that appellant had proved his tort action.” (*Pugh v. See’s Candies, Inc.* (1988) 203 Cal.App.3d 743, 761, fn. 13 [250 Cal.Rptr. 195], internal citation omitted.)
- “The trial court would have been better advised to make an explicit instruction that duplicate damages could not be awarded. Indeed, it had a duty to do so.” (*Dubarry International, Inc. v. Southwest Forest Industries, Inc.* (1991) 231 Cal.App.3d 552, 565, fn. 16 [282 Cal.Rptr. 181], internal citation omitted.)
- “The trial court instructed the jury, with CACI No. 361, that [plaintiff] could not be awarded duplicative damages on different counts, thus suggesting that it was the jury’s responsibility to avoid awarding duplicative damages. But neither the instructions nor the special verdict form told the jury how to avoid awarding duplicative damages. With a single general verdict or a general verdict with special findings, where the verdict includes a total damages award, the jury presumably will follow

the instruction (such as the one given here) and ensure that the total damages award includes no duplicative amounts. A special verdict on multiple counts, however, is different. If the jury finds the amount of damages separately for each count and does not calculate the total damages award, as here, the jury has no opportunity to eliminate any duplicative amounts in calculating the total award. Absent any instruction specifically informing the jury how to properly avoid awarding duplicative damages, it might have attempted to do so by finding no liability or no damages on certain counts, resulting in an inconsistent verdict.” (Singh, supra, 186 Cal.App.4th at p. 360.)

Secondary Sources

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.06

NOTE: The proposed changes to this verdict form would be made to all verdict forms.

VF-300. Breach of Contract

We answer the questions submitted to us as follows:

1. Did *[name of plaintiff]* and *[name of defendant]* enter into a contract?
 Yes No

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

2. Did *[name of plaintiff]* do all, or substantially all, of the significant things that the contract required *[him/her/it]* to do?
 Yes No

If your answer to question 2 is yes, then skip question 3 and answer question 4. If you answered no, answer question 3.

3. Was *[name of plaintiff]* excused from having to do all, or substantially all, of the significant things that the contract required *[him/her/it]* to do?
 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 all the conditions occur that were required for *[name of defendant]*'s performance?
 Yes No

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

5. Did *[name of defendant]* fail to do something that the contract required *[him/her/it]* to do?
 Yes No

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

6. Was *[name of plaintiff]* harmed by that failure?

___ Yes ___ No

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

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

[a. Past [economic] loss [including [insert descriptions of claimed damages]]:

\$ _____]

[b. Future [economic] loss [including [insert descriptions of claimed damages]]:

\$ _____]

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

{After [it this verdict form has/all verdict forms have] has been signed/After all verdict forms have been signed}, deliver this verdict form to notify the [clerk/bailiff/court attendant judge] that you are ready to present your verdict in the courtroom.

New April 2004; Revised December 2010

Directions for Use

If the verdict form used combines other causes of action involving both economic and non-economic damages, use “economic” in question 7.

The special verdict forms in this section 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. 303, *Breach of Contract—Essential Factual Elements*. This form is intended for use in most contract disputes. If more specificity is desired, see verdict forms that follow. If the allegation is that the defendant breached the contract by doing something that the contract prohibited, then change question 5 to the following: “Did [name of defendant] do something that the contract prohibited [him/her/it] from doing?”

If specificity is not required, users do not have to itemize 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. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

450A. Good Samaritan—Nonemergency

[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 in a nonemergency situation. If you decide that [name of defendant] was negligent, [he/she] is not responsible unless [name of plaintiff] proves all 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/ [or] reliance] was a substantial factor in causing harm to [name of plaintiff].**
-

Derived from former CACI No. 450 December 2010

Directions for Use

Use this instruction for situations other than at the scene of an emergency. Different standards apply in an emergency situation. (See Health. & Saf. Code, § 1799.102; CACI No. 450B, *Good Samaritan—Scene of Emergency*.) Give both instructions if the jury will be asked to decide whether an emergency existed as the preliminary issue. Because under Health and Safety Code section 1799.102 a defendant receives greater protection in an emergency situation, the advisory committee believes that the defendant bears the burden of proving an emergency. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted].)

Select either or both options for element 1 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.)

- “A police officer, paramedic or other public safety worker is as much entitled to the benefit of this general rule as anyone else.” (*Camp v. State of California* (2010) 184 Cal.App.4th 967, 975 [109 Cal.Rptr.3d 676].)
- 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.)
- 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), 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)

450B. Good Samaritan—Scene of Emergency

[Name of defendant] claims that [he/she] is not responsible for [name of plaintiff]’s harm because [he/she] was trying to protect [name of plaintiff] from harm at the scene of an emergency.

To succeed on this defense, [name of defendant] must prove all of the following:

- 1. That [name of defendant] rendered medical or nonmedical care or assistance to [name of plaintiff] at the scene of an emergency;**
- 2. That [name of defendant] was acting in good faith; and**
- 3. That [name of defendant] was not acting for compensation.**

If you decide that [name of defendant] has proved all of the above, but you decide that [name of defendant] was negligent, [he/she] is not responsible unless [name of plaintiff] proves that [name of defendant]’s conduct constituted gross negligence or willful or wanton misconduct.

“Gross negligence” is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation.

“Willful or wanton misconduct” means conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result.

If you find that [name of defendant] was grossly negligent or acted willfully or wantonly, [name of plaintiff] must then also prove:

- 1. [(a) That [name of defendant]’s conduct 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/ [or] reliance] was a substantial factor in causing harm to [name of plaintiff].**
-

Derived from former CACI No. 450 December 2010

Directions for Use

Use this instruction for situations at the scene of an emergency not involving medical, law enforcement, or emergency personnel. (See Health. & Saf. Code, § 1799.102.) In a nonemergency situation, give CACI No. 450A, *Good Samaritan—Nonemergency*.

Under Health and Safety Code section 1799.102(b), the defendant must have acted at the scene of an emergency, in good faith, and not for compensation. These terms are not defined, and neither the statute nor case law indicates who has the burden of proof. However, the advisory committee believes that it is more likely that the defendant has the burden of proving those things necessary to invoke the protections of the statute. (See Evid. Code, § 500 [party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense asserted].)

If the jury finds that the statutory standards have been met, then presumably it must also find that the common-law standards for Good-Samaritan liability have also been met. (See Health. & Saf. Code, § 1799.102(c) [“Nothing in this section shall be construed to change any existing legal duties or obligations”].) In the common-law part of the instruction, select either or both options for element 1 depending on the facts.

See also CACI No. 425, “*Gross Negligence*” *Explained*.

Sources and Authority

- Health and Safety Code section 1799.102 provides:
 - (a) No person who in good faith, and not for compensation, renders emergency medical or nonmedical care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission. The scene of an emergency shall not include emergency departments and other places where medical care is usually offered. This subdivision applies only to the medical, law enforcement, and emergency personnel specified in this chapter.
 - (b)
 - (1) It is the intent of the Legislature to encourage other individuals to volunteer, without compensation, to assist others in need during an emergency, while ensuring that those volunteers who provide care or assistance act responsibly.
 - (2) Except for those persons specified in subdivision (a), no person who in good faith, and not for compensation, renders emergency medical or nonmedical care or assistance at the scene of an emergency shall be liable for civil damages resulting from any act or omission other than an act or omission constituting gross negligence or willful or wanton misconduct. The scene of an emergency shall not include emergency departments and other places where medical care is usually offered. This subdivision shall not be construed to alter existing protections from liability for licensed medical or other personnel specified in subdivision (a) or any other law.
 - (c) Nothing in this section shall be construed to change any existing legal duties or obligations, nor does anything in this section in any way affect the provisions in Section 1714.5 of the Civil Code, as

proposed to be amended by Senate Bill 39 of the 2009-10 Regular Session of the Legislature.

(d) The amendments to this section made by the act adding subdivisions (b) and (c) shall apply exclusively to any legal action filed on or after the effective date of that act.

- “ ‘Gross negligence’ long has been defined in California and other jurisdictions as either a ‘ ‘ ‘want of even scant care’ ’ ’ or ‘ ‘ ‘an extreme departure from the ordinary standard of conduct.’ ’ ’ ’ (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754 [62 Cal.Rptr.3d 527, 161 P.3d 1095], internal citations omitted.)
- “By contrast, ‘wanton’ or ‘reckless’ misconduct (or ‘ ‘ ‘willful and wanton negligence’ ’ ’) describes conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result.” (*City of Santa Barbara, supra*, 41 Cal.4th at p. 754, fn. 4, internal citations omitted.)
- “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.)
- “A police officer, paramedic or other public safety worker is as much entitled to the benefit of this general rule as anyone else.” (*Camp v. State of California* (2010) 184 Cal.App.4th 967, 975 [109 Cal.Rptr.3d 676].)
- 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), 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)

1009B. Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control

[Name of plaintiff] claims that [he/she] was harmed by an unsafe condition while employed by [name of plaintiff's employer] and working on [name of defendant]'s property. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] [owned/leased/occupied/controlled] the property;
2. That [name of defendant] retained control over safety conditions at the worksite;
3. That [name of defendant] negligently exercised [his/her/its] retained control over safety conditions by [specify alleged negligent acts or omissions];
4. That [name of plaintiff] was harmed; and
5. That [name of defendant]'s negligent exercise of [his/her/its] retained control over safety conditions was a substantial factor in causing [name of plaintiff]'s harm.

Derived from former CACI No. 1009 April 2007; Revised April 2009, [December 2010](#)

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant retained control over the safety conditions at the worksite. For an instruction for injuries to others due to a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries based on unsafe conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on a nondelegable duty, see CACI No. 1009C, *Liability to Employees of Independent Contractors for Unsafe Conditions—Nondelegable Duty*. For an instruction for injuries based on the property owner's providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

See also the Vicarious Responsibility Series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.

The hirer's retained control must have "affirmatively contributed" to the plaintiff's injury. (*Hooker v. Department of Transportation* (2002) 27 Cal.4th 198, 202 [115 Cal.Rptr.2d 853, 38 P.3d 1081].) However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. (*Id.* at p. 212, fn. 3.) The advisory committee believes that the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately

expresses the “affirmative contribution” requirement.

Sources and Authority

- “We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer’s exercise of retained control *affirmatively contributed* to the employee’s injuries.” (*Hooker, supra, v. Department of Transportation* (2002) 27 Cal.4th at p.198, 202 [~~115 Cal.Rptr.2d 853, 38 P.3d 1081~~], original italics.)
- “Imposing tort liability on a hirer of an independent contractor when the hirer’s conduct has affirmatively contributed to the injuries of the contractor’s employee is consistent with the rationale of our decisions in *Privette, Toland* and *Camargo* because the liability of the hirer in such a case is not ‘in essence ‘vicarious’ or ‘derivative’ in the sense that it derives from the ‘act or omission’ of the hired contractor.’ To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term.” (*Hooker, supra*, 27 Cal.4th at pp. 211–212, original italics, internal citations and footnote omitted.)
- “Such affirmative contribution need not always be in the form of actively directing a contractor or contractor’s employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer’s negligent failure to do so should result in liability if such negligence leads to an employee injury.” (*Hooker, supra*, 27 Cal.4th at p. 212, fn. 3.)
- “[U]nder Government Code section 815.4, a public entity can be held liable under the retained control doctrine, provided a private person would be liable under the same circumstances. This means that the public entity must *negligently* exercise its retained control so as to affirmatively contribute to the injuries of the employee of the independent contractor.” (*McCarty v. Department of Transportation* (2008), 164 Cal.App.4th 955, 985 [79 Cal.Rptr.3d 777], original italics.)
- Section 414 of the Restatement Second of Torts provides: “One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.”

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1117

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.23 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.12 (Matthew Bender)

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

1009C. Liability to Employees of Independent Contractors for Unsafe Conditions—Nondelegable Duty

[Name of plaintiff] claims that **[he/she]** was harmed while employed by *[name of plaintiff's employer]* and working on *[name of defendant]*'s property because *[name of defendant]* breached a duty to *[him/her]*. There is a duty that cannot be delegated to another person arising from *[insert statute or regulation establishing nondelegable duty]* that is as follows: *[quote from statute/regulation or paraphrase duty]*.

To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* **[owned/leased/occupied/controlled]** the property;
 2. That *[name of defendant]* **breached this duty;**
 3. That *[name of plaintiff]* **was harmed; and**
 4. That *[name of defendant]*'s **breach of this duty was a substantial factor in causing** *[name of plaintiff]*'s **harm.**
-

New April 2008; Revised April 2009, [December 2010](#)

Directions for Use

This instruction is for use if a dangerous condition on property causes injury to an employee of an independent contractor hired to perform work on the property. The basis of liability is that the defendant breached a duty established by a statute or regulation and that this duty was nondelegable as a matter of law. The statute or regulation that creates the duty may be paraphrased rather than quoted verbatim if its language would be confusing to the jury.

For an instruction for injuries to others involving a concealed condition, see CACI No. 1003, *Unsafe Conditions*. For an instruction for injuries to an employee of an independent contractor based on unsafe concealed conditions not discoverable by the plaintiff's employer, see CACI No. 1009A, *Liability to Employees of Independent Contractors for Unsafe Concealed Conditions*. For an instruction for injuries based on the owner's retained control, see CACI No. 1009B, *Liability to Employees of Independent Contractors for Unsafe Conditions—Retained Control*. For an instruction for injuries based on the property owner's providing defective equipment, see CACI No. 1009D, *Liability to Employees of Independent Contractors for Unsafe Conditions—Defective Equipment*.

See also the Vicarious Responsibility series, CACI No. 3700 et seq., for instructions on the liability of a hirer for the acts of an independent contractor.

The hirer's breach of a nondelegable duty must have "affirmatively contributed" to the plaintiff's injury. (*Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 147 [62 Cal.Rptr.3d 479].) However, the affirmative contribution need not be active conduct but may be in the form of an omission to act. (Id.

at p. 147.) The advisory committee believes that the “affirmative contribution” requirement simply means that there must be causation between the hirer’s conduct and the plaintiff’s injury. Because “affirmative contribution” might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard “substantial factor” element adequately expresses the “affirmative contribution” requirement.

Sources and Authority

- “The nondelegable duty doctrine addresses an affirmative duty imposed by reason of a person or entity’s relationship with others. Such a duty cannot be avoided by entrusting it to an independent contractor. Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure the safety of others.” (*Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 671–672 [82 Cal.Rptr.3d 869], internal citations omitted.)
- “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.” (*Evard, supra, v. Southern California Edison* (2007) 153 Cal.App.4th at p.137, 146 [~~62 Cal.Rptr.3d 479~~].)
- “Imposing tort liability on a hirer of an independent contractor when the hirer’s conduct has affirmatively contributed to the injuries of the contractor’s employee is consistent with the rationale of our decisions in *Privette*, *Toland* and *Camargo* because the liability of the hirer in such a case is *not* ‘in essence ‘vicarious’ or ‘derivative’ in the sense that it derives from the ‘act or omission’ of the hired contractor.’ To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term.” (*Hooker v. Dep’t of Transp.* (2002) 27 Cal.4th 198, 211–212 [115 Cal.Rptr.2d 853, 38 P.3d 1081], original italics, internal citations omitted.)
- “[T]he liability of a hirer for injury to employees of independent contractors caused by breach of a nondelegable duty imposed by statute or regulation remains subject to the *Hooker* test. Under that test, the hirer will be liable if its breach of regulatory duties affirmatively contributes to the injury of a contractor’s employee.” (*Padilla, supra*, 166 Cal.App.4th at p. 673, internal citations omitted.)
- “[A]n owner may be liable if its breach of regulatory duties affirmatively contributes to injury of a contractor’s employee.” (*Evard, supra*, 153 Cal.App.4th at p. 147.)
- “Liability may be predicated on a property owner’s ‘breach of its own regulatory duties, regardless of whether or not it voluntarily retained control or actively participated in the project. ... For purposes of imposing liability for affirmatively contributing to a plaintiff’s injuries, the affirmative contribution need not be active conduct but may be in the form of an omission to act.’” (*Evard, supra*, 153 Cal.-App.-4th at p. 147.)
- “Notwithstanding *Evard’s* conclusion that the regulation at issue imposed a nondelegable duty, we do not agree with plaintiff’s inference from that case that in every instance Cal-OSHA regulations

impose a nondelegable duty. While a nondelegable duty may arise when a statute or regulation requires specific safeguards or precautions to insure others' safety, it is the nature of the regulation itself that determines whether the duties it creates are nondelegable.” (*Padilla, supra*, 166 Cal.App.4th at pp. 672–673, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1117

1 California Construction Contracts and Disputes, Ch. 6, *Negligence and Strict Liability for Dangerous Condition on Worksite* (Cont.Ed.Bar 3d ed.) § 6.11

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.08 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.23 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.33 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.90 et seq. (Matthew Bender)

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

[Name of defendant] is not responsible for any harm to *[name of plaintiff]* if *[name of defendant]* proves that *[his/her/its]* *[statement/description/sample/model/other]* was not a basis of the parties’ bargain.

The *[statement/description/sample/model/other]* is presumed to be a basis of the bargain. To overcome this presumption, *[name of defendant]* must prove that the resulting bargain was not based in any way on the *[statement/description/sample/model/other]*.

If *[name of defendant]* proves that *[name of plaintiff]* had actual knowledge of the true condition of the *[product]* before agreeing to buy, the resulting bargain was not based in any way on the *[statement/description/sample/model/other]*.

New September 2003; Revoked June 2010; Reinstated and revised December 2010

Sources and Authority

- California Uniform Commercial Code section 2313 provides:
 - (1) Express warranties by the seller are created as follows:
 - (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
 - (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
 - (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.
 - (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.
- “The key under [Uniform Commercial Code section 2313] is that the seller's statements—whether fact or opinion—must become ‘part of the basis of the bargain.’ The basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller, the Uniform Commercial Code requires no such proof. According to official comment 3 to the Uniform Commercial Code following section 2313, ‘no particular reliance . . . need be shown in order to weave [the seller's affirmations of fact] into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made,

out of the agreement requires clear affirmative proof.’ ” (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 115 [120 Cal.Rptr. 681, 534 P.2d 377, internal citations and footnote omitted.]

- “The California Supreme Court, in discussing the continued viability of the reliance factor, noted that commentators have disagreed in regard to the impact of this development. Some have indicated that it shifts the burden of proving nonreliance to the seller, and others have indicated that the code eliminates the concept of reliance altogether.” (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 22 [220 Cal.Rptr. 392], citing *Hauter, supra*, 14 Cal.3d at pp. 115–116.)
- “The official Uniform Commercial Code comment in regard to section 2-313 ‘indicates that in actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.’ It is clear from the new language of this code section that the concept of reliance has been purposefully abandoned.” (*Keith, supra*, 173 Cal.App.3d at p. 23, internal citations omitted.)
- “The change of the language in section 2313 of the California Uniform Commercial Code modifies both the degree of reliance and the burden of proof in express warranties under the code. 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.)
- “[O]nce affirmations have been made, they are woven into the fabric of the agreement and the seller must present ‘clear affirmative proof’ to remove them from the agreement.” (*Weinstat v. Dentsply International, Inc.* (2010) 180 Cal.App.4th 1213, 1234 [103 Cal.Rptr.3d 614.]
- “[W]hile the basis of the bargain of course includes dickered terms to which the buyer specifically assents, section 2313 itself does not suggest that express warranty protection is confined to them such that affirmations by the seller that are not dickered are excluded. Any affirmation, once made, is part of the agreement unless there is ‘clear affirmative proof’ that the affirmation has been taken out of the agreement.” (*Weinstat, supra*, 180 Cal.App.4th at p. 1229.)
- “The official comment to section 2313 is also instructive on this point, providing: ‘The precise time when words of description or affirmation are made ... is not material. The sole question is whether the language ... [is] fairly to be regarded as part of the contract.’ Thus, the California Uniform Commercial Code contemplates that affirmations, promises and descriptions about the goods contained in product manuals and other materials that are given to the buyer at the time of delivery can become part of the basis of the bargain, and can be ‘fairly ... regarded as part of the contract,’ notwithstanding that delivery occurs after the purchase price has been paid.” (*Weinstat, supra*, 180 Cal.App.4th at p. 1230.)
- “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.)

- “First, ... affirmations and descriptions in product literature received at the time of delivery but after payment of the purchase price are, without more, part of the basis of the bargain, period. Second, the seller's right to rebut goes to proof that extracts the affirmations from the ‘agreement’ or ‘bargain of the parties in fact,’ not, as *Keith* would suggest, to proof that they were not an inducement for the purchase. Relying on *Keith*, the court in effect equated the concept of the ‘bargain in fact of the parties’ with the concept of reliance, but ... the two are not synonymous. Moreover, the opinion in *Keith* contradicts itself on this matter. On the one hand the opinion states unequivocally that ‘[i]t is clear’ section 2313 ‘purposefully abandoned’ the concept of reliance. On the other hand, we must ask if section 2313 has eliminated the concept of reliance from express warranty law all together, by what logic can reliance reappear, by its absence, as an affirmative defense?” (*Weinstat, supra*, 180 Cal.App.4th at p. 1234, internal citation omitted.)

Secondary Sources

44 California Forms of Pleading and Practice, Ch. 502, *Sales: Warranties*, § 502.62 (Matthew Bender)

20 California Points and Authorities, Ch. 206, *Sales*, § 206.60 (Matthew Bender)

21 California Legal Forms, Ch. 52, *Sales of Goods Under the Uniform Commercial Code*, § 52.290[1] (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 24, *Suing or Defending Action for Breach of Warranty*, 24.36[4]

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07 (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; Revised December 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. For an instruction for use in such a case, see CACI No. 1247, Affirmative Defense—Failure to Warn—Government Contractor. ~~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.)
- “[I]n order to satisfy the first condition—government ‘approval’ ... the government's involvement must transcend rubber stamping.” (*Oxford, supra*, 177 Cal.App.4th at p. 712, quoting *Tate, supra*, 55 F.3d at p. 1157.)
- ~~“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)

1247. Affirmative Defense—Failure to Warn—Government Contractor

[Name of defendant] may not be held liable for failure to warn about the dangers in the use of 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 imposed reasonably precise specifications on [name of defendant] regarding the provision of warnings for the [product];**
- 3. That the [product] conformed to those specifications regarding warnings; 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 December 2010

Directions for Use

This instruction is for use if the defendant's product about which a failure to warn is alleged (see CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*, and CACI No. 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements*) 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.

Different standards and elements apply in a design defect case. For an instruction for use in such a case, see CACI No. 1246, *Affirmative Defense—Design Defect—Government Contractor*.

Sources and Authority

- “The appellate court in *Tate* [*Tate v. Boeing Helicopters* (6th Cir. 1995) 55 F.3d 1150, 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.)

- “As in design defect cases, in order to satisfy the first condition—government ‘approval’—in failure to warn cases, the government's involvement must transcend rubber stamping. And where the government goes beyond approval and actually determines for itself the warnings to be provided, the contractor has surely satisfied the first condition because the government exercised its discretion. The second condition in failure to warn cases, as in design defect cases, assures that the defense protects the government's, not the contractor's, exercise of discretion. Finally, the third condition encourages frank communication to the government of the equipment's dangers and increases the likelihood that the government will make a well-informed judgment.” (*Oxford, supra*, 177 Cal.App.4th at p. 712, quoting *Tate, supra*, 55 F.3d at p. 1157.)
- “Under California law, a manufacturer has a duty to warn of a danger when the manufacturer has knowledge of the danger or has reason to know of it and has no reason to know that those who use the product will realize its dangerous condition. Whereas the government contractor's defense may be used to trump a design defect claim by proving that the government, not the contractor, is responsible for the defective design, that defense is inapplicable to a failure to warn claim in the absence of evidence that in making its decision whether to provide a warning ... , [defendant] was ‘acting in compliance with “reasonably precise specifications” imposed on [it] by the United States.’ ” (*Butler v. Ingalls Shipbuilding* (9th Cir. 1996) 89 F.3d 582, 586.)
- “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.)
- “Defendants' evidence did not establish as a matter of law the necessary significant conflict between federal contracting requirements and state law. Although defendants' evidence did show that certain warnings were required by the military specifications, that evidence did not establish that the specifications placed any limitation on additional information from the manufacturers to users of their products. Instead, the evidence suggested no such limitation existed.” (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1317 [273 Cal.Rptr. 214].)
- “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.” (*Oxford, supra*, 177 Cal.App.4th at p. 708, quoting *Boyle, supra*, 487 U.S. at pp. 500, 504, 507, 512.)
- “[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.)
- “[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, supra*, 223 Cal.App.3d at p. 1319.)
- “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.)

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)

1400. Essential Factual Elements—No Arrest Involved

[Name of plaintiff] claims that *[he/she]* was wrongfully *[restrained/confined/detained]* by *[name of defendant]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* intentionally deprived *[name of plaintiff]* of *[his/her]* freedom of movement by use of *[physical barriers/force/threats of force/menace/fraud/deceit/unreasonable duress]*;
2. That the *[restraint/detention/confinement]* compelled *[name of plaintiff]* to stay or go somewhere for some appreciable time, however short;~~and~~
23. That *[name of plaintiff]* did not *[knowingly or voluntarily]* consent;
34. That *[name of plaintiff]* was ~~actually~~ harmed; and
45. That *[name of defendant]*'s conduct was a substantial factor in causing *[name of plaintiff]*'s harm.

If you find elements 1, 2, and 3 above, but you find that *[name of plaintiff]* was not actually harmed, *[he/she]* is still entitled to a nominal sum, such as one dollar.

[Name of plaintiff] need not have been aware that *[he/she]* was being *[restrained/confined/detained]* at the time.

New September 2003; Revised December 2010

Directions for Use

~~In element 2-3, include should be either eliminated or modified by inserting~~ the words “knowingly” or “voluntarily” ~~before the word “consent”~~ if it is alleged that the plaintiff’s consent was obtained by fraud. (See ~~was involved: “Because “[t]here is no real or free consent when it is obtained through fraud” ... the girls’ confinement on the aircraft was nonconsensual and therefore actionable as a false imprisonment.”~~ (*Scofield v. Critical Air Medicine, Inc.* (1996) 45 Cal.App.4th 990, 1006, fn. 16 [52 Cal.Rptr.2d 915]; ~~internal citations omitted.~~)

~~If plaintiff is seeking nominal damages as an alternative to actual damages, insert the following paragraph above element 3:~~

~~If you find both of the above, then the law assumes that *[name of plaintiff]* has been harmed and *[he/she]* is entitled to a nominal sum such as one dollar. *[Name of plaintiff]* is also entitled to additional damages if *[he/she]* proves the following:~~

~~The second sentence of the above paragraph, along with the final two elements of this instruction, should be omitted if plaintiff is seeking nominal damages only. Read “actually” in the third element only if~~

~~nominal damages are also being sought.~~

Include the paragraph about nominal damages if there is a dispute about whether the plaintiff was actually harmed. (See *Scofield, supra*, 45 Cal.App.4th at p. 1007.) Include the last paragraph if applicable. (See *Id.* at pp. 1006-1007.)

If the defendant alleges that he or she had a lawful privilege, the judge should read the applicable affirmative defense instructions immediately following this one.

~~The confinement must be for “an appreciable length of time, however short.” (*City of Newport Beach v. Sasse* (1970) 9 Cal.App.3d 803, 810 [88 Cal.Rptr. 476].) If this is an issue, the judge can instruct on this point as follows: “There is no requirement that the confinement last for a particular period of time.”~~

~~Insert the following at the end of the instruction if applicable: “At the time, [name of plaintiff] need not have been aware that [he/she] was being [restrained/confined/detained].” (See *Scofield, supra*, 45 Cal.App.4th at pp. 1006-1007.)~~

Sources and Authority

- “The crime of false imprisonment is defined by Penal Code section 236 as the ‘unlawful violation of the personal liberty of another.’ The tort is identically defined. As we recently formulated it, the tort consists of the ‘nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short.’ That length of time can be as brief as 15 minutes. Restraint may be effectuated by means of physical force, threat of force or of arrest, confinement by physical barriers, or by means of any other form of unreasonable duress.” (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 716 [30 Cal.Rptr.2d 18, 872 P.2d 559, internal citations omitted].) Penal Code section 236 provides: “False imprisonment is the unlawful violation of the personal liberty of another.” Courts have held that this statutory definition applies whether the offense is treated as a tort or a crime. (See *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 715 [30 Cal.Rptr.2d 18, 872 P.2d 559]; *Molko v. Holy Spirit Ass’n* (1988) 46 Cal.3d 1092, 1123 [252 Cal.Rptr. 122, 762 P.2d 46]; see also *Wilson v. Houston Funeral Home* (1996) 42 Cal.App.4th 1124, 1135 [50 Cal.Rptr.2d 169] [the tort of false imprisonment is “a willful and wrongful interference with the freedom of movement of another against his will”].)
- “ [T]he tort [of false imprisonment] consists of the “ ‘nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short.’ ” ” (*Scofield, supra*, 45 Cal.App.4th at p. 1001, internal citations omitted.)
- “The only mental state required to be shown to prove false imprisonment is the intent to confine, or to create a similar intrusion.” (*Fermino, supra*, 7 Cal.4th at p. 716.)
- There is no requirement that the restraint last for any particular period of time. (See *Alterauge v. Los Angeles Turf Club* (1950) 97 Cal.App.2d 735, 736 [218 P.2d 802] [15 minutes was sufficient for false imprisonment]; see also *City of Newport Beach, supra*, 9 Cal.App.3d at p. 810 [restraint must be for an “appreciable length of time, however short”].)

- False imprisonment “requires some restraint of the person and that he be deprived of his liberty or compelled to stay where he does not want to remain, or compelled to go where he does not wish to go; and that the person be restrained of his liberty without sufficient complaint or authority.” (*Collins v. County of Los Angeles* (1966) 241 Cal.App.2d 451, 459-460 [50 Cal.Rptr. 586], internal citations omitted.)
- “[I]t is clear that force or the threat of force are not the only means by which the tort of false imprisonment can be achieved. Fraud or deceit or any unreasonable duress are alternative methods of accomplishing the tort.” (*Scofield, supra*, 45 Cal.App.4th at p. 1002, internal citations omitted.)
- “Because ‘[t]here is no real or free consent when it is obtained through fraud’ ... the [plaintiffs’] confinement on the aircraft was nonconsensual and therefore actionable as a false imprisonment.” (*Scofield, supra*, 45 Cal.App.4th at p. 1006, fn. 16, internal citations omitted.)
- “[C]ontemporaneous awareness of the false imprisonment is not, and need not be, an essential element of the tort.” (*Scofield, supra*, 45 Cal.App.4th at p. 1006.)
- “[T]he critical question as to causation in intentional torts is whether the actor’s conduct is a substantial factor in bringing about the type of harm which he intended from his original act.” (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1536, fn. 6 [254 Cal.Rptr. 492], internal citations omitted.)
- “[T]he law of this state clearly allows a cause of action for false imprisonment notwithstanding the fact a plaintiff suffered merely nominal damage.” (*Scofield, supra*, 45 Cal.App.4th at p. 1007.)
- “In addition to recovery for emotional suffering and humiliation, one subjected to false imprisonment is entitled to compensation for other resultant harm, such as loss of time, physical discomfort or inconvenience, any resulting physical illness or injury to health, business interruption, and damage to reputation, as well as punitive damages in appropriate cases.” (*Scofield, supra*, 45 Cal.App.4th at p. 1009, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 426–429

3 Levy et al., California Torts, Ch. 42, *False Imprisonment and False Arrest*, §§ 42.01, 42.07, 42.20 (Matthew Bender)

22 California Forms of Pleading and Practice, Ch. 257, *False Imprisonment*, § 257.17 (Matthew Bender)

10 California Points and Authorities, Ch. 103, *False Imprisonment*, § 103.40 et seq. (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 13:8–13:10

2003. ~~Treble Damages to Timber—Timber~~ Willful and Malicious Conduct

[Name of plaintiff] also claims that [name of defendant]’s conduct in cutting down, damaging, or harvesting [name of plaintiff]’s trees was ~~intentional and despicable~~ willful and malicious.

~~To establish this claim, [name of plaintiff] must prove that [name of defendant] intended to harm [him/her/it] and acted willfully or maliciously with the intent to vex, harass, or annoy. “Willful” simply means that [name of defendant]’s conduct was intentional.~~

“Malicious” means that [name of defendant] acted with intent to vex, annoy, harass, or injure, or that [name of defendant]’s conduct was done with a knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

New September 2003; Revised December 2010

Directions for Use

Read this instruction ~~only~~ if the plaintiff is seeking double or treble damages because the defendant’s conduct was willful and malicious. (See Civ. Code, § 3346; Code Civ. Proc., § 733; *Ostling v. Loring* (1994) 27 Cal.App.4th 1731, 1742 [33 Cal.Rptr.2d 391].) The judge should ensure that this finding is noted on the special verdict form. The jury should find the actual damages suffered. If the jury finds willful and malicious conduct, the court must award double damages and may award treble damages. (See *Ostling, supra*, 27 Cal.App.4th at p. 1742.)

Sources and Authority

- Civil Code section 3346(a) provides: “For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, the measure of damages shall be twice the sum as would compensate for the actual detriment, and excepting further that where the wood was taken by the authority of highway officers for the purpose of repairing a public highway or bridge upon the land or adjoining it, in which case judgment shall only be given in a sum equal to the actual detriment.”
- Code of Civil Procedure section 733 provides, in part: “Any person who cuts down or carries off any wood or underwood, tree, or timber ... or otherwise injures any tree or timber on the land of another person ... is liable to the owner of such land ... for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction.”
- The damages provisions in sections 3346 and 733 must be “treated as penal and punitive.” (*Baker v. Ramirez* (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)

- “However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).’ ” (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)
- “Although an award of double the actual damages is mandatory under section 3346, the court retains discretion whether to triple them under that statute or Code of Civil Procedure section 733. [¶] ‘So, the effect of section 3346 as amended, read together with section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages.’ ” (*Ostling, supra, v. Loring* (1994) 27 Cal.App.4th ~~at p. 1731~~, 1742 [~~33 Cal.Rptr.2d 391~~], internal citation omitted.)
- “Treble damages could only be awarded under [section 3346] where the wrongdoer intentionally acted wilfully or maliciously. The required intent is one to vex, harass or annoy, and the existence of such intent is a question of fact for the trial court.” (*Sills v. Siller* (1963) 218 Cal.App.2d 735, 743 [32 Cal.Rptr. 621], internal citation omitted.)
- “Although neither section [3346 or 733] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious.” (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762 [27 Cal.Rptr. 675], internal citations omitted.)
- “A proper and helpful analogue here is the award of exemplary damages under section 3294 of the Civil Code when a defendant has been guilty, inter alia, of ‘malice, express or implied.’ ... ‘In order to warrant the allowance of such damages the act complained of must not only be wilful, in the sense of intentional, but it must be accompanied by some aggravating circumstance, amounting to malice. Malice implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others. There must be an intent to vex, annoy or injure. Mere spite or ill will is not sufficient.’ ... Malice may consist of a state of mind determined to perform an act with reckless or wanton disregard of or indifference to the rights of others. Since a defendant rarely admits to such a state of mind, it must frequently be established from the circumstances surrounding his allegedly malicious acts.” (*Caldwell, supra*, 211 Cal.App.2d at pp. 763-764, internal citations omitted.)
- “Under [Health and Safety Code] section 13007, a tortfeasor generally is liable to the owner of property for damage caused by a negligently set fire. ‘[T]he statute places no restrictions on the type of property damage that is compensable.’ Such damages might include, for example, damage to structures, to movable personal property, to soil, or to undergrowth; damages may even include such elements as the lost profits of a business damaged by fire. If the fire also damages trees—that is, causes ‘injuries to ... trees ... upon the land of another’—then the actual damages recoverable under section 13007 may be doubled (for negligently caused fires) or trebled (for fires intended to spread to

the plaintiff's property) pursuant to section 3346.” (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 461 [102 Cal.Rptr.3d 32], internal citations omitted; but see *Gould v. Madonna* (1970) 5 Cal.App.3d 404, 407–408 [85 Cal.Rptr. 457] [Civ. Code, § 3346 does not apply to fires negligently set; Health & Saf. Code, § 13007 provides sole remedy].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1733

[4 Levy et al., California Torts, Ch. 52, Recovery for Medical Expenses and Economic Loss, § 52.34 \(Matthew Bender\)](#)

31 California Forms of Pleading and Practice, Ch. 350, *Logs and Timber*, § 350.12 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.161 et seq. (Matthew Bender)

2031. Damages for Annoyance and Discomfort—Trespass or Nuisance

If you decide that [name of plaintiff] has proved that [name of defendant] committed a [trespass/nuisance], [name of plaintiff] may recover damages that would reasonably compensate [him/her] for the annoyance and discomfort caused by the injury to [his/her] peaceful enjoyment of the property that [he/she] occupied.

New December 2010

Directions for Use

Give this instruction if the plaintiff claims damages for annoyance and discomfort resulting from a trespass or nuisance. These damages are distinct from general damages for mental or emotional distress. (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 456 [102 Cal.Rptr.2d 32].)

Sources and Authority

- “Once a cause of action for trespass or nuisance is established, an occupant of land may recover damages for annoyance and discomfort that would naturally ensue therefrom.” (*Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 272 [288 P.2d 507].)
- “We do not question that a nonresident property owner may suffer mental or emotional distress from damage to his or her property. But annoyance and discomfort damages are distinct from general damages for mental and emotional distress. Annoyance and discomfort damages are intended to compensate a plaintiff for the loss of his or her peaceful occupation and enjoyment of the property. ... ‘We recognize that annoyance and discomfort by their very nature include a mental or emotional component, and that some dictionary definitions of these terms include the concept of distress. Nevertheless, the “annoyance and discomfort” for which damages may be recovered on nuisance and trespass claims generally refers to distress arising out of physical discomfort, irritation, or inconvenience caused by odors, pests, noise, and the like. Our cases have permitted recovery for annoyance and discomfort damages on nuisance and trespass claims while at the same time precluding recovery for “pure” emotional distress.’ ” (*Kelly, supra*, 179 Cal.App.4th at p. 456, internal citations omitted.)
- “California cases upholding an award of annoyance and discomfort damages have involved a plaintiff who was in immediate possession of the property as a resident or commercial tenant. We are aware of no California case upholding an award of annoyance and discomfort damages to a plaintiff who was not personally in immediate possession of the property.” (*Kelly, supra*, 179 Cal.App.4th at p. 458, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1730

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.23 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 550, *Trespass*, § 550.21 (Matthew Bender)

22 California Points and Authorities, Ch. 225, *Trespass*, § 225.145 (Matthew Bender)

VF-2004. Trespass to Timber ~~(Civ. Code, § 3346; Code Civ. Proc., § 733)~~ ~~Treble Damages Sought~~ Willful and Malicious Conduct (Civ. Code, § 3346; Code Civ. Proc., § 733)

We answer the questions submitted to us as follows:

1. Did [name of plaintiff] [own/lease/occupy/control] the property?
 Yes No

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

2. Did [name of defendant] intentionally, recklessly, or negligently enter [name of plaintiff]'s property and [cut down or damage trees/take timber] located on the property?
 Yes No

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

3. Did [name of plaintiff] give permission to [cut down or damage the trees/take timber]?
 Yes No

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

4. Was [name of defendant]'s conduct a substantial factor in causing harm to [name of plaintiff]?
 Yes No

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

- ~~5. Did [name of defendant] intend to harm [name of plaintiff]?
 Yes No~~

~~If your answer to question 5 is no, then answer question 6. If you answered yes, skip question 6 and answer question 7.~~

- ~~6. Did [name of defendant] act willfully or and maliciously ~~with the intent to vex, harass, or annoy~~?
 Yes No~~

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

76. 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 [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

~~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 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. 2002, *Trespass to Timber*, and CACI No. 2003, ~~*Freble-Damage to Timbers*~~ *Timber Willful and Malicious Conduct*.

| If specificity is not required, users do not have to itemize all the damages listed in question 7-6 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. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

If there is an issue regarding whether the defendant exceeded the scope of the plaintiff’s consent, question 3 can be modified as in element 3 in CACI No. 2002.

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

2100. Conversion—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] wrongfully exercised control over [his/her/its] personal property. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff] [owned/possessed/had a right to possess] [a/an] [insert item of personal property];
 2. That [name of defendant] intentionally **and substantially interfered with [name of plaintiff]’s property by** [insert one or more of the following:]
 - ~~took-taking~~ possession of the [insert item of personal property] ~~for a significant period of time;~~ [or]
 - ~~prevented-preventing~~ [name of plaintiff] from having access to the [insert item of personal property] ~~for a significant period of time;~~ [or]
 - ~~destroyed-destroying~~ the [insert item of personal property]; [or]
 - ~~refused-refusing~~ to return ~~[name of plaintiff]’s~~the [insert item of personal property] after [name of plaintiff] demanded its return.]
 3. That [name of plaintiff] did not consent;
 4. That [name of plaintiff] was harmed; and
 5. That [name of defendant]’s conduct was a substantial factor in causing [name of plaintiff]’s harm.
-

New September 2003; Revised December 2009, December 2010

Directions for Use

The last option for element 2 may be used if the defendant’s original possession of the property was not tortious. (See *Atwood v. S. Cal. Ice Co.* (1923) 63 Cal.App. 343, 345 [218 P. 283].)

Sources and Authority

- “[Cross-complainant] maintains that he alleged the essential elements of a conversion action, which ‘are the plaintiff’s ownership or right to possession of the property at the time of the conversion; the defendant’s conversion by a wrongful act or disposition of property rights; and damages. It is not necessary that there be a manual taking of the property; it is only necessary to show an assumption of

control or ownership over the property, or that the alleged converter has applied the property to his own use.” ...’ ” (*Shopoff & Cavallo LLP v. Hyon* (2008) 167 Cal.App.4th 1489, 1507 [85 Cal.Rptr.3d 268].)

- “[A]ny act of dominion wrongfully exerted over the personal property of another inconsistent with the owner’s rights thereto constitutes conversion.” (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 50 [108 Cal.Rptr.3d 455].)
- “Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant’s good faith, lack of knowledge, and motive are ordinarily immaterial.” (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066 [80 Cal.Rptr.2d 704], internal citations omitted.)
- “[I]t is generally acknowledged that conversion is a tort that may be committed only with relation to personal property and not real property.” (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7 [89 Cal.Rptr. 323], disagreeing with *Katz v. Enos* (1945) 68 Cal.App.2d 266, 269 [156 P.2d 461].)
- “The first element of that cause of action is his ownership or right to possession of the property at the time of the conversion. Once it is determined that [plaintiff] has a right to reinstate the contract, he has a right to possession of the vehicle and standing to bring conversion. Unjustified refusal to turn over possession on demand constitutes conversion even where possession by the withholder was originally obtained lawfully and of course so does an unauthorized sale.” (*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609 [218 Cal.Rptr. 15], internal citations omitted.)
- “ ‘To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. ... Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.’ ” (*Moore v. Regents of the Univ. of Cal.* (1990) 51 Cal.3d 120, 136 [271 Cal.Rptr. 146, 793 P.2d 479], internal citations omitted.)
- “In a conversion action the plaintiff need show only that he was entitled to possession at the time of conversion; the fact that plaintiff regained possession of the converted property does not prevent him from suing for damages for the conversion.” (*Enterprise Leasing Corp. v. Shugart Corp.* (1991) 231 Cal.App.3d 737, 748 [282 Cal.Rptr. 620], internal citation omitted.)
- “Neither legal title nor absolute ownership of the property is necessary. ... A party need only allege it is ‘entitled to immediate possession at the time of conversion. ...’ ... However, a mere contractual right of payment, without more, will not suffice.” (*Plummer, supra*, 184 Cal.App.4th at p. 45) ~~It is clear that legal title to property is not a requisite to maintain an action for damages in conversion. To mandate a conversion action ‘it is not essential that plaintiff shall be the absolute owner of the property converted but she must show that she was entitled to immediate possession at the time of conversion.’ ”~~ (*Hartford Financial Corp. v. Burns* (1979) 96 Cal.App.3d 591, 598 [158 Cal.Rptr. 169], internal citation omitted.)
- “The existence of a lien ... can establish the immediate right to possess needed for conversion. ‘One who holds property by virtue of a lien upon it may maintain an action for conversion if the property

was wrongfully disposed of by the owner and without authority’ Thus, attorneys may maintain conversion actions against those who wrongfully withhold or disburse funds subject to their attorney’s liens.” (Plummer, supra, 184 Cal.App.4th at p. 45, internal citation omitted.)

- “Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use. As [plaintiff] was a cotenant and had the right of possession of the realty, which included the right to keep his personal property thereon, [defendant]’s act of placing the goods in storage, although not constituting the assertion of ownership and a substantial interference with possession to the extent of a conversion, amounted to an intermeddling. Therefore, [plaintiff] is entitled to actual damages in an amount sufficient to compensate him for any impairment of the property or loss of its use.” (Zaslow v. Kroenert (1946) 29 Cal.2d 541, 551–552 [176 P.2d 1], internal citation omitted.)
- “[T]he law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property.” (*Farrington v. A. Teichert & Son, Inc.* (1943) 59 Cal.App.2d 468, 474 [139 P.2d 80], internal citations omitted.)
- “As to intentional invasions of the plaintiff’s interests, his consent negatives the wrongful element of the defendant’s act, and prevents the existence of a tort. ‘The absence of lawful consent,’ said Mr. Justice Holmes, ‘is part of the definition of an assault.’ The same is true of false imprisonment, conversion, and trespass.” (*Tavernier v. Maes* (1966) 242 Cal.App.2d 532, 552 [51 Cal.Rptr. 575], internal citations omitted.)
- “ ‘Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment.’ A ‘generalized claim for money [is] not actionable as conversion.’ ” (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 [58 Cal.Rptr.3d 516], internal citations omitted.)
- ~~“ ‘Conversion is any act of dominion wrongfully exerted over another’s personal property in denial of or inconsistent with his rights therein.’~~ One who buys property in good faith from a party lacking title and the right to sell may be liable for conversion. The remedies for conversion include specific recovery of the property, damages, and a quieting of title.” (*State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1076, 1081–1082 [62 Cal.Rptr.2d 178], internal citations omitted.)
- ~~“[Conversion] is the wrongful exercise of dominion over the personal property of another. The act~~ must be knowingly or intentionally done, but a wrongful intent is not necessary. Because the act must be knowingly done, ‘neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.’ It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion.” (*Taylor v. Forte Hotels International* (1991) 235 Cal.App.3d 1119, 1124 [1 Cal.Rptr.2d 189], internal citations omitted.)

- “In order to establish a conversion, the plaintiff ‘must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.’ Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort.” (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 812 [26 Cal.Rptr.2d 391], internal citations omitted.)
- “A conversion can occur when a willful failure to return property deprives the owner of possession.” (*Fearon v. Department of Corrections* (1984) 162 Cal.App.3d 1254, 1257 [209 Cal.Rptr. 309], internal citation omitted.)
- “A demand for return of the property is not a condition precedent to institution of the action when possession was originally acquired by a tort as it was in this case.” (*Igauye v. Howard* (1952) 114 Cal.App.2d 122, 127 [249 P.2d 558].)
- “ ‘Negligence in caring for the goods is not an act of dominion over them such as is necessary to make the bailee liable as a converter.’ Thus a warehouseman’s negligence in causing a fire which destroyed the plaintiffs’ goods will not support a conversion claim.” (*Gonzales v. Pers. Storage* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473], internal citations omitted.)
- “Although damages for conversion are frequently the equivalent to the damages for negligence, i.e., specific recovery of the property or damages based on the value of the property, negligence is no part of an action for conversion.” (*Taylor, supra*, 235 Cal.App.3d at p. 1123, internal citation omitted.)
- “A person without legal title to property may recover from a converter if the plaintiff is responsible to the true owner, such as in the case of a bailee or pledgee of the property.” (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1096 [64 Cal.Rptr.2d 457], internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 699–719

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.40 (Matthew Bender)

13 California Forms of Pleading and Practice, Ch. 150, *Conversion*, §§ 150.10, 150.40–150.41 (Matthew Bender)

5 California Points and Authorities, Ch. 51, *Conversion*, § 51.21[3][b] (Matthew Bender)

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*~~*a person providing services under a contract with to [name of defendant]]*?
 Yes No

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

3. Was *[name of 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.

~~{clerk/bailiff/judge}~~

New June 2010; Revised December 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. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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.

3007. Municipal-Local Government Liability—Policy or Custom—Essential Factual Elements (42 U.S.C. § 1983)

[Name of plaintiff] claims that [he/she] was deprived of [his/her] civil rights as a result of ~~the~~ an official [policy/custom] of the [name of ~~municipality~~ local governmental entity]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That the [name of local governmental entity] had an official [policy/custom] [specify policy or custom];
2. That [name of local governmental entity] knew, or it should have been obvious to it, that this official [policy/custom] was likely to result in a deprivation of the right [specify right violated];
3. That [name of officer or employee] was an [officer/employee/other] of [name of local governmental entity];
14. That [name of officer ~~or~~ employee, ~~etc.~~] [intentionally/[insert other applicable state of mind]] [insert conduct allegedly violating plaintiff's civil rights];
5. That [name of officer or employee]'s conduct violated [name of plaintiff]'s right [specify right];
26. That [name of officer or employee] ~~insert conduct allegedly violating plaintiff's civil rights~~ ~~occurred as a result~~ acted because of the this official [policy/custom] of the [name of municipality];
- ~~3. That [name of plaintiff] was harmed; and~~
- ~~4. That [name of officer, employee, etc.]'s conduct was a substantial factor in causing [name of plaintiff]'s harm.~~

New September 2003; Revised December 2010

Directions for Use

Give this instruction and CACI No. 3008, “Official Policy” Explained, if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the entity’s official policy or custom. First give CACI No. 3000, Violation of Federal Civil Rights—In General—Essential Factual Elements, and the instructions on the particular constitutional violation alleged.

The policy must amount to a deliberate indifference to constitutional rights. (*Burke v. County of Alameda* (9th Cir. 2009) 586 F.3d 725, 734.) Element 2 expresses this deliberate-indifference standard. (See

Clouthier v. County of Contra Costa (9th Cir. 2010) 591 F.3d 1232, 1249.)

In element 13, ~~the standard a constitutional violation~~ is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases ~~involve involving failure to provide a prisoner with proper medical care require~~ “deliberate indifference.” (See *Hudson v. McMillian* (1992) 503 U.S. 1, 5 [112 S.Ct. 995, 117 L.Ed.2d 156].) ~~and~~ And Fourth Amendment claims ~~require an “unreasonable” search or seizure.~~ (See *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834.] ~~do not necessarily involve intentional conduct.~~

For other theories of liability against a local governmental entity, see CACI No. 3009, *Local Government Liability—Failure to Train—Essential Factual Elements*, and CACI No. 3010, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- “[I]t is when execution of a government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.” (*Monell v. Dept. of Social Services of New York* (1978) 436 U.S. 658, 694 [98 S.Ct. 2018, 56 L.Ed.2d 611].)
- “To establish municipal liability under § 1983, a plaintiff ‘must show that (1) she was deprived of a constitutional right; (2) the County had a policy; (3) the policy amounted to a deliberate indifference to her constitutional right; and (4) the policy was the moving force behind the constitutional violation.’” (*Burke, supra*, 586 F.3d at p. 734.)
- Local governmental entities “ ‘can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted. ...’ ” Local governmental entities also can be sued “ ‘for constitutional deprivations visited pursuant to governmental “custom”.’ ” In addition, “ ‘[t]he plaintiff must ... demonstrate that, through its *deliberate* conduct, the municipality was the “moving force” behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.’ ” (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1147 [119 Cal.Rptr.2d 709, 45 P.3d 1171], internal citations omitted.)
- “Entity liability may arise in one of two forms. The municipality may itself have directed the deprivation of federal rights through an express government policy. This was the situation in *Monell*, where there was an explicit policy requiring pregnant government employees to take unpaid leaves of absence before such leaves were medically required. ... Alternatively, the municipality may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy.” (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)

- “[I]n order to successfully maintain an action under 42 United States Code section 1983 against governmental defendants for the tortious conduct of employees under federal law, it is necessary to establish that the conduct occurred in execution of a government’s policy or custom promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.’ ” (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 1564 [266 Cal.Rptr. 682], internal citations omitted.)
- “Normally, the question of whether a policy or custom exists would be a jury question. However, when there are no genuine issues of material fact and the plaintiff has failed to establish a prima facie case, disposition by summary judgment is appropriate.” (*Trevino v. Gates* (9th Cir. 1996) 99 F.3d 911, 920.)
- “At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award.” (*Choate, supra*, 86 Cal.App.4th at p. 328.)
- “Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]’s injuries. [Plaintiff]’s recovery, if any, based upon a *Monell* claim would be limited to nominal damages.” (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)
- “Local governmental bodies such as cities and counties are considered ‘persons’ subject to suit under section 1983. States and their instrumentalities, on the other hand, are not.” (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1101 [100 Cal.Rptr.2d 289], internal citations omitted.)
- “A local governmental unit cannot be liable under this section for acts of its employees based solely on a respondeat superior theory. A local governmental unit is liable only if the alleged deprivation of rights ‘implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body’s officers,’ or when the injury is in ‘execution of a [local] government’s policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.’ ” (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1171 [80 Cal.Rptr.2d 860], internal citations omitted.)
- “A municipality’s policy or custom resulting in constitutional injury may be actionable even though the individual public servants are shielded by good faith immunity.” (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 568 [195 Cal.Rptr. 268], internal citations omitted.)
- “No punitive damages can be awarded against a public entity.” (*Choate, supra*, 86 Cal.App.4th at p. 328, internal citation omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 816, 819 et seq.

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender

17A Moore's Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 17.23 (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03[2][a] (Matthew Bender)

3009. ~~Public Entity~~Local Government Liability—Failure to Train—Essential Factual Elements (42 U.S.C. § 1983)

[Name of plaintiff] claims that [he/she] was deprived of [his/her] civil rights as a result of [name of ~~public-local governmental~~ entity]’s failure to train its [officers/employees]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of ~~public-local governmental~~ entity]’s training program was not adequate to train its [officers/employees] ~~to properly handle usual and recurring situations;~~
2. ~~That [name of local governmental entity] knew, or it should have been obvious to it, that the inadequate training program was likely to result in a deprivation of the right [specify right violated]; That [name of public entity] was deliberately indifferent to the need to train its [officers/employees] adequately;~~
3. ~~That [name of officer or employee] violated [name of plaintiff]’s right [specify right]; and~~
34. That the failure to provide ~~proper adequate~~ training was the cause of the deprivation of [name of plaintiff]’s right [~~insert specify right, e.g., “of privacy”~~];
4. ~~That [name of plaintiff] was harmed; and~~
5. ~~That [name of public entity]’s failure to adequately train its [officers/employees] was a substantial factor in causing [name of plaintiff]’s harm.~~

~~“Deliberate indifference” is the knowing or reckless disregard of the consequences of one’s acts or omissions. To establish deliberate indifference, [name of plaintiff] must prove that [name of public entity] knew or should have known that its failure to provide reasonable training would likely result in a violation of the right [e.g., “of privacy”] of a person in [name of plaintiff]’s situation.~~

New September 2003; Revised December 2010

Directions for Use

Give this instruction if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the entity’s failure to adequately train its officers or employees. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*, and the instructions on the particular constitutional violation alleged.

The inadequate training must amount to a deliberate indifference to constitutional rights. (*Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1249.) Element 2 expresses this deliberate-indifference standard.

For other theories of liability against a local governmental entity, see CACI No. 3007, *Local Government Liability—Policy or Custom—Essential Factual Elements*, and CACI No. 3010, *Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements*.

Sources and Authority

- Title 42 U.S.C. United States Code 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].)~~
- “We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell* and *Polk County v. Dodson*, that a municipality can be liable under § 1983 only where its policies are the ‘moving force [behind] the constitutional violation.’ Only where a municipality’s failure to train its employees in a relevant respect evidences a ‘deliberate indifference’ to the rights of its inhabitants can such a shortcoming be properly thought of as a city ‘policy or custom’ that is actionable under § 1983.” (*City of Canton v. Harris* (1989) 489 U.S. 378, 388-389 [109 S.Ct. 1197, 103 L.Ed.2d 412], internal citations and footnote omitted.)
- “To impose liability on a local government for failure to adequately train its employees, the government's omission must amount to ‘deliberate indifference’ to a constitutional right. This standard is met when ‘the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.’ For example, if police activities in arresting fleeing felons ‘so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers,’ then the city's failure to train may constitute ‘deliberate indifference.’” (*Clouthier, supra*, 591 F.3d at p. 1249, internal citations omitted.)
- “It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective.” (*Farmer v. Brennan* (1994) 511 U.S. 825, 841 [114 S.Ct. 1970, 128 L.Ed.2d 811].)
- “To prove deliberate indifference, the plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation.” (*Gibson v. County of Washoe* (2002) 290 F.3d 1175, 1186, internal citation omitted.)
- “The issue in a case like this one ... is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent “city policy.” Furthermore, the inadequacy in the city’s training program must be closely related to the ‘ultimate

injury,’ such that the injury would have been avoided had the employee been trained under a program that was not deficient in the identified respect.” (*Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 526 [27 Cal.Rptr.2d 433], internal citations omitted.)

- “At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award.” (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)
- “Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]’s injuries. [Plaintiff]’s recovery, if any, based upon a *Monell* claim would be limited to nominal damages.” (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 822

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

17A Moore’s Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 17.23 (Matthew Bender)

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03[3] (Matthew Bender)

3010. Local Government Liability—Act or Ratification by Official With Final Policymaking Authority—Essential Factual Elements (42 U.S.C. § 1983)

[Name of plaintiff] claims that [he/she] was deprived of [his/her] civil rights as a result of [specify alleged unconstitutional conduct, e.g., being denied a parade permit because of the political message of the parade]. [Name of official] is the person responsible for establishing final policy with respect to [specify subject matter, e.g., granting parade permits] for [name of local governmental entity].

To establish that [name of local governmental entity] is responsible for this deprivation, [name of plaintiff] must prove all of the following:

1. That [name of plaintiff]’s right [specify right violated] was violated;
2. That [name of official] was the person who [either] [actually [made the decision/committed the acts]/ [or] later personally ratified the [decision/acts]] that led to the deprivation of [name of plaintiff]’s civil rights;
3. That [name of official]’s [acts/decision] [was/were] a conscious and deliberate choice to follow a course of action from among various alternatives; and
4. That [name of official] [[made the decision/committed the acts]/ [or] approved the [decision/acts]] with knowledge of [specify facts constituting the alleged unlawful conduct].

[[Name of official] “ratified” the decision if [he/she] knew the unlawful reason for the decision and personally approved it after it had been made.]

New December 2010

Directions for Use

Give this instruction if the plaintiff seeks to hold a local governmental entity liable for a civil rights violation based on the acts of an official with final policymaking authority. First give CACI No. 3000, *Violation of Federal Civil Rights—In General—Essential Factual Elements*, and the instructions on the particular constitutional violation alleged.

Liability may be based on either the official’s personal acts or policy decision that led to the violation or the official’s subsequent ratification of the acts or decision of another. (See *Gillette v. Delmore* (9th Cir. 1992) 979 F.2d 1342, 1346–1347.) If both theories are alleged in the alternative, include “either” in element 1. Include the last paragraph if ratification is alleged.

For other theories of liability against a local governmental entity, see CACI No. 3007, *Local Government Liability—Policy or Custom—Essential Factual Elements*, and CACI No. 3009, *Local Government Liability—Failure to Train—Essential Factual Elements*.

The court determines whether a person is an official policymaker under state law. (See *Jett v. Dallas Independent School Dist.* (1989) 491 U.S. 701, 737 [109 S.Ct. 2702, 105 L.Ed.2d 598].)

Sources and Authority

- “[A] local government may be held liable under § 1983 when ‘the individual who committed the constitutional tort was an official with final policy-making authority’ or such an official ‘ratified a subordinate’s unconstitutional decision or action and the basis for it.’ ‘If the authorized policymakers approve a subordinate’s decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.’ ‘There must, however, be evidence of a conscious, affirmative choice’ on the part of the authorized policymaker. A local government can be held liable under § 1983 ‘only where “a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question.” ’ ” (*Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1250, internal citations omitted.)
- “Two terms ago, ... we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. ... First, a majority of the Court agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, ‘that is, acts which the municipality has officially sanctioned or ordered.’ Second, only those municipal officials who have ‘final policymaking authority’ may by their actions subject the government to § 1983 liability. Third, whether a particular official has ‘final policymaking authority’ is a question of state law. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city’s business.” (*St. Louis v. Praprotnik* (1988) 485 U.S. 112, 123 [108 S.Ct. 915, 99 L.Ed.2d 107], internal citations omitted.)
- “A municipality can be liable even for an isolated constitutional violation ... when the person causing the violation has final policymaking authority.” (*Webb v. Sloan* (9th Cir. 2003) 330 F.3d 1158, 1164.)
- “As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury.” (*Jett, supra*, 491 U.S. at p. 737, original italics.)
- “Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him.” (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73 [104 Cal.Rptr. 57, 500 P.2d 1401].)
- “To show ratification, a plaintiff must prove that the ‘authorized policymakers approve a subordinate’s decision and the basis for it.’ Accordingly, ratification requires, among other things, knowledge of the alleged constitutional violation.” (*Christie v. Iopa* (9th Cir. 1999) 176 F.3d 1231, 1239, internal citations omitted.)

- “[A] policymaker's mere refusal to overrule a subordinate's completed act does not constitute approval.” (*Christie, supra*, 176 F.3d at p. 1239.)
- “At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award.” (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)
- “Any damages resulting from a possible *Monell* claim would result from the same constitutional violation of the warrantless arrest which resulted in nominal damages. Even if [plaintiff] were to prove the City failed to adequately train the police officers, the result would simply be another theory of action concerning the conduct the jury has already determined was not the proximate cause of [plaintiff]’s injuries. [Plaintiff]’s recovery, if any, based upon a *Monell* claim would be limited to nominal damages.” (*George v. Long Beach* (9th Cir. 1992) 973 F.2d 706, 709.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 830

1 Civil Rights Actions, Ch. 2, *Governmental Liability and Immunity*, ¶ 2.03[2][b] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.12 (Matthew Bender)

17A Moore’s Federal Practice (3d ed.), Ch.123, *Access to Courts: Eleventh Amendment and State Sovereign Immunity*, § 17.23 (Matthew Bender)

30103013. 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; Renumbered from CACI No. 3010 December 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.”

Sources and Authority

- [Title 42 U.S.C. United States Code](#) 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~~ whether the use of force could plausibly have been thought ~~necessary~~ 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], original italics, 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 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

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 826

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

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶ 11.03
(Matthew Bender)

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

30133017. Supervisor Liability (42 U.S.C. § 1983)

[Name of plaintiff] claims that [name of supervisor defendant] is personally liable for [his/her] harm. In order to establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of supervisor defendant] knew, or in the exercise of reasonable diligence should have known, of [name of employee defendant]'s wrongful conduct;
2. That [name of supervisor defendant]'s response was so inadequate that it showed deliberate indifference to, or tacit authorization of, [name of employee defendant]'s conduct; and
3. That [name of supervisor defendant]'s inaction was a substantial factor in causing [name of plaintiff]'s harm.

New April 2007; Renumbered from CACI No. 3013 December 2010

Directions for Use

Read this instruction in cases in which a supervisor is alleged to be personally liable for the violation of the plaintiff's civil rights under Title 42 United States Code section 1983.

Sources and Authority

- “A ‘supervisory official may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates. ... [T]hat liability is not premised upon *respondeat superior* but upon “a recognition that supervisory indifference or tacit authorization of subordinates’ misconduct may be a causative factor in the constitutional injuries they inflict.” ’ ” (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 209 [73 Cal.Rptr.2d 571], internal citations omitted.)
- “To establish supervisory liability under section 1983, [plaintiff] was required to prove: (1) the supervisor had actual or constructive knowledge of [defendant’s] wrongful conduct; (2) the supervisor's response ““““was so inadequate as to show ““deliberate indifference to or tacit authorization of the alleged offensive practices’ ” ’ ”; and (3) the existence of an 'affirmative causal link' between the supervisor's inaction and [plaintiff's] injuries.” (*Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1279–1280 [48 Cal.Rptr.3d 715], internal citations omitted.)
- “We have found supervisory liability under § 1983 where the supervisor ‘was personally involved in the constitutional deprivation or a sufficient causal connection exists between the supervisor's unlawful conduct and the constitutional violation.’ Thus, supervisors ‘can be held liable for: 1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others.’ ” (*Edgerly v. City & County of San Francisco* (9th Cir. 2010) 599 F.3d 946, 961, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 347

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

[2 Civil Rights Actions, Ch. 7, Deprivation of Rights Under Color of State Law—General Principles, ¶ 7.10 \(Matthew Bender\)](#)

11 California Forms of Pleading and Practice, Ch. 113, *Civil Rights: The Post-Civil War Civil Rights Statutes*, § 113.14 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.20[4] (Matthew Bender)

3704. Existence of “Employee” Status Disputed

[Name of plaintiff] claims that [name of agent] was [name of defendant]’s employee.

In deciding whether [name of agent] was [name of defendant]’s employee, **you must first decide the most important factor is** whether [name of defendant] had the right to control how [name of agent] performed the work, rather than just the right to specify the result. It does not matter whether [name of defendant] exercised the right to control. **~~If you decide that the right to control existed, then [name of agent] was [name of defendant]’s employee.~~**

~~If you decide that [name of defendant] did not have~~In addition to the right of control, **~~then~~** you must **also** consider all **of** the circumstances in deciding whether [name of agent] was [name of defendant]’s employee. The following factors, if true, may show that [name of agent] was the employee of [name of defendant]:

- (a) [Name of defendant] supplied the equipment, tools, and place of work;
 - (b) [Name of agent] was paid by the hour rather than by the job;
 - (c) The work being done by [name of agent] was part of the regular business of [name of defendant];
 - (d) [Name of defendant] had an unlimited right to end the relationship with [name of agent];
 - (e) The work being done by [name of agent] was **~~the~~ [his/her]** only occupation or business **~~of [name of agent];~~**
 - (f) The kind of work performed by [name of agent] is usually done under the direction of a supervisor rather than by a specialist working without supervision;
 - (g) The kind of work performed by [name of agent] does not require specialized or professional skill;
 - (h) The services performed by [name of agent] were to be performed over a long period of time; and
 - (i) [Name of defendant] and [name of agent] acted as if they had an employer-employee relationship.
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New September 2003; Revised December 2010

Directions for Use

~~Not all of the secondary factors need to be given. Give only those factors that are supported by admissible evidence.~~

This instruction is primarily intended for employer-employee relationships. Most of the factors are less appropriate for analyzing other types of agency relationships, such as franchisor/franchisee. For an instruction more appropriate to these kinds of relationships, see CACI No. 3705, *Existence of "Agency" Relationship Disputed*.

Secondary factors (a)–(i) come from the Restatement Second of Agency, section 220. They have been phrased in a way to suggest whether or not they point toward an employment relationship. Omit any that are not supported by the evidence. Additional factors have been endorsed by the California Supreme Court and may be included if applicable. (See *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 354–355 [256 Cal.Rptr. 543, 769 P.2d 399].)

Sources and Authority

- Civil Code section 2295 provides: “An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency.”
- “Following common law tradition, California decisions ... declare that ‘[t]he principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired’ [¶] However, the courts have long recognized that the ‘control’ test, applied rigidly and in isolation, is often of little use in evaluating the infinite variety of service arrangements. While conceding that the right to control work details is the ‘most important’ or ‘most significant’ consideration, the authorities also endorse several ‘secondary’ indicia of the nature of a service relationship.” (*S. G. Borello & Sons, Inc., supra*, 48 Cal.3d at p.350, internal citations omitted.)
- “Additional factors have been derived principally from the Restatement Second of Agency. These include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. ‘Generally, . . . the individual factors cannot be applied mechanically as separate tests; they are intertwined and their weight depends often on particular combinations.’” (*S. G. Borello & Sons, Inc., supra*, 48 Cal.3d at p. 351, internal citations omitted.)
- [T]he Restatement guidelines heretofore approved in our state remain a useful reference.” (*S. G. Borello & Sons, Inc., supra*, 48 Cal.3d at p. 354.)
- “We also note the six-factor test developed by other jurisdictions which determine independent contractorship in light of the remedial purposes of the legislation. Besides the ‘right to control the

work,’ the factors include (1) the alleged employee's opportunity for profit or loss depending on his managerial skill; (2) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (3) whether the service rendered requires a special skill; (4) the degree of permanence of the working relationship; and (5) whether the service rendered is an integral part of the alleged employer's business. [¶] As can be seen, there are many points of individual similarity between these guidelines and our own traditional Restatement tests. We find that all are logically pertinent to the inherently difficult determination whether a provider of service is an employee or an excluded independent contractor for purposes of workers' compensation law.” (S. G. Borello & Sons, Inc., supra, 48 Cal.3d at pp. 354–355, internal cross-reference omitted.)

- “Whether a person is an independent contractor or an employee is a question of fact if dependent upon the resolution of disputed evidence or inferences.” (Bowman v. Wyatt (2010) 186 Cal.App.4th 286, 297, fn. 4 [111 Cal.Rptr.3d 787])~~The existence of an agency is a factual question within the province of the trier of fact whose determination may not be disturbed on appeal if supported by substantial evidence.” (L. Byron Culver & Associates v. Jaoudi Industrial & Trading Corp. (1991) 1 Cal.App.4th 300, 305 [1 Cal.Rptr.2d 680], internal citation omitted.)~~
- The burden of proving the existence of an agency rests on the one affirming its existence. (Burbank v. National Casualty Co. (1941) 43 Cal.App.2d 773, 781 [111 P.2d 740].)
- “The label placed by the parties on their relationship is not dispositive, and subterfuges are not countenanced.” (S. G. Borello & Sons, Inc., supra, 48 Cal.3d at p. 342.)
- ~~One who performs a mere favor for another without being subject to any legal duty of service and without assenting to right of control is not an agent, because the agency relationship rests upon mutual consent. (Hanks v. Carter & Higgins of Cal., Inc. (1967) 250 Cal.App.2d 156, 161 [58 Cal.Rptr. 190].)~~
- ~~An agency must rest upon an agreement. (D’Acquisto v. Evola (1949) 90 Cal.App.2d 210, 213 [202 P.2d 596].) “Agency may be implied from the circumstances and conduct of the parties.” (Michelson v. Hamada (1994) 29 Cal.App.4th 1566, 1579 [36 Cal.Rptr.2d 343], internal citations omitted.)~~
- “Whether a person performing work for another is an agent or an independent contractor depends primarily upon whether the one for whom the work is done has the legal right to control the activities of the alleged agent.... It is not essential that the right of control be exercised or that there be actual supervision of the work of the agent. The existence of the right of control and supervision establishes the existence of an agency relationship.” (Malloy v. Fong (1951) 37 Cal.2d 356, 370 [232 P.2d 241], internal citations omitted.)
- When the principal controls only the results of the work and not the means by which it is accomplished, an independent contractor relationship is established. (White v. Uniroyal, Inc. (1984) 155 Cal.App.3d 1, 25 [202 Cal.Rptr. 141], overruled on other grounds in Soule v. GM Corp. (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)
- “Agency and independent contractorship are not necessarily mutually exclusive legal categories as independent contractor and servant or employee are. ... One who contracts to act on behalf of another

and subject to the other's control, except with respect to his physical conduct, is both an agent and an independent contractor." (*City of Los Angeles v. Meyers Brothers Parking System* (1975) 54 Cal.App.3d 135, 138 [126 Cal.Rptr. 545], internal citations omitted; accord *Mottola v. R. L. Kautz & Co.* (1988) 199 Cal.App.3d 98, 108 [244 Cal.Rptr. 737].)

- ~~The factors that may be considered in determining whether an agency exists are drawn from the Restatement Second of Agency, section 220, provides and are phrased therein as follows:~~
 - ~~(1) A servant is a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control.~~
 - ~~(2) In determining whether one acting for another is a servant or an independent contractor, the following matters of fact, among others, are considered:~~
 - (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
 - (b) whether or not the one employed is engaged in a distinct occupation or business;
 - (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
 - (d) the skill required in the particular occupation;
 - (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
 - (f) the length of time for which the person is employed;
 - (g) the method of payment, whether by the time or by the job;
 - (h) whether or not the work is a part of the regular business of the employer;
 - (i) whether or not the parties believe they are creating the relation of master and servant; and
 - (j) whether the principal is or is not in business.
- ~~These factors have been cited with approval by the Supreme Court. (*Malloy, supra*, 37 Cal.2d at pp. 370-371.) As phrased in the Restatement, they do not indicate in whose favor each factor weighs. The draft instruction states the factors in a way to suggest whether or not they point toward an employment relationship.~~

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 2-42

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.03[2] (Matthew Bender)

2 [Wilcox](#), California Employment Law, Ch. 30, *Employers' Tort Liability to Third Parties for Conduct of Employees*, § 30.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 248, *Employer's Liability for Employee's Torts*, §§ 248.15, [248.22](#), 248.51 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 427, *Principal and Agent*, [§ 427.13](#) (Matthew Bender)

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior*, [§ 100A.41 et seq.](#) (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 3:5–3:6

3904A. Present Cash Value

If you decide that [name of plaintiff]'s harm includes future [economic] damages for [loss of earnings/future medical expenses/lost profits/[insert other economic damages]], then the amount of those future damages must be reduced to their present cash value. This is necessary because money received now will, through investment, grow to a larger amount in the future. [Name of defendant] must prove the amount by which future damages should be reduced to present value.

To find present cash value, you must determine the amount of money that, if reasonably invested today, will provide [name of plaintiff] with the amount of [his/her/its] future damages.

[You may consider expert testimony in determining the present cash value of future [economic] damages.] [You must use the interest rate of ___ percent/ [and] [specify other stipulated information] agreed to by the parties in determining the present cash value of future [economic] damages.

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

New September 2003; Revised April 2008; Revised and renumbered from 3904 December 2010

Directions for Use

Give this instruction if future economic damages are sought. Include "economic" if future noneconomic damages are also sought. Future noneconomic damages are not reduced to present cash value because the amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]; CACI No. 3905A, *Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)*.)

~~Give the optional last sentence if the parties have stipulated to a discount rate or if evidence from which the jury can determine an appropriate discount rate has been presented. A table appropriate to this calculation should be provided. (See *Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716].)~~

Give the next-to-last sentence if there has been expert testimony on reduction to present value. Expert testimony will usually be required to accurately establish present values for future economic losses. Give the last sentence if there has been a stipulation as to the interest rate to use or any other facts related to present cash value.

It would appear that because reduction to present value benefits the defendant, the defendant bears the burden of proof on the discount rate. (See *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613–614 [102 Cal.Rptr. 31] [no error to refuse instruction on reduction to present value when defendant presented no evidence].) However, tables may be helpful to the jury in many cases.

Present-value tables may assist the jury in making its determination of present cash value. Tables, worksheets, and an instruction on how to use them are provided in CACI No. 3904B, *Use of Present-*

| Value Tables.

Sources and Authority

- “The present value of a gross award of future damages is that sum of money prudently invested at the time of judgment which will return, over the period the future damages are incurred, the gross amount of the award. ‘The concept of present value recognizes that money received after a given period is worth less than the same amount received today. This is the case in part because money received today can be used to generate additional value in the interim.’ The present value of an award of future damages will vary depending on the gross amount of the award, and the timing and amount of the individual payments.” (*Holt v. Regents of the University of California* (1999) 73 Cal.App.4th 871, 878 [86 Cal.Rptr.2d 752], internal citations omitted.)
- “Exact actuarial computation should result in a lump-sum, present-value award which if prudently invested will provide the beneficiaries with an investment return allowing them to regularly withdraw matching support money so that, by reinvesting the surplus earnings during the earlier years of the expected support period, they may maintain the anticipated future support level throughout the period and, upon the last withdrawal, have depleted both principal and interest.” (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 521 [196 Cal.Rptr. 82].)
- The Supreme Court has held that “it is not a violation of the plaintiff’s jury trial right for the court to submit only the issue of the gross amount of future economic damages to the jury, with the timing of periodic payments—and hence their present value—to be set by the court in the exercise of its sound discretion.” (*Salgado, supra*, 19 Cal.4th at p. 649, internal citation omitted.)
- “Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the ‘jury would have been put to sheer speculation in determining ... “the present sum of money which ... will pay to the plaintiff ... the equivalent of his [future economic] loss” ’ ” (*Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716]*Schiernbeck, supra*, 7 Cal.App.4th at p. 877, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1552

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.96

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.21–52.22 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages*, § 65.40 et seq. (Matthew Bender)

| 1 California Civil Practice: Torts (Thomson Reuters West) § 5:22

3904B. Use of Present-Value Tables

[For Table A:]

[Use Worksheet A and Table A to compute the present value of [specify future damages that can be expressed as a regular dollar amount over a determinable period of time, e.g., lost future income or the cost of permanent medical care].

1. Determine the amount of [name of plaintiff]'s future loss for [e.g., lost income] each year. Enter this amount into Worksheet A, Step 1.
2. Determine the number of years that this loss will continue. Enter this amount into Worksheet A, Step 2.
3. Select the interest rate that you decide [based on the expert testimony that you have heard] represents the most likely rate of return on money invested today over that period of years. Enter this amount into Worksheet A, Step 3.
4. Select the appropriate Present Value Factor from Table A. To locate this factor, use the Number of Years from Step 2 on the worksheet and the Interest Rate from Step 3 on the worksheet and find the number that is the intersection of the Interest Rate column and Number of Years row. (For example, if the number of years is 15 and the interest rate is 10 percent, the corresponding Present Value Factor is 7.61.) Enter the factor into Worksheet A, Step 4.
5. Multiply the amount of [name of plaintiff]'s annual future loss from Step 1 by the factor from Step 4. This is the present value of [name of plaintiff]'s total future loss for [e.g., lost income]. Enter this amount into Worksheet A, Step 5.

WORKSHEET A

Step 1: Repeating identical annual dollar amount of future loss: \$ _____

Step 2: Number of years that this loss will continue: _____

Step 3: Interest rate that represents a reasonable rate of return on money
invested today over that period of years: _____ %

Step 4: Present Value Factor from Table A: _____

Step 5: Amount from Step 1 times Factor from Step 4: \$ _____

Enter the amount from Step 5 on your verdict form as [name of plaintiff]'s total future economic loss for [e.g., lost income].]

[For Table B:]

[Use Worksheet B and Table B to compute the present value of [specify future damages that cannot be expressed as a repeating identical dollar amount over a determinable period of time, e.g., future surgeries].

1. Determine the future years in which a future loss will occur. In Column A, starting with the current year, enter each year through the last year that you determined a future loss will occur.
2. Determine the amount of [name of plaintiff]'s future loss for [e.g., future surgeries] for each year that you determine the loss will occur. Enter these future losses in Column B on the worksheet. Enter \$0 if no future loss occurs in a given year.
3. Select the interest rate that you decide [based on the expert testimony that you have heard] represents a reasonable rate of return on money invested today over the number of years determined in Step 2. Enter this rate in Column C on the worksheet for each year that future-loss amounts are entered in Column B.
4. Select the appropriate Present Value Factor from Table B for each year for which you have determined that a loss will occur. To locate this factor, use the Number of Years from Column A on the worksheet and the Interest Rate in Column C on the worksheet and find the number that is the intersection of the Interest Rate column and Number of Years row from the table. (For example, for year 15, if the interest rate is 10 percent, the corresponding Present Value Factor is 0.239.) Enter the appropriate Present Value Factors in Column D. For the current year, the Present Value Factor is 1.000. It is not necessary to select an interest rate for the current year in Step 3.
5. Multiply the amount in Column B by the factor in Column D for each year for which you determined that a loss will occur and enter these amounts in Column E.
6. Add all of the entries in Column E and enter this sum into Total Present Value of Future Loss.

Enter the amount from Step 6 on your verdict form as [name of plaintiff]'s total future economic loss for [e.g., future surgeries].

WORKSHEET B

A	B	C	D	E
Year	Dollar Amount of Future Loss Each Year	Interest Rate	Present Value Factor	Present Value of Future Loss
Current year (20__)	\$	Not applicable	1.000	\$
Year 1 (20__)	\$	%		\$
Year 2 (20__)	\$	%		\$
Year 3 (20__)	\$	%		\$
Year 4 (20__)	\$	%		\$
Year 5 (20__)	\$	%		\$
Year 6 (20__)	\$	%		\$
Year 7 (20__)	\$	%		\$
Year 8 (20__)	\$	%		\$
Year 9 (20__)	\$	%		\$
Year 10 (20__)	\$	%		\$
Year 11 (20__)	\$	%		\$
Year 12 (20__)	\$	%		\$
Year 13 (20__)	\$	%		\$
Year 14 (20__)	\$	%		\$
Year 15 (20__)	\$	%		\$
Year 16 (20__)	\$	%		\$
Year 17 (20__)	\$	%		\$
Year 18 (20__)	\$	%		\$
Year 19 (20__)	\$	%		\$
Year 20 (20__)	\$	%		\$
Year 21 (20__)	\$	%		\$
Year 22 (20__)	\$	%		\$
Year 23 (20__)	\$	%		\$
Year 24 (20__)	\$	%		\$
Year 25 (20__)	\$	%		\$
Total Present Value of Future Loss (add all amounts in Column E)				\$

New December 2010

Directions for Use

Give this instruction if one of the accompanying tables is to be given to the jury. Also give CACI No. 359, *Present Cash Value of Future Damages*, in a contract action or CACI No. 3904A, *Present Cash Value*, in a tort action.

Use Worksheet A and Table A if future economic loss will occur over multiple years and the amount of the loss will be the same every year. For example, lost future income may be capable of being expressed in a fixed annual dollar figure. Similarly, the cost of future medical care may be reduced to present value under Table A if it will be a regular amount over a determinable period of time.

Use Worksheet B and Table B in all other instances of future economic loss. In some cases, it may be necessary to give the jury both worksheets and tables if there are categories of both regular recurring future economic loss and irregular or varying loss.

The interest rate to be used in the tables must be established by stipulation or by the evidence. Expert testimony will usually be required to accurately establish present values for future economic losses. It would appear that because reduction to present value benefits the defendant, the defendant bears the burden of proof on the discount rate. (See *Wilson v. Gilbert* (1972) 25 Cal.App.3d 607, 613–614 [102 Cal.Rptr. 31] [no error to refuse instruction on reduction to present value when defendant presented no evidence].)

Tables should not be used for future noneconomic damages. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585]; CACI No. 3904A, *Present Cash Value*.)

Sources and Authority

- “Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the ‘jury would have been put to sheer speculation in determining ... “the present sum of money which ... will pay to the plaintiff ... the equivalent of his [future economic] loss” ’ ” (*Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716], internal citations omitted.)
- “[W]e cannot presume that the jurors were unable to make the various computations without the proffered aid of court and counsel after first reaching necessary agreement on the various determinables comprising the formula. Further, defendant's counsel took a calculated risk in this regard; he produced neither statistician nor economist to aid his cause in this regard. Too, we have found no California cases which hold that use of the present table is indispensable to a proper award of damages for loss of future earning capacity” (*Howard v. Global Marine, Inc.* (1972) 28

Cal.App.3d 809, 816 [105 Cal.Rptr. 50].)

- “The trial court was also correct in refusing the proposed instruction, on its merits, for lack of evidence which would have supported a jury finding of the ‘present cash value’ of any sum assessed as the value of [plaintiff]’s future earning capacity The computation of such ‘present cash value’ is ‘difficult and confusing . . . to present to a jury’ and, in the pertinent cases, the computation was apparently reached by the respective juries upon the basis of real evidence. Absent such evidence in the present case (and there was none), this jury would have been put to sheer speculation in determining (as the proposed instruction would have had it do) ‘the present sum of money which, together with interest thereon when invested so as to yield the highest rate of interest consistent with reasonable security, will pay to the plaintiff . . . the equivalent of his loss of earning capacity . . . in the future’ The instruction would have required the jury to reach this result without the benefit of evidence or advice as to the complicated factors of compounding and discounting which the instruction necessarily involved. There are ‘present cash value’ tables which might have assisted the jury in this regard, if judicially noticed for instruction purposes, but the proposed instruction included no reference to them. For these reasons, and on the instruction’s merits, the trial court did not err in refusing to give it.” (*Wilson, supra*, 25 Cal.App.3d at pp. 613–614, internal citations omitted.)
- “Anticipated future increases of medical costs may be presented to the jury. Expert testimony may be used with regard to a ‘subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; . . . ’ Future medical expenses are such a subject. Testimony by actuaries is frequently used to show discount rates and the present value of future benefits. [¶] The expert testimony was substantial evidence supporting the portion of the award relating to the future cost of attendant care. The substantial evidence test is applied in view of the entire record; other than a vigorous cross-examination of plaintiffs’ expert, appellants presented no evidence on the cost of attendant care. The elaborate economic arguments presented in the briefs of appellants and amicus curiae might better have been presented to the jury in opposition to respondents’ expert testimony.” (*Niles v. City of San Rafael* (1974) 42 Cal.App.3d 230, 243 [116 Cal.Rptr. 733], internal citations omitted.)
- “Appellants claim that the 5 percent discount rate presented by the expert was too low. A discount rate, similar to an interest rate, is used to determine the present value of future expenses. The expert, in arriving at a 5 percent rate, used commercial investment studies pertaining to the riskiness of corporate bonds, charts compiled by the Federal Reserve System showing interest yields on various bonds since 1920, and tables published by the United States Savings and Loan League showing interest rates on savings accounts since 1929. He took into account the need for reasonable security of investment over the period of [plaintiff]’s life. All of this was apparently within the competence of the expert.” (*Niles, supra*, 42 Cal.App.3d at pp. 243–244.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1552

California Tort Damages (Cont.Ed.Bar) Bodily Injury, § 1.96

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.21, 52.22 (Matthew

Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.46 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.40 et seq. (Matthew Bender)

Table A goes here

Table B goes here

Table A - Present Value Factor of Repeating Identical Amount (Present value of \$1 per period for *t* periods at *r*%)

	Interest Rate																			
	1%	2%	3%	4%	5%	6%	7%	8%	9%	10%	11%	12%	13%	14%	15%	16%	17%	18%	19%	20%
1	0.99	0.98	0.97	0.96	0.95	0.94	0.93	0.93	0.92	0.91	0.90	0.89	0.88	0.88	0.87	0.86	0.85	0.85	0.84	0.83
2	1.97	1.94	1.91	1.89	1.86	1.83	1.81	1.78	1.76	1.74	1.71	1.69	1.67	1.65	1.63	1.61	1.59	1.57	1.55	1.53
3	2.94	2.88	2.83	2.78	2.72	2.67	2.62	2.58	2.53	2.49	2.44	2.40	2.36	2.32	2.28	2.25	2.21	2.17	2.14	2.11
4	3.90	3.81	3.72	3.63	3.55	3.47	3.39	3.31	3.24	3.17	3.10	3.04	2.97	2.91	2.85	2.80	2.74	2.69	2.64	2.59
5	4.85	4.71	4.58	4.45	4.33	4.21	4.10	3.99	3.89	3.79	3.70	3.60	3.52	3.43	3.35	3.27	3.20	3.13	3.06	2.99
6	5.80	5.60	5.42	5.24	5.08	4.92	4.77	4.62	4.49	4.36	4.23	4.11	4.00	3.89	3.78	3.68	3.59	3.50	3.41	3.33
7	6.73	6.47	6.23	6.00	5.79	5.58	5.39	5.21	5.03	4.87	4.71	4.56	4.42	4.29	4.16	4.04	3.92	3.81	3.71	3.60
8	7.65	7.33	7.02	6.73	6.46	6.21	5.97	5.75	5.53	5.33	5.15	4.97	4.80	4.64	4.49	4.34	4.21	4.08	3.95	3.84
9	8.57	8.16	7.79	7.44	7.11	6.80	6.52	6.25	6.00	5.76	5.54	5.33	5.13	4.95	4.77	4.61	4.45	4.30	4.16	4.03
10	9.47	8.98	8.53	8.11	7.72	7.36	7.02	6.71	6.42	6.14	5.89	5.65	5.43	5.22	5.02	4.83	4.66	4.49	4.34	4.19
11	10.37	9.79	9.25	8.76	8.31	7.89	7.50	7.14	6.81	6.50	6.21	5.94	5.69	5.45	5.23	5.03	4.84	4.66	4.49	4.33
12	11.26	10.58	9.95	9.39	8.86	8.38	7.94	7.54	7.16	6.81	6.49	6.19	5.92	5.66	5.42	5.20	4.99	4.79	4.61	4.44
13	12.13	11.35	10.63	9.99	9.39	8.85	8.36	7.90	7.49	7.10	6.75	6.42	6.12	5.84	5.58	5.34	5.12	4.91	4.71	4.53
14	13.00	12.11	11.30	10.56	9.90	9.29	8.75	8.24	7.79	7.37	6.98	6.63	6.30	6.00	5.72	5.47	5.23	5.01	4.80	4.61
15	13.87	12.85	11.94	11.12	10.38	9.71	9.11	8.56	8.06	7.61	7.19	6.81	6.46	6.14	5.85	5.58	5.32	5.09	4.88	4.68
16	14.72	13.58	12.56	11.65	10.84	10.11	9.45	8.85	8.31	7.82	7.38	6.97	6.60	6.27	5.95	5.67	5.41	5.16	4.94	4.73
17	15.56	14.29	13.17	12.17	11.27	10.48	9.76	9.12	8.54	8.02	7.55	7.12	6.73	6.37	6.05	5.75	5.47	5.22	4.99	4.77
18	16.40	14.99	13.75	12.66	11.69	10.83	10.06	9.37	8.76	8.20	7.70	7.25	6.84	6.47	6.13	5.82	5.53	5.27	5.03	4.81
19	17.23	15.68	14.32	13.13	12.09	11.16	10.34	9.60	8.95	8.36	7.84	7.37	6.94	6.55	6.20	5.88	5.58	5.32	5.07	4.84
20	18.05	16.35	14.88	13.59	12.46	11.47	10.59	9.82	9.13	8.51	7.96	7.47	7.02	6.62	6.26	5.93	5.63	5.35	5.10	4.87
21	18.86	17.01	15.42	14.03	12.82	11.76	10.84	10.02	9.29	8.65	8.08	7.56	7.10	6.69	6.31	5.97	5.66	5.38	5.13	4.89
22	19.66	17.66	15.94	14.45	13.16	12.04	11.06	10.20	9.44	8.77	8.18	7.64	7.17	6.74	6.36	6.01	5.70	5.41	5.15	4.91
23	20.46	18.29	16.44	14.86	13.49	12.30	11.27	10.37	9.58	8.88	8.27	7.72	7.23	6.79	6.40	6.04	5.72	5.43	5.17	4.92
24	21.24	18.91	16.94	15.25	13.80	12.55	11.47	10.53	9.71	8.98	8.35	7.78	7.28	6.84	6.43	6.07	5.75	5.45	5.18	4.94
25	22.02	19.52	17.41	15.62	14.09	12.78	11.65	10.67	9.82	9.08	8.42	7.84	7.33	6.87	6.46	6.10	5.77	5.47	5.20	4.95
26	22.80	20.12	17.88	15.98	14.38	13.00	11.83	10.81	9.93	9.16	8.49	7.90	7.37	6.91	6.49	6.12	5.78	5.48	5.21	4.96
27	23.56	20.71	18.33	16.33	14.64	13.21	11.99	10.94	10.03	9.24	8.55	7.94	7.41	6.94	6.51	6.14	5.80	5.49	5.22	4.96
28	24.32	21.28	18.76	16.66	14.90	13.41	12.14	11.05	10.12	9.31	8.60	7.98	7.44	6.96	6.53	6.15	5.81	5.50	5.22	4.97
29	25.07	21.84	19.19	16.98	15.14	13.59	12.28	11.16	10.20	9.37	8.65	8.02	7.47	6.98	6.55	6.17	5.82	5.51	5.23	4.97
30	25.81	22.40	19.60	17.29	15.37	13.76	12.41	11.26	10.27	9.43	8.69	8.06	7.50	7.00	6.57	6.18	5.83	5.52	5.23	4.98
31	26.54	22.94	20.00	17.59	15.59	13.93	12.53	11.35	10.34	9.48	8.73	8.08	7.52	7.02	6.58	6.19	5.84	5.52	5.24	4.98
32	27.27	23.47	20.39	17.87	15.80	14.08	12.65	11.43	10.41	9.53	8.77	8.11	7.54	7.03	6.59	6.20	5.84	5.53	5.24	4.99
33	27.99	23.99	20.77	18.15	16.00	14.23	12.75	11.51	10.46	9.57	8.80	8.14	7.56	7.05	6.60	6.20	5.85	5.53	5.25	4.99
34	28.70	24.50	21.13	18.41	16.19	14.37	12.85	11.59	10.52	9.61	8.83	8.16	7.57	7.06	6.61	6.21	5.85	5.54	5.25	4.99
35	29.41	25.00	21.49	18.66	16.37	14.50	12.95	11.65	10.57	9.64	8.86	8.18	7.59	7.07	6.62	6.22	5.86	5.54	5.25	4.99
36	30.11	25.49	21.83	18.91	16.55	14.62	13.04	11.72	10.61	9.68	8.88	8.19	7.60	7.08	6.62	6.22	5.86	5.54	5.25	4.99
37	30.80	25.97	22.17	19.14	16.71	14.74	13.12	11.78	10.65	9.71	8.90	8.21	7.61	7.09	6.63	6.22	5.86	5.54	5.25	4.99
38	31.48	26.44	22.49	19.37	16.87	14.85	13.19	11.83	10.69	9.73	8.92	8.22	7.62	7.09	6.63	6.23	5.87	5.55	5.26	5.00
39	32.16	26.90	22.81	19.58	17.02	14.95	13.26	11.88	10.73	9.76	8.94	8.23	7.63	7.10	6.64	6.23	5.87	5.55	5.26	5.00
40	32.83	27.36	23.11	19.79	17.16	15.05	13.33	11.92	10.76	9.78	8.95	8.24	7.63	7.11	6.64	6.23	5.87	5.55	5.26	5.00
41	33.50	27.80	23.41	19.99	17.29	15.14	13.39	11.97	10.79	9.80	8.96	8.25	7.64	7.11	6.65	6.24	5.87	5.55	5.26	5.00
42	34.16	28.23	23.70	20.19	17.42	15.22	13.45	12.01	10.81	9.82	8.98	8.26	7.65	7.11	6.65	6.24	5.87	5.55	5.26	5.00
43	34.81	28.66	23.98	20.37	17.55	15.31	13.51	12.04	10.84	9.83	8.99	8.27	7.65	7.12	6.65	6.24	5.88	5.55	5.26	5.00
44	35.46	29.08	24.25	20.55	17.66	15.38	13.56	12.08	10.86	9.85	9.00	8.28	7.66	7.12	6.65	6.24	5.88	5.55	5.26	5.00
45	36.09	29.49	24.52	20.72	17.77	15.46	13.61	12.11	10.88	9.86	9.01	8.28	7.66	7.12	6.65	6.24	5.88	5.55	5.26	5.00
46	36.73	29.89	24.78	20.88	17.88	15.52	13.65	12.14	10.90	9.88	9.02	8.29	7.66	7.13	6.66	6.24	5.88	5.55	5.26	5.00
47	37.35	30.29	25.02	21.04	17.98	15.59	13.69	12.16	10.92	9.89	9.02	8.29	7.67	7.13	6.66	6.24	5.88	5.55	5.26	5.00
48	37.97	30.67	25.27	21.20	18.08	15.65	13.73	12.19	10.93	9.90	9.03	8.30	7.67	7.13	6.66	6.24	5.88	5.55	5.26	5.00
49	38.59	31.05	25.50	21.34	18.17	15.71	13.77	12.21	10.95	9.91	9.04	8.30	7.67	7.13	6.66	6.25	5.88	5.55	5.26	5.00
50	39.20	31.42	25.73	21.48	18.26	15.76	13.80	12.23	10.96	9.91	9.04	8.30	7.68	7.13	6.66	6.25	5.88	5.55	5.26	5.00

Note: The factors in this table are calculated as $\left(\frac{1}{r}\right) - \left(\frac{1}{r \times (1+r)^t}\right)$, where *r* is the interest rate and *t* is the number of years. This formula can be used to calculate any present value factors not shown on this table.

Table B - Present Value Factor for Lump Sum (Present value of \$1 from period *t* at *r*%)

	Interest Rate																			
	1%	2%	3%	4%	5%	6%	7%	8%	9%	10%	11%	12%	13%	14%	15%	16%	17%	18%	19%	20%
1	0.990	0.980	0.971	0.962	0.952	0.943	0.935	0.926	0.917	0.909	0.901	0.893	0.885	0.877	0.870	0.862	0.855	0.847	0.840	0.833
2	0.980	0.961	0.943	0.925	0.907	0.890	0.873	0.857	0.842	0.826	0.812	0.797	0.783	0.769	0.756	0.743	0.731	0.718	0.706	0.694
3	0.971	0.942	0.915	0.889	0.864	0.840	0.816	0.794	0.772	0.751	0.731	0.712	0.693	0.675	0.658	0.641	0.624	0.609	0.593	0.579
4	0.961	0.924	0.888	0.855	0.823	0.792	0.763	0.735	0.708	0.683	0.659	0.636	0.613	0.592	0.572	0.552	0.534	0.516	0.499	0.482
5	0.951	0.906	0.863	0.822	0.784	0.747	0.713	0.681	0.650	0.621	0.593	0.567	0.543	0.519	0.497	0.476	0.456	0.437	0.419	0.402
6	0.942	0.888	0.837	0.790	0.746	0.705	0.666	0.630	0.596	0.564	0.535	0.507	0.480	0.456	0.432	0.410	0.390	0.370	0.352	0.335
7	0.933	0.871	0.813	0.760	0.711	0.665	0.623	0.583	0.547	0.513	0.482	0.452	0.425	0.400	0.376	0.354	0.333	0.314	0.296	0.279
8	0.923	0.853	0.789	0.731	0.677	0.627	0.582	0.540	0.502	0.467	0.434	0.404	0.376	0.351	0.327	0.305	0.285	0.266	0.249	0.233
9	0.914	0.837	0.766	0.703	0.645	0.592	0.544	0.500	0.460	0.424	0.391	0.361	0.333	0.308	0.284	0.263	0.243	0.225	0.209	0.194
10	0.905	0.820	0.744	0.676	0.614	0.558	0.508	0.463	0.422	0.386	0.352	0.322	0.295	0.270	0.247	0.227	0.208	0.191	0.176	0.162
11	0.896	0.804	0.722	0.650	0.585	0.527	0.475	0.429	0.388	0.350	0.317	0.287	0.261	0.237	0.215	0.195	0.178	0.162	0.148	0.135
12	0.887	0.788	0.701	0.625	0.557	0.497	0.444	0.397	0.356	0.319	0.286	0.257	0.231	0.208	0.187	0.168	0.152	0.137	0.124	0.112
13	0.879	0.773	0.681	0.601	0.530	0.469	0.415	0.368	0.326	0.290	0.258	0.229	0.204	0.182	0.163	0.145	0.130	0.116	0.104	0.093
14	0.870	0.758	0.661	0.577	0.505	0.442	0.388	0.340	0.299	0.263	0.232	0.205	0.181	0.160	0.141	0.125	0.111	0.099	0.088	0.078
15	0.861	0.743	0.642	0.555	0.481	0.417	0.362	0.315	0.275	0.239	0.209	0.183	0.160	0.140	0.123	0.108	0.095	0.084	0.074	0.065
16	0.853	0.728	0.623	0.534	0.458	0.394	0.339	0.292	0.252	0.218	0.188	0.163	0.141	0.123	0.107	0.093	0.081	0.071	0.062	0.054
17	0.844	0.714	0.605	0.513	0.436	0.371	0.317	0.270	0.231	0.198	0.170	0.146	0.125	0.108	0.093	0.080	0.069	0.060	0.052	0.045
18	0.836	0.700	0.587	0.494	0.416	0.350	0.296	0.250	0.212	0.180	0.153	0.130	0.111	0.095	0.081	0.069	0.059	0.051	0.044	0.038
19	0.828	0.686	0.570	0.475	0.396	0.331	0.277	0.232	0.194	0.164	0.138	0.116	0.098	0.083	0.070	0.060	0.051	0.043	0.037	0.031
20	0.820	0.673	0.554	0.456	0.377	0.312	0.258	0.215	0.178	0.149	0.124	0.104	0.087	0.073	0.061	0.051	0.043	0.037	0.031	0.026
21	0.811	0.660	0.538	0.439	0.359	0.294	0.242	0.199	0.164	0.135	0.112	0.093	0.077	0.064	0.053	0.044	0.037	0.031	0.026	0.022
22	0.803	0.647	0.522	0.422	0.342	0.278	0.226	0.184	0.150	0.123	0.101	0.083	0.068	0.056	0.046	0.038	0.032	0.026	0.022	0.018
23	0.795	0.634	0.507	0.406	0.326	0.262	0.211	0.170	0.138	0.112	0.091	0.074	0.060	0.049	0.040	0.033	0.027	0.022	0.018	0.015
24	0.788	0.622	0.492	0.390	0.310	0.247	0.197	0.158	0.126	0.102	0.082	0.066	0.053	0.043	0.035	0.028	0.023	0.019	0.015	0.013
25	0.780	0.610	0.478	0.375	0.295	0.233	0.184	0.146	0.116	0.092	0.074	0.059	0.047	0.038	0.030	0.024	0.020	0.016	0.013	0.010
26	0.772	0.598	0.464	0.361	0.281	0.220	0.172	0.135	0.106	0.084	0.066	0.053	0.042	0.033	0.026	0.021	0.017	0.014	0.011	0.009
27	0.764	0.586	0.450	0.347	0.268	0.207	0.161	0.125	0.098	0.076	0.060	0.047	0.037	0.029	0.023	0.018	0.014	0.011	0.009	0.007
28	0.757	0.574	0.437	0.333	0.255	0.196	0.150	0.116	0.090	0.069	0.054	0.042	0.033	0.026	0.020	0.016	0.012	0.010	0.008	0.006
29	0.749	0.563	0.424	0.321	0.243	0.185	0.141	0.107	0.082	0.063	0.048	0.037	0.029	0.022	0.017	0.014	0.011	0.008	0.006	0.005
30	0.742	0.552	0.412	0.308	0.231	0.174	0.131	0.099	0.075	0.057	0.044	0.033	0.026	0.020	0.015	0.012	0.009	0.007	0.005	0.004
31	0.735	0.541	0.400	0.296	0.220	0.164	0.123	0.092	0.069	0.052	0.039	0.030	0.023	0.017	0.013	0.010	0.008	0.006	0.005	0.004
32	0.727	0.531	0.388	0.285	0.210	0.155	0.115	0.085	0.063	0.047	0.035	0.027	0.020	0.015	0.011	0.009	0.007	0.005	0.004	0.003
33	0.720	0.520	0.377	0.274	0.200	0.146	0.107	0.079	0.058	0.043	0.032	0.024	0.018	0.013	0.010	0.007	0.006	0.004	0.003	0.002
34	0.713	0.510	0.366	0.264	0.190	0.138	0.100	0.073	0.053	0.039	0.029	0.021	0.016	0.012	0.009	0.006	0.005	0.004	0.003	0.002
35	0.706	0.500	0.355	0.253	0.181	0.130	0.094	0.068	0.049	0.036	0.026	0.019	0.014	0.010	0.008	0.006	0.004	0.003	0.002	0.002
36	0.699	0.490	0.345	0.244	0.173	0.123	0.088	0.063	0.045	0.032	0.023	0.017	0.012	0.009	0.007	0.005	0.004	0.003	0.002	0.001
37	0.692	0.481	0.335	0.234	0.164	0.116	0.082	0.058	0.041	0.029	0.021	0.015	0.011	0.008	0.006	0.004	0.003	0.002	0.002	0.001
38	0.685	0.471	0.325	0.225	0.157	0.109	0.076	0.054	0.038	0.027	0.019	0.013	0.010	0.007	0.005	0.004	0.003	0.002	0.001	0.001
39	0.678	0.462	0.316	0.217	0.149	0.103	0.071	0.050	0.035	0.024	0.017	0.012	0.009	0.006	0.004	0.003	0.002	0.002	0.001	0.001
40	0.672	0.453	0.307	0.208	0.142	0.097	0.067	0.046	0.032	0.022	0.015	0.011	0.008	0.005	0.004	0.003	0.002	0.001	0.001	0.001
41	0.665	0.444	0.298	0.200	0.135	0.092	0.062	0.043	0.029	0.020	0.014	0.010	0.007	0.005	0.003	0.002	0.002	0.001	0.001	0.001
42	0.658	0.435	0.289	0.193	0.129	0.087	0.058	0.039	0.027	0.018	0.012	0.009	0.006	0.004	0.003	0.002	0.001	0.001	0.001	0.000
43	0.652	0.427	0.281	0.185	0.123	0.082	0.055	0.037	0.025	0.017	0.011	0.008	0.005	0.004	0.002	0.002	0.001	0.001	0.001	0.000
44	0.645	0.418	0.272	0.178	0.117	0.077	0.051	0.034	0.023	0.015	0.010	0.007	0.005	0.003	0.002	0.001	0.001	0.001	0.000	0.000
45	0.639	0.410	0.264	0.171	0.111	0.073	0.048	0.031	0.021	0.014	0.009	0.006	0.004	0.003	0.002	0.001	0.001	0.001	0.000	0.000
46	0.633	0.402	0.257	0.165	0.106	0.069	0.044	0.029	0.019	0.012	0.008	0.005	0.004	0.002	0.002	0.001	0.001	0.000	0.000	0.000
47	0.626	0.394	0.249	0.158	0.101	0.065	0.042	0.027	0.017	0.011	0.007	0.005	0.003	0.002	0.001	0.001	0.001	0.000	0.000	0.000
48	0.620	0.387	0.242	0.152	0.096	0.061	0.039	0.025	0.016	0.010	0.007	0.004	0.003	0.002	0.001	0.001	0.001	0.000	0.000	0.000
49	0.614	0.379	0.235	0.146	0.092	0.058	0.036	0.023	0.015	0.009	0.006	0.004	0.003	0.002	0.001	0.001	0.000	0.000	0.000	0.000
50	0.608	0.372	0.228	0.141	0.087	0.054	0.034	0.021	0.013	0.009	0.005	0.003	0.002	0.001	0.001	0.001	0.000	0.000	0.000	0.000

Note: The factors in this table are calculated as $\frac{1}{(1+r)^t}$, where *r* is the interest rate and *t* is the number of years. This formula can be used to calculate any present value factors not shown on this table.

3920. Loss of Consortium (Noneconomic Damage)

[*Name of plaintiff*] claims that [he/she] has been harmed by the injury to [his/her] [husband/wife]. If you decide that [*name of injured spouse*] has proved [his/her] claim against [*name of defendant*], you also must decide how much money, if any, will reasonably compensate [*name of plaintiff*] for loss of [his/her] [husband/wife]'s companionship and services, including:

1. The loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support; and
2. The loss of the enjoyment of sexual relations [or the ability to have children].

[*Name of plaintiff*] may recover for harm [he/she] proves [he/she] has suffered to date and for harm [he/she] is reasonably certain to suffer in the future.

For future harm, determine the amount in current dollars paid at the time of judgment that will compensate [*name of plaintiff*] for that harm. This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.

No fixed standard exists for deciding the amount of these damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

Do not include in your award any compensation for the following:

1. The loss of financial support from [*name of injured spouse*];
 2. Personal services, such as nursing, that [*name of plaintiff*] has provided or will provide to [*name of injured spouse*]; ~~or~~
 3. Any loss of earnings that [*name of plaintiff*] has suffered by giving up employment to take care of [*name of injured spouse*]; ~~or~~
 4. **The cost of obtaining domestic household services to replace services that would have been performed by [*name of injured spouse*].**
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New September 2003; Revised December 2010

Directions for Use

~~Depending on the circumstances of the case, it may be appropriate to add after “to be suffered in the future” either “during the period of [*name of injured spouse*]’s disability” or “as measured by the life expectancy that [*name of injured spouse*] had before [his/her] injury or by the life expectancy of [*name of plaintiff*], whichever is shorter.”~~

Loss of consortium is considered a noneconomic damages item under Proposition 51. (Civ. Code, § 1431.2(b)(2).) Loss of future consortium is recoverable, including loss of consortium because of reduced life expectancy. (See *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 799–800 [108 Cal.Rptr.3d 806, 230 P.2d 342].) In such a case, this instruction may need to be modified.

Give the second and third paragraphs if recovery for loss of future consortium is sought. Future noneconomic damages should not be reduced to present value. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].)

~~Insofar as this instruction addresses the loss of a spouse’s assistance in operating the household, it is not intended to include the cost of obtaining household services. (See *Kellogg v. Asbestos Corp. Ltd.* (1996) 41 Cal.App.4th 1397, 1408 [49 Cal.Rptr.2d 256]: “Although the trial court labeled the damages awarded Mrs. Kellogg as being for ‘loss of consortium’ (a noneconomic damages item under Proposition 51), much of the testimony at trial actually involved the ‘costs of obtaining substitute domestic services’ on her behalf (an economic damage item in the statute). (See Civ. Code, § 1431.2, subd. (b)(1), (2).)”~~

Sources and Authority

- Civil Code section 1431.2(b)(2) provides, in part: “For purposes of this section, the term ‘non-economic damages’ means subjective, non-monetary losses including ... loss of consortium”
- “We ... declare that in California each spouse has a cause of action for loss of consortium, as defined herein, caused by a negligent or intentional injury to the other spouse by a third party.” (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 408 [115 Cal.Rptr. 765, 525 P.2d 669].)
- “The concept of consortium includes not only loss of support or services; it also embraces such elements as love, companionship, comfort, affection, society, sexual relations, the moral support each spouse gives the other through the triumph and despair of life, and the deprivation of a spouse’s physical assistance in operating and maintaining the family home.” (*Ledger v. Tippitt* (1985) 164 Cal.App.3d 625, 633 [210 Cal.Rptr. 814], disapproved of on other grounds in *Elden v. Sheldon* (1988) 46 Cal.3d 267, 277 [250 Cal.Rptr. 254, 758 P.2d 582].)
- “Since he has no cause of action in tort his spouse has no cause of action for loss of consortium.” (*Blain v. Doctor’s Co.* (1990) 222 Cal.App.3d 1048, 1067 [272 Cal.Rptr. 250].)
- “*Rodriguez* never mentions the concept of a complete loss of consortium. To the contrary, the opinion speaks of ‘loss or impairment of her rights of consortium.’ This dichotomy suggests that a diminution of a wife’s rights are compensable, and we so hold.” (*Carlson v. Wald* (1984) 151 Cal.App.3d 598, 602 [199 Cal.Rptr. 10], internal citation omitted.)
- “[S]hould [husband] prevail in his own cause of action against these defendants, he will be entitled to recover, among his medical expenses, the full cost of whatever home nursing is necessary. To allow [wife] also to recover the value of her nursing services, however personalized, would therefore constitute double recovery.” (*Rodriguez, supra*, 12 Cal.3d at p. 409, internal citations omitted.)
- “For the same reason, [wife] cannot recover for the loss of her earnings and earning capacity

assertedly incurred when she quit her job in order to furnish [husband] these same nursing services. To do so would be to allow her to accomplish indirectly that which we have just held she cannot do directly.” (*Rodriguez, supra*, 12 Cal.3d at p. 409.)

- “The deprivation of a husband’s physical assistance in operating and maintaining the home is a compensable item of loss of consortium.” (*Rodriguez, supra*, 12 Cal.3d at p. 409, fn. 31, internal citations omitted.)
- “Although the trial court labeled the damages awarded [plaintiff] as being for ‘loss of consortium’ (a noneconomic damages item under Proposition 51), much of the testimony at trial actually involved the ‘costs of obtaining substitute domestic services’ on her behalf (an economic damage item in the statute).” (*Kellogg v. Asbestos Corp. Ltd.* (1996) 41 Cal.App.4th 1397, 1408 [49 Cal.Rptr.2d 256].)
- “Whether the degree of harm suffered by the plaintiff’s spouse is sufficiently severe to give rise to a cause of action for loss of consortium is a matter of proof. When the injury is emotional rather than physical, the plaintiff may have a more difficult task in proving negligence, causation, and the requisite degree of harm; but these are questions for the jury, as in all litigation for loss of consortium. In *Rodriguez* we acknowledged that the loss is ‘principally a form of mental suffering,’ but nevertheless declared our faith in the ability of the jury to exercise sound judgment in fixing compensation. We reaffirm that faith today.” (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 933 [167 Cal.Rptr. 831, 616 P.2d 813], internal citations omitted.)
- “We ... conclude that we should not recognize a cause of action by a child for loss of parental consortium.” (*Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 451 [138 Cal.Rptr. 302, 563 P.2d 858].)
- A parent may not recover loss of consortium damages for injury to his or her child. (*Baxter v. Superior Court* (1977) 19 Cal.3d 461 [138 Cal.Rptr. 315, 563 P.2d 871].)
- Unmarried cohabitants may not recover damages for loss of consortium. (*Elden, supra*, 46 Cal.3d at p. 277.)
- Under Proposition 51, damages for loss of consortium may be reduced by the negligence of the injured spouse. (*Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1309–1310 [107 Cal.Rptr.2d 881]; *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1810–1811 [34 Cal.Rptr.2d 732].)
- “ ‘To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.’ ” (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)
- “[I]n a common law action for loss of consortium, the plaintiff can recover not only for the loss of companionship and affection through the time of the trial but also for any future loss of companionship and affection that is sufficiently certain to occur. In *Rodriguez*, we held that when a plaintiff’s spouse is permanently disabled as a result of a defendant’s wrongdoing, future (posttrial)

loss of companionship and affection is sufficiently certain to permit an award of prospective damages. If instead the injured spouse will soon die as a result of his or her injuries, the future (posttrial) loss of companionship and affection is no less certain. In short, we see no reason to make an exception here to the general rule permitting an award of prospective damages in civil tort actions. Therefore, under long-standing principles of tort liability, the recovery of prospective damages in a common law action for loss of consortium includes damages for lost companionship and affection resulting from the anticipated (and sufficiently certain) premature death of the injured spouse.” (Boeken, supra, 48 Cal.4th at pp. 799–800, internal citation omitted.)

- “[T]he plaintiff in a common law action for loss of consortium may not recover for loss during a period in which the companionship and affection of the injured spouse would have been lost anyway, irrespective of the defendant's wrongdoing, and therefore the life expectancy of the plaintiff and the life expectancy of the injured spouse, whichever is shorter, necessarily places an outer limit on damages.” (Boeken, supra, 48 Cal.4th at p. 800.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1678–1685

California Tort Damages (Cont.Ed.Bar) Loss of Consortium, §§ 2.6–2.7

4 Levy et al., California Torts, Ch. 56, *Loss of Consortium*, § 56.08 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. ~~177~~354, *DamagesLoss of Consortium*, §§ ~~354.12~~, ~~354.14~~ (Matthew Bender)

6 California Points and Authorities, Ch. ~~65~~64, *Damages: Tort*, § ~~64.25~~ (Matthew Bender)

1 California Civil Practice: Torts (Thomson West) §§ 10:10–10:16

3926. Settlement Deduction

You have heard evidence that [name of plaintiff] has settled [his/her/its] claim against [name of defendant]. ~~Your~~ Any award of damages to [name of plaintiff] should be made without considering any amount that [he/she/it] may have received under this settlement. ~~After you have returned your verdict,~~ I will make the proper deduction from ~~your~~ any award of damages.

New September 2003; Revised December 2010

Sources and Authority

- Code of Civil Procedure section 877 provides, in pertinent part: “Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort ... it shall have the following effect: ... It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater.”
- “When the plaintiff stipulates to the fact and amount of settlement before the court, an approved procedure is for the court to reduce the verdict award by the amount paid in settlement before entering judgment on the verdict.” (*Syverson v. Heitmann* (1985) 171 Cal.App.3d 106, 111 [214 Cal.Rptr. 581], internal citations omitted.)
- Courts have held that it is “proper to exclude evidence of the pretrial settlement by one joint tortfeasor from the jury’s consideration, leaving it to the court to apply Code of Civil Procedure section 877 to reduce the verdict.” (*Knox v. County of Los Angeles* (1980) 109 Cal.App.3d 825, 834-835 [167 Cal.Rptr. 463], internal citation omitted.)
- “[W]here there is an admission ‘that a settlement has been made with one or more joint tortfeasors in a certain amount there is no factual question to be resolved by the jury respecting the settlement.’ ” (*Albrecht v. Broughton* (1970) 6 Cal.App.3d 173, 177 [85 Cal.Rptr. 659], internal citation omitted.)
- “Where the purpose of introducing evidence of a settlement is to reduce any recovery that might be awarded pro tanto, this result can be achieved by a simple calculation made by the court after the verdict has been rendered.” (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079, 1082 [105 Cal.Rptr. 387], footnote omitted.)
- “The presentation of evidence concerning the amount or fact of settlement to the jury ... is not only confusing, but also can lead to abuse in argument as it did here.” (*Shepherd, supra*, 28 Cal.App.3d at p. 1083.)
- “[E]vidence of the fact and amount of settlement made by [plaintiff] with [settling witness] might be admissible under proper limiting instructions for the purpose of showing bias since he was a witness.”

(*Shepherd, supra*, 28 Cal.App.3d at p. 1082, fn. 2, internal citation omitted.)

- “Under Civil Code section 1431.2, a defendant is only responsible for its share of noneconomic damages as that share has been determined by the jury. ‘Therefore, a nonsettling defendant may not receive any setoff under [Code of Civil Procedure] section 877 for the portion of a settlement by another defendant that is attributable to noneconomic damages.’ After application of Civil Code section 1431.2, ‘... there is no amount that represents a common claim for noneconomic damages against the settling and nonsettling defendants’ and thus Code of Civil Procedure section 877 has no applicability to noneconomic damages.” (*Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1319 [87 Cal.Rptr.2d 363], internal citations omitted.)
- “[A]n undifferentiated settlement must be apportioned between economic and noneconomic damages so that the setoff applies only to economic damages.” (*Ehret, supra*, 73 Cal.App.4th at p. 1320, internal citation omitted.)
- It has been held that, “[i]n the absence of any other allocation ... the percentage of economic damages reflected in the jury verdict [should] be applied to determine the percentage of the settlements to be offset.” (*Ehret, supra*, 73 Cal.App.4th at p. 1320, internal citation omitted.)
- “Where there is a complete dismissal of a defendant, and a plaintiff seeks an allocation of the settlement with that defendant for purposes of limiting the setoff against another defendant’s liability, the burden is on the plaintiff to establish facts to justify the allocation.” (*Ehret, supra*, 73 Cal.App.4th at p. 1322, internal citation omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 95, 98

California Tort Damages (Cont.Ed.Bar) Restrictions on Recovery, § 15.12

4 Levy et al., California Torts, Ch. 74, *Resolving Multiparty Tort Litigation*, §§ 74.20-74.28 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, [§ 177.45](#) (Matthew Bender)

[25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.73 \(Matthew Bender\)](#)

[11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.150 et seq.](#) ~~6 California Points and Authorities, Ch. 65, *Damages*~~ (Matthew Bender)

3933. Damages From Multiple Defendants

In this case, [name of plaintiff] seeks damages from more than one defendant. You must determine the liability of each defendant to [name of plaintiff] separately.

If you determine that more than one defendant is liable to [name of plaintiff] for damages, you will be asked to find [name of plaintiff]'s total damages [and the comparative fault of [[name of plaintiff]/each defendant/ [and] other nonparties]].

In deciding on the amount of damages, consider only [name of plaintiff]'s claimed losses. Do not attempt to divide the damages [between/among] the defendants. The allocation of responsibility for payment of damages among multiple defendants is to be done by the court after you reach your verdict.

New December 2010

Directions for Use

Give this instruction in any case involving the joint and several liability of multiple defendants or several liability only for noneconomic damages under Proposition 51. (See Civ. Code, § 1431.2.) It is designed to deter the jury from awarding different damages against each defendant after factoring in the respective culpability of the defendants. Do not give this instruction in a case in which separate tortfeasors have caused separate injuries. (See *Carr v. Cove* (1973) 33 Cal.App.3d 851, 854 [109 Cal.Rptr. 449].)

If comparative fault is at issue, give the bracketed language in the second paragraph. Comparative fault may involve each defendant, the plaintiff, and other nonparties. “Nonparties” include the universe of tortfeasors who are not present at trial, including defendants who settled before trial and nonjoined alleged tortfeasors. (*Dafonte v. Up-Right* (1992) 2 Cal.4th 593, 603 [7 Cal.Rptr.2d 238, 828 P.2d 140].) See also CACI No. 406, *Apportionment of Responsibility*, and CACI No. VF-402, *Negligence—Fault of Plaintiff and Others at Issue*.

Sources and Authority

- Civil Code section 1431.2(a) (Proposition 51) provides: “In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount.”
- “The *pro tanto* reduction provision works to prevent settlements from producing double recoveries in the case of a *single* injury caused by joint tortfeasors. The general theory of compensatory damages bars double recovery for the *same wrong*. The principal situation is where joint or concurrent tortfeasors are jointly and severally liable for the same wrong. Only one complete satisfaction is

permissible, and, if partial satisfaction is received from one, the liability of others will be correspondingly reduced.” (*Carr, supra*, 33 Cal.App.3d at p. 854, original italics.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1358 et seq.

1 Levy et al., California Torts, Ch. 11, *Conflicts of Law and Preemption*, § 11.07 (Matthew Bender)

25 California Forms of Pleading and Practice, Ch. 300, *Indemnity and Contribution*, § 300.60 et seq. (Matthew Bender)

11 California Points and Authorities, Ch. 115, *Indemnity and Contribution*, § 115.130 et seq. (Matthew Bender)

3934. Damages on Multiple Legal Theories

[Name of plaintiff] seeks damages from *[name of defendant]* under more than one legal theory. However, each item of damages may be awarded only once, regardless of the number of legal theories alleged.

You will be asked to decide whether *[name of defendant]* is liable to *[name of plaintiff]* under the following legal theories *[list]*:

1. *[e.g., breach of employment contract]*;
2. *[e.g., wrongful termination in violation of public policy]*;
3. *[continue]*.

The following items of damages are recoverable only once under all of the above legal theories:

1. *[e.g., lost past income]*;
2. *[e.g., medical expenses]*;
3. *[continue]*.

[The following additional items of damages are recoverable only once for *[specify legal theories]*:

1. *[e.g., emotional distress]*;
2. *[continue]*.

[Continue until all items of damages recoverable under any legal theory have been listed.]

New December 2010

Directions for Use

This instruction is to guide the jury in awarding damages in a case involving multiple claims, causes of action, or counts in which different damages are recoverable under different legal theories. It should be used with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

This instruction and verdict form are designed to help avoid juror confusion in filling out the damages table or tables when multiple causes of action, counts, or legal theories are to be decided and the potential damages are different on some or all of them. (See, e.g., *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 701–705 [101 Cal.Rptr.3d 773, 219 P.3d 749].) It is not necessary to give this instruction if the same damages are recoverable on all causes of action, counts, or legal theories, although giving only the

opening paragraph might be appropriate.

First list all of the causes of action, counts, or legal theories that the jury must address. Then list the items of damages recoverable under all of the theories. Then list the additional damages that may be awarded on each of the other causes of action. Each item of damages should be listed somewhere, but only once.

If there are multiple plaintiffs with different claims for different damages, repeat the entire instruction for each plaintiff except for the opening paragraph.

Often it will be necessary to identify items of damages with considerable specificity. For example, instead of just “emotional distress,” it may be necessary to specify “emotional distress from harassment before termination of employment” and “additional emotional distress because of termination of employment.” (See, e.g., *Roby, supra*, 47 Cal.4th at pp. 701–705.)

Sources and Authority

- “Regardless of the nature or number of legal theories advanced by the plaintiff, he is not entitled to more than a single recovery for each distinct item of compensable damage supported by the evidence. [Citation.] Double or duplicative recovery for the same items of damage amounts to overcompensation and is therefore prohibited. [Citation.] [¶] ... [¶] In contrast, where separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories.” (*Roby, supra*, 47 Cal.4th at p. 702.)
- “As for the Court of Appeal's statement that under the instructions plaintiff was entitled to recover the same amount of damages under any of plaintiff's various theories, we have reviewed the instructions and none of them would preclude a finding of differing amounts of damage for each theory of recovery. Indeed, as a matter of logic, it would seem unlikely that plaintiff's damages from being defamed by defendants would be identical to the damages he incurred from being ousted from [the] board of directors. ... [T]hese theories of recovery seem based on different ‘primary’ rights and duties of the parties.” (*Tavaglione v. Billings* (1993) 4 Cal.4th 1150, 1158 [17 Cal.Rptr.2d 608, 847 P.2d 574].)
- “The trial court instructed the jury ... that [plaintiff] could not be awarded duplicative damages on different counts, thus suggesting that it was the jury's responsibility to avoid awarding duplicative damages. But neither the instructions nor the special verdict form told the jury how to avoid awarding duplicative damages. With a single general verdict or a general verdict with special findings, where the verdict includes a total damages award, the jury presumably will follow the instruction (such as the one given here) and ensure that the total damages award includes no duplicative amounts. A special verdict on multiple counts, however, is different. If the jury finds the amount of damages separately for each count and does not calculate the total damages award, as here, the jury has no opportunity to eliminate any duplicative amounts in calculating the total award. Absent any instruction specifically informing the jury how to properly avoid awarding duplicative damages, it might have attempted to do so by finding no liability or no damages on

certain counts, resulting in an inconsistent verdict.” (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 360 [112 Cal.Rptr.3d 445].)

- “A special verdict must present the jury's conclusions of facts, ‘and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law.’ In our view, a special verdict on multiple counts should include factual findings identifying any duplicative amounts, or a finding as to the total amount of damages eliminating any duplicative amounts, so as to allow the trial court to avoid awarding duplicative damages in the judgment.” (*Singh, supra*, 186 Cal.App.4th at p. 360, internal citation omitted.)
- “‘In California the phrase “cause of action” is often used indiscriminately ... to mean *counts* which state [according to different legal theories] the same cause of action’ But for purposes of applying the doctrine of res judicata, the phrase ‘cause of action’ has a more precise meaning: The cause of action is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory (common law or statutory) advanced. ... [T]he “cause of action” is based upon the harm suffered, as opposed to the particular theory asserted by the litigant. [Citation.] Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. ‘Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different *legal ground* for relief.’ [Citations.]’ Thus, under the primary rights theory, the determinative factor is the harm suffered. When two actions involving the same parties seek compensation for the same harm, they generally involve the same primary right.” (*Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal.4th 788, 798 [108 Cal.Rptr.3d 806, 230 P.3d 342], original italics, internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1550

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, § 17.23 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.50 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.150 (Matthew Bender)

VF-3920. Damages on Multiple Legal Theories

What are [name of plaintiff]’s damages? [List each item of damages listed in CACI No. 3934.]

1. [e.g., economic damages: lost past earnings]. **[Enter the amount below if you find that [name of defendant] is liable to [name of plaintiff] under [specify all of the legal theories supporting this element of damages; use “or” if more than one].]**

\$ _____

2. [e.g., economic damages: past medical expenses]. **[Enter the amount below if you find that [name of defendant] is liable to [name of plaintiff] under [specify the legal theories supporting this element of damages; use “or” if more than one].]**

\$ _____

3. [e.g., economic damages: lost future earnings]. **[Enter the amount below if you find that [name of defendant] is liable to [name of plaintiff] under [specify the legal theories supporting this element of damages; use “or” if more than one].]**

\$ _____

4. [e.g., economic damages: future medical expenses]. **[Enter the amount below if you find that [name of defendant] is liable to [name of plaintiff] under [specify the legal theories supporting this element of damages; use “or” if more than one].]**

\$ _____

5. [e.g., past noneconomic loss including [physical pain/mental suffering].] **[Enter the amount below if you find that [name of defendant] is liable to [name of plaintiff] under [specify the legal theories supporting this element of damages; use “or” if more than one].]**

\$ _____

6. [e.g., future noneconomic loss including [physical pain/mental suffering].] **[Enter the amount below if you find that [name of defendant] is liable to [name of plaintiff] under [specify the legal theories supporting this element of damages; use “or” if more than one].]**

\$ _____

TOTAL \$ _____

Signed: _____
Presiding Juror

Dated: _____

After [this verdict form has/all verdict forms have] been signed, notify the [clerk/bailiff/court attendant] that you are ready to present your verdict in the courtroom.

New December 2010

Directions for Use

This verdict form is for use with CACI No. 3934, *Damages on Multiple Legal Theories*. Together they are designed to avoid the jury's awarding the same damages twice under different causes of action, counts, or legal theories, or failing to distinguish sufficiently what damages are being awarded under what cause of action, count, or legal theory.

If multiple causes of action are at issue, use this verdict form instead of the damages tables in each separate verdict form. If multiple verdict forms will be combined, delete all damages tables and incorporate this verdict form instead.

List each item of damages identified in CACI No. 3934. Include each item only once regardless of the number of claims under which the item may be recovered. The sentence after the item of damages must be included if the item is not recoverable under all causes of action, counts, or legal theories asserted against the defendant. The jury must be advised to find damages only if it has found liability on at least one theory under which the item is recoverable. For example, lost past earnings might be recoverable under all claims, in which case the additional sentence should be omitted. But noneconomic damages for mental suffering might be recoverable only under "the claim for bad-faith breach of insurance contract," in which case the additional sentence must be included.

Often it will be necessary to identify items of damages with considerable specificity. For example, instead of just "emotional distress," it may be necessary to specify "emotional distress from harassment before termination of employment" and "additional emotional distress because of termination of employment." (See, e.g., *Roby v. McKesson Corp.* (2009) 47 Cal.4th 686, 701–705 [101 Cal.Rptr.3d 773, 219 P.3d 749].)

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 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]**
- [6. That [name of defendant] did not [describe action to correct failure to perform]; and]**
- 7. 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, [December 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 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 3, “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 3, “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 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 5.

If the violation of the condition or covenant involves assignment, sublet, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4); *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 [64 Cal.Rptr. 246].) In such a case, ~~nuisance, or illegal activity and cannot be cured (see Code Civ. Proc., § 1161(4))~~; omit the bracketed language in element 5 and also omit element 6. If the violation involves nuisance or illegal activity, give CACI No. 4308, *Termination for Nuisance or Illegal Activity—Essential Factual Elements*. ~~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, repealed and replaced with a new version January 1, 2012, 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.

4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter. For purposes of this subdivision, a person who commits an offense described in subdivision (c) of Section 3485 of the Civil Code, or subdivision (c) of Section 3486 of the Civil Code, or uses the premises to further the purpose of that offense shall be deemed to have committed a nuisance upon the premises. For purposes of this subdivision, if a person commits an act of domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 261, 261.5, 262, 286, 288a, or 289 of the Penal Code, or stalking as defined in Section 1708.7 of the Civil Code, against another tenant or subtenant on the premises there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises, provided, however, that this shall not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises. This subdivision shall not be construed to supersede the provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence against cotenants.

- 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].)
- “It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent or quit, perform the covenant or quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession.” (*Hinman v. Wagon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.
- “Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days’ notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do.” (*Hinman, supra*, 172 Cal.App.2d at p. 29.)
- “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*, 195 Cal.App.3d at p. 1051, 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].)
- “Where 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.*, *supra*, 256 Cal.App.2d at p. 529.)
- “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 [Reuters](#) West) Ch. 19, *Landlord-Tenant*, § 19:201

UNLAWFUL DETAINER

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

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

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

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

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

[or:

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

[or:

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

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

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

New August 2007; Revised December 2010

Directions for Use

~~If the violation of the condition or covenant cannot be cured, If the violation of the condition or covenant involves assignment, subletting, or waste, or if the breach cannot be cured, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4) ; *Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 64 Cal.Rptr. 246.)~~ In such a case, omit the bracketed language in the first paragraph and in elements 1 and 2. If the violation involves nuisance or illegal activity, give CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Illegal Activity*. ~~If a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action. (*Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 64 Cal.Rptr. 246), internal citation omitted.)~~

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

Select the manner of service used; personal service, substituted service by leaving the notice at the defendant’s home or place of work, or substituted service by posting on the property. (Code Civ. Proc., § 1162(a).) Adapt if needed for a commercial tenancy. (See Code Civ. Proc., § 1162(b).)

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

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

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

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

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

Sources and Authority

- Code of Civil Procedure section 1161, repealed and replaced with a new version January 1, 2012, 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.

4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter. For purposes of this subdivision, a person who commits an offense described in subdivision (c) of Section 3485 of the Civil Code, or subdivision (c) of Section 3486 of the Civil Code, or uses the premises to further the purpose of that offense shall be deemed to have committed a nuisance upon the premises. For purposes of this subdivision, if a person commits an act of domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 261, 261.5, 262, 286, 288a, or 289 of the Penal Code, or stalking as defined in Section 1708.7 of the Civil Code, against another tenant or subtenant on the premises there is a rebuttable presumption affecting the burden of proof that the

person has committed a nuisance upon the premises, provided, however, that this shall not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises. This subdivision shall not be construed to supersede the provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence against cotenants.

- Code of Civil Procedure section 1162(a) provides:

~~Code of Civil Procedure section 1162 provides:~~

Except as provided in subdivision (b), ~~t~~The notices required by Sections 1161 and 1161a may be served, ~~either~~ by any of the following methods:

- ~~(1).~~ By delivering a copy to the tenant personally; ~~or,~~
- ~~(2).~~ If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence; ~~or,~~
- ~~(3).~~ If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

- “[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action.” (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)
- “We ... hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent.” (*Davidson, supra*, 138 Cal.App.3d Supp. at p. 14.)
- “We ... hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed.” (*Walters, supra*, 226 Cal.App.3d Supp. at p. 20.)
- “It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent or quit, perform the covenant or quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of

unlawful detainer upon his continued possession.” (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749], original italics.

- “Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do.” (*Hinman, supra*, 172 Cal.App.2d at p. 29.)
- “Where 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., supra*, 256 Cal.App.2d at p. 529.)

Secondary Sources

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

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

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

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

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

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

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

Miller & Starr, California Real Estate (Thomson [Reuters](#) West) Ch. 19, *Landlord-Tenant*, §§ 19:202-19:204

UNLAWFUL DETAINER

**4308. Termination for Nuisance or Unlawful Use—Essential Factual Elements
(Code Civ. Proc, § 1161(4))**

[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 [created a nuisance on the property/ [or] used the property for an illegal purpose]. 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** *[name of defendant]* **[include one or both of the following:]**

created a nuisance on the property by *[specify conduct constituting nuisance];*

[or]

used the property for an illegal purpose by *[specify illegal activity];*

4. **That** *[name of plaintiff]* **properly gave** *[name of defendant]* **[and** *[name of subtenant]] **three days’ written notice to vacate the property[, or that** *[name of defendant]* **actually received this notice at least three days before** *[date on which action was filed]];* **[and]***
5. **That** *[name of defendant]* **[or subtenant** *[name of subtenant]]* **is still occupying the property.**

New December 2010

Directions for Use

Uncontested elements may be deleted from this instruction.

Include the bracketed references to a subtenancy in the opening paragraph and in elements 4 and 5 if persons other than the tenant-defendant are in occupancy of the premises.

If the plaintiff is the landlord or owner, select “owns” in element 1, and “rented” in element 2.

If the plaintiff is a tenant seeking to recover possession from a subtenant, include the bracketed language on subtenancy in the opening paragraph and in element 4, “leases” in element 1, and “subleased” in element 2. (Code Civ. Proc., § 1161(3).)

Certain conduct or statutory violations that constitute or create a rebuttable presumption of a nuisance are set forth in Code of Civil Procedure section 1161(4). If applicable, insert the appropriate ground in element 3. (See also Health & Saf. Code, § 17922 [adopting various uniform housing and building codes].)

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 4. Defective service is waived if defendant admits 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 4.

For nuisance or unlawful use, the landlord is entitled to possession on service of a three-day notice to quit; no opportunity to cure by performance is required. (Code Civ. Proc., § 1161(4).)

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

See CACI No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*, for an instruction on proper written notice.

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

Sources and Authority

- Code of Civil Procedure section 1161, repealed and replaced with a new version January 1, 2012, provides, in part:

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

4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter. For purposes of this subdivision, a person who commits an offense described in subdivision (c) of Section 3485 of the Civil Code, or subdivision (c) of Section 3486 of the Civil Code, or uses the premises to further the purpose of that offense shall be deemed to have committed a nuisance upon the premises. For purposes of this subdivision, if a person commits an act of domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in

Section 261, 261.5, 262, 286, 288a, or 289 of the Penal Code, or stalking as defined in Section 1708.7 of the Civil Code, against another tenant or subtenant on the premises there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises, provided, however, that this shall not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises. This subdivision shall not be construed to supersede the provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence against cotenants.

- Civil Code section 3479 provides: “Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.”
- “Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do.” (*Hinman v. Wagon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)

Secondary Sources

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

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

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

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

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

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 (Matthew Bender)

UNLAWFUL DETAINER

4309. Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use

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

1. That the notice informed *[name of defendant]* in writing that *[he/she/it]* must vacate the property within three days;
2. That the notice described how *[name of defendant]* *[created a nuisance on the property/ [or] used the property for an illegal purpose];* and
3. That the notice was given to *[name of defendant]* at least three days before *[insert date on which action was filed]*.

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

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

[or:

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

[or:

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

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

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

New December 2010

Directions for Use

Select the manner of service used; personal service, substituted service by leaving the notice at the defendant's home or place of work, or substituted service by posting on the property. (Code Civ. Proc., § 1162(a).) Adapt if needed for a commercial tenancy. (See Code Civ. Proc., § 1162(b).)

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

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

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

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

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

Sources and Authority

- Code of Civil Procedure section 1161, repealed and replaced with a new version January 1, 2012, provides, in part:

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

4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the

premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter. For purposes of this subdivision, a person who commits an offense described in subdivision (c) of Section 3485 of the Civil Code, or subdivision (c) of Section 3486 of the Civil Code, or uses the premises to further the purpose of that offense shall be deemed to have committed a nuisance upon the premises. For purposes of this subdivision, if a person commits an act of domestic violence as defined in Section 6211 of the Family Code, sexual assault as defined in Section 261, 261.5, 262, 286, 288a, or 289 of the Penal Code, or stalking as defined in Section 1708.7 of the Civil Code, against another tenant or subtenant on the premises there is a rebuttable presumption affecting the burden of proof that the person has committed a nuisance upon the premises, provided, however, that this shall not apply if the victim of the act of domestic violence, sexual assault, or stalking, or a household member of the victim, other than the perpetrator, has not vacated the premises. This subdivision shall not be construed to supersede the provisions of the Violence Against Women and Department of Justice Reauthorization Act of 2005 (Public Law 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence against cotenants.

- Code of Civil Procedure section 1162(a) provides:

Except as provided in subdivision (b), the notices required by Sections 1161 and 1161a may be served by any of the following methods:

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

days of written notice required by the Legislature in which he may cure his default in the payment of rent.” (*Davidson, supra*, 138 Cal.App.3d Supp. at p. 14.)

- “We ... hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed.” (*Walters, supra*, 226 Cal.App.3d Supp. at p. 20.)
- “Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do.” (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 29 [341 P.2d 749].)

Secondary Sources

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

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

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

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

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.23

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 (Matthew Bender)

4400. Misappropriation of Trade Secrets—Introduction

[Name of plaintiff] claims that [he/she/it] **[is/was]** the [owner/licensee] of [insert general description of alleged trade secret[s]].

[Name of plaintiff] claims that [this/these] [select short term to describe, e.g., information] [is/are] [a] trade secret[s] and that [name of defendant] misappropriated [it/them]. “Misappropriation” means the improper [acquisition/use/ [or] disclosure] of the trade secret[s].

[Name of plaintiff] also claims that [name of defendant]’s misappropriation caused [[him/her/it] harm/ [or] [name of defendant] to be unjustly enriched].

[Name of defendant] denies [insert denial of any of the above claims].

[[Name of defendant] also claims [insert affirmative defenses].]

New December 2007; Revised December 2010

Directions for Use

This instruction is designed to introduce the jury to the issues involved in a case involving the misappropriation of trade secrets under the California Uniform Trade Secrets Act. (See Civ. Code, § 3426.1 et seq.) It should be read before the instructions on the substantive law.

In the first sentence, provide only a general description of the alleged trade secrets. Then in the second sentence, select a short term to identify the items, such as “information,” “customer lists,” or “computer code.” The items that are alleged to be trade secrets will be described with more specificity in CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements*.

Select the appropriate term, “owner” or “licensee,” to indicate the plaintiff’s interest in the alleged trade secrets. No reported California state court decision has addressed whether a licensee has a sufficient interest to assert a claim of trade secret misappropriation. These instructions take no position on **the standing this** issue. The court should make a determination whether the plaintiff has **the right as a matter of substantive law to maintain a cause of action for misappropriation of trade secrets**standing if that issue is disputed.

Civil Code section 3426.1(b)(1) defines “misappropriation” as improper “[a]cquisition” of a trade secret, and subsection (b)(2) defines it as improper “[d]isclosure or use” of a trade secret. In some cases, the mere acquisition of a trade secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should be instructed only on matters relevant to damage claims, do not select “acquiring” in the second paragraph unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

To avoid confusion, instruct the jury only on the particular theory of misappropriation applicable under the facts of the case. For example, the jury should not be instructed on misappropriation through “use” if the plaintiff does not assert that the defendant improperly used the trade secrets. Nor should the jury be instructed on a particular type of “use” if that type of “use” is not asserted and supported by the evidence.

In the third paragraph, select the nature of the recovery sought, either damages for harm to the plaintiff or for the defendant’s unjust enrichment, or both.

Include the last paragraph if the defendant asserts any affirmative defenses.

Sources and Authority

- Civil Code section 3426.1 provides:

As used in this title, unless the context requires otherwise:

(a) “Improper means” includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means.

(b) “Misappropriation” means:

(1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(2) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(A) Used improper means to acquire knowledge of the trade secret; or

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:

(i) Derived from or through a person who had utilized improper means to acquire it;

(ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(c) “Person” means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.

(d) “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

(1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

- “[W]e agree with the federal cases applying California law, which hold that section 3426.7, subdivision (b), preempts common law claims that are ‘based on the same nucleus of facts as the misappropriation of trade secrets claim for relief.’ Depending on the particular facts pleaded, the

statute can operate to preempt the specific common claims asserted here: breach of confidence, interference with contract, and unfair competition.” (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 958–959 [90 Cal.Rptr.3d 247], internal citation omitted.)

- “[W]e find no support for [a current-ownership] rule in the text of the CUTSA, cases applying it, or legislative history. Nor do we find any evidence of such a rule in patent or copyright law, which defendants have cited by analogy. Defendants have offered no persuasive argument from policy for our adoption of such a rule.” (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 986 [103 Cal.Rptr.3d 426].)
- “[T]he only California authority [defendant] cited for the asserted requirement [that a trade-secrets plaintiff must own the trade secret when the action is filed] was the official California pattern jury instructions—whose ‘first element,’ [defendant] asserted, ‘requires the plaintiff to be either the owner or the licensee of the trade secret. See CACI Nos. 4400, 4401.’ [Defendant] did not quote the cited instructions—for good reason. The most that can be said in favor of its reading is that the broader and less specific of the two instructions uses the present tense to refer to the requirement of ownership. That instruction, whose avowed purpose is ‘to introduce the jury to the issues involved’ in a trade secrets case (Directions for Use for CACI No. 4400), describes the plaintiff as claiming that he ‘is’ the owner/licensee of the trade secrets underlying the suit. (CACI No. 4400.) The second instruction, which enumerates the actual *elements* of the plaintiff’s cause of action, dispels whatever weak whiff of relevance this use of the present tense might have. It requires the plaintiff to prove that he ‘owned’ or ‘was a licensee of’ the trade secrets at issue. (CACI No. 4401, italics added.) Given only these instructions to go on, one would suppose that *past* ownership—i.e., ownership at the time of the alleged misappropriation—is sufficient to establish this element.” (*Jasmine Networks, Inc., supra*, 180 Cal.App.4th at p. 997, original italics.)

Secondary Sources

13 Witkin, Summary of California Law (10th ed. 2005) Equity, § 81

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, § 1.01 (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.50 et seq. (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103 (Matthew Bender)

1 Zamore, Business Torts, Ch. 17, *Trade Secrets*, § 17.05 et seq. (Matthew Bender)

| Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009) Chs. 1, 2, 6, 12

4401. Misappropriation of Trade Secrets—Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] has misappropriated a trade secret. To succeed on this claim, [name of plaintiff] must prove all of the following:

1. **That [name of plaintiff] [owned/was a licensee of] [the following:]***[[describe each item claimed to be a trade secret that is subject to the misappropriation claim];*
2. **That [this/these] [select short term to describe, e.g., information] [was/were] [a] trade secret[s] at the time of the misappropriation;**
3. **That [name of defendant] improperly [acquired/used/ [or] disclosed] the trade secret[s];**
4. **That [[name of plaintiff] was harmed/ [or] [name of defendant] was unjustly enriched]; and**
5. **That [name of defendant]’s [acquisition/use/ [or] disclosure] was a substantial factor in causing [[name of plaintiff]’s harm/ [or] [name of defendant] to be unjustly enriched].**

New December 2007; Revised December 2010

Directions for Use

In element 1, specifically describe all items that are alleged to be the trade secrets that were misappropriated. If more than one item is alleged, include “the following” and present the items as a list. Then in element 2, select a short term to identify the items, such as “information,” “customer lists,” or “computer code.”

In element 1, select the appropriate term, “owned” or “was a licensee of,” to indicate the plaintiff’s interest in the alleged trade secrets. No reported California state court decision has addressed whether a licensee has a sufficient interest to assert a claim of trade secret misappropriation. These instructions take no position on ~~the standing~~this issue. The court should make a determination whether the plaintiff has the right as a matter of substantive law to maintain a cause of action for misappropriation of trade secrets~~standing~~ if that issue is disputed.

Read also CACI No. 4402, “*Trade Secret*” *Defined*, to give the jury guidance on element 2.

Civil Code section 3426.1(b)(1) defines “misappropriation” as improper “[a]cquisition” of a trade secret, and subsection (b)(2) defines it as improper “[d]isclosure or use” of a trade secret. In some cases, the mere acquisition of a trade secret, as distinguished from a related disclosure or use, will not result in damages and will only be relevant to injunctive relief. Because generally the jury should be instructed only on matters relevant to damage claims, do not select “acquired” in element 3 or “acquisition” in element 5 unless there is evidence that the acquisition resulted in damages, other than damages from related disclosure or use.

To avoid confusion, instruct the jury only on the particular theory of misappropriation applicable under the facts of the case. For example, the jury should not be instructed on misappropriation through “use” if the plaintiff does not assert that the defendant improperly used the trade secrets. Nor should the jury be instructed on a particular type of “use” if that type of “use” is not asserted and supported by the evidence.

Give also CACI No. 4409, *Remedies for Misappropriation of Trade Secret*.

Sources and Authority

- Civil Code section 3426.1 provides:

As used in this title, unless the context requires otherwise:

- (a) “Improper means” includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means. Reverse engineering or independent derivation alone shall not be considered improper means.
- (b) “Misappropriation” means:
 - (1) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or
 - (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (A) Used improper means to acquire knowledge of the trade secret; or
 - (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
 - (i) Derived from or through a person who had utilized improper means to acquire it;
 - (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
 - (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
 - (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.
- (c) “Person” means a natural person, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, government, governmental subdivision or agency, or any other legal or commercial entity.
- (d) “Trade secret” means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:
 - (1) Derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and

(2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

- “A trade secret is misappropriated if a person (1) acquires a trade secret knowing or having reason to know that the trade secret has been acquired by ‘improper means,’ (2) discloses or uses a trade secret the person has acquired by ‘improper means’ or in violation of a nondisclosure obligation, (3) discloses or uses a trade secret the person knew or should have known was derived from another who had acquired it by improper means or who had a nondisclosure obligation or (4) discloses or uses a trade secret after learning that it is a trade secret but before a material change of position.” (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66 [37 Cal.Rptr.3d 221].)
- “A cause of action for monetary relief under CUTSA may be said to consist of the following elements: (1) possession by the plaintiff of a trade secret; (2) the defendant's misappropriation of the trade secret, meaning its wrongful acquisition, disclosure, or use; and (3) resulting or threatened injury to the plaintiff. The first of these elements is typically the most important, in the sense that until the content and nature of the claimed secret is ascertained, it will likely be impossible to intelligibly analyze the remaining issues.” (*Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 220 [109 Cal.Rptr.3d 27], internal citations omitted.)
- “We find the trade secret situation more analogous to employment discrimination cases. In those cases, as we have seen, information of the employer's intent is in the hands of the employer, but discovery affords the employee the means to present sufficient evidence to raise an inference of discriminatory intent. The burden of proof remains with the plaintiff, but the defendant must then bear the burden of producing evidence once a prima facie case for the plaintiff is made. [¶] We conclude that the trial court correctly refused the proposed instruction that would have shifted the burden of proof.” (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1674 [3 Cal.Rptr.3d 279], internal citation omitted.)
- “[W]e find no support for [a current-ownership] rule in the text of the CUTSA, cases applying it, or legislative history. Nor do we find any evidence of such a rule in patent or copyright law, which defendants have cited by analogy. Defendants have offered no persuasive argument from policy for our adoption of such a rule.” (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 986 [103 Cal.Rptr.3d 426].)
- “[T]he only California authority [defendant] cited for the asserted requirement [that a trade-secrets plaintiff must own the trade secret when the action is filed] was the official California pattern jury instructions—whose ‘first element,’ [defendant] asserted, ‘requires the plaintiff to be either the owner or the licensee of the trade secret. See CACI Nos. 4400, 4401.’ [Defendant] did not quote the cited instructions—for good reason. The most that can be said in favor of its reading is that the broader and less specific of the two instructions uses the present tense to refer to the requirement of ownership. That instruction, whose avowed purpose is ‘to introduce the jury to the issues involved’ in a trade secrets case (Directions for Use for CACI No. 4400), describes the plaintiff as claiming that he ‘is’ the owner/licensee of the trade secrets underlying the suit. (CACI No. 4400.) The second instruction, which enumerates the actual *elements* of the plaintiff's cause of action, dispels whatever weak whiff of relevance this use of the present tense might have. It requires the plaintiff to prove that he ‘owned’ or ‘was a licensee of’ the trade secrets at issue. (CACI No. 4401, italics added.) Given only these instructions to go on, one would suppose that *past* ownership—i.e., ownership at the time of the alleged misappropriation—is sufficient to establish this element.” (*Jasmine Networks, Inc., supra*, 180 Cal.App.4th at p. 997, original italics.)

Secondary Sources

1 Milgrim on Trade Secrets, Ch. 1, *Definitional Aspects*, § 1.01 (Matthew Bender)

Zamore, Business Torts, Ch. 17, *Trade Secrets*, § 17.05 et seq. (Matthew Bender)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.51 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4] (Matthew Bender)

| Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009~~5~~)
Chs. 1, 2, 6, 10, 11, 12

4406. Misappropriation by Disclosure

[Name of defendant] misappropriated [name of plaintiff]’s trade secret[s] by disclosure if [name of defendant]

1. ~~Disclosed~~ **disclosed** [it/them] without [name of plaintiff]’s consent; and
2. ~~Did~~ **did** any of the following:

[insert one or more of the following:]

~~Acquired~~ **acquired** knowledge of the trade secret[s] by improper means[./; or]

~~At~~ **at** the time of disclosure, knew or had reason to know that [his/her/its] knowledge of [name of plaintiff]’s trade secret[s] came from or through [name of third party], and that [name of third party] had previously acquired the trade secret[s] by improper means[./; or]

~~At~~ **at** the time of disclosure, knew or had reason to know that [his/her/its] knowledge of [name of plaintiff]’s trade secret[s] was acquired [insert circumstances giving rise to duty to maintain secrecy], which created a duty to keep the [select short term to describe, e.g., information] secret[./; or]

~~At~~ **at** the time of disclosure, knew or had reason to know that [his/her/its] knowledge of [name of plaintiff]’s trade secret[s] came from or through [name of third party], and that [name of third party] had a duty to [name of plaintiff] to keep the [e.g., information] secret[./; or]

[Before a material change of [his/her/its] position, knew or had reason to know that [it was/they were] [a] trade secret[s] and that knowledge of [it/them] had been acquired by accident or mistake.]

New December 2007; Revised December 2010

Directions for Use

Read this instruction with CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements*, if the plaintiff claims that the defendant’s disclosure of the information alleged to be a trade secret is a misappropriation.

If consent is at issue, CACI No. 1302, *Consent Explained*, and CACI No. 1303, *Invalid Consent*, may also be given.

In element 2, select the applicable statutory act(s) alleged to constitute misappropriation by disclosure. (See Civ. Code, § 3624.1(b)(2).) If only one act is selected, omit the words “did any of the following.”

If either of the first two acts constituting misappropriation by disclosure is alleged, give also CACI No. 4408, *Improper Means of Acquiring Trade Secret*.

~~Each act of misappropriation based on improper disclosure requires that the defendant have “knowledge of the trade secret.” (See Civ. Code, § 3426.1(b)(2).) No reported California state court decision has interpreted the meaning of “knowledge of the trade secret.”~~

Sources and Authority

- Civil Code section 3426.1(b)(2) provides:
 - (b) “Misappropriation” means:
 - (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (A) Used improper means to acquire knowledge of the trade secret; or
 - (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
 - (i) Derived from or through a person who had utilized improper means to acquire it;
 - (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
 - (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
 - (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.
- Civil Code section 19 provides: “Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.”
- “The fact that [defendant]’s postings were not of the ‘entire secret,’ and included only portions of courses, does not mean that [defendant]’s disclosures are not misappropriations. While previous partial disclosures arguably made public only those parts disclosed, [defendant]’s partial disclosures of non-public portions of the secrets may themselves be actionable because they constitute ‘disclosure ... without ... consent by a person who ... knew or had reason to know that his ... knowledge of the trade secret was ... [either] derived from or through a person who had utilized improper means to acquire it [or] acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.’ ” (*Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.* (N.D. Cal. 1995) 923 F.Supp. 1231, 1257, fn. 31.)

- “Under the UTSA, simple disclosure or use may suffice to create liability. It is no longer necessary, if it ever was, to prove that the purpose to which the acquired information is put is outweighed by the interests of the trade secret holder or that use of a trade secret cannot be prohibited if it is infeasible to do so.” (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1527 [66 Cal.Rptr.2d 731].)
- “[N]othing in the UTSA requires that the defendant gain any advantage from the disclosure; it is sufficient to show ‘use’ by disclosure of a trade secret with actual or constructive knowledge that the secret was acquired under circumstances giving rise to a duty to maintain its secrecy.” (*Religious Tech. Ctr.*, *supra*, 923 F.Supp. at p. 1257, fn. 31.)
- “Liability under CUTSA is not dependent on the defendant's ‘comprehension’ of the trade secret but does require ‘knowledge’ of it.” (*Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 229 [109 Cal.Rptr.3d 27].)
- “ ‘Knowledge,’ of course, is ‘[t]he fact or condition of knowing,’ ... and in this context, ‘[t]he fact of knowing a thing, state, etc. ...’ (8 Oxford English Dict., *supra*, p. 517.) To ‘know’ a thing is to have information of that thing at one's command, in one's possession, subject to study, disclosure, and exploitation. To say that one ‘knows’ a fact is also to say that one *possesses information of that fact*. Thus, although the Restatement Third of Unfair Competition does not identify knowledge of the trade secret as an element of a trade secrets cause of action, the accompanying comments make it clear that liability presupposes the defendant's ‘possession’ of misappropriated information.” (*Silvaco*, *supra*, 184 Cal.App.4th at pp. 225–226, original italics.)
- “The record contains no evidence that [defendant] ever possessed or had knowledge of any source code connected with either [software product]. So far as the record shows, [defendant] never had access to that code, could not disclose any part of it to anyone else, and had no way of using it to write or improve code of its own. [Defendant] appears to have been in substantially the same position as the customer in the pie shop who is accused of stealing the secret recipe because he bought a pie with knowledge that a rival baker had accused the seller of using the rival's stolen recipe. The customer does not, by buying or eating the pie, gain knowledge of the recipe used to make it.” (*Silvaco*, *supra*, 184 Cal.App.4th at p. 226.)
- “When a competitor hires a former employee of plaintiff who is likely to disclose trade secrets, ‘[i]t is a question of fact whether the competitor had constructive notice of the plaintiff's right in the secret.’ ” (*Ralph Andrews Productions, Inc. v. Paramount Pictures Corp.* (1990) 222 Cal.App.3d 676, 682–683 [271 Cal.Rptr. 797], internal citation omitted.)

Secondary Sources

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.53[1][b] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4][c] (Matthew Bender)

| Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009)
Chs. 2, 6, 12

4407. Misappropriation by Use

[Name of defendant] misappropriated [name of plaintiff]’s trade secret[s] by use if [name of defendant]

1. ~~Used~~used [it/them] without [name of plaintiff]’s consent; and
2. ~~Did~~did any of the following:]

[insert one or more of the following:]

~~Acquired~~acquired knowledge of the trade secret[s] by improper means][./; or]

~~At~~at the time of use, knew or had reason to know that [his/her/its] knowledge of [name of plaintiff]’s trade secret[s] came from or through [name of third party], and that [name of third party] had previously acquired the trade secret[s] by improper means][./; or]

~~At~~at the time of use, knew or had reason to know that [his/her/its] knowledge of [name of plaintiff]’s trade secret[s] was acquired under circumstances creating a legal obligation to limit use of the [select short term to describe, e.g., information][./; or]

~~At~~at the time of use, knew or had reason to know that [his/her/its] knowledge of [name of plaintiff]’s trade secret[s] came from or through [name of third party], and that [name of third party] had a duty to [name of plaintiff] to limit use of the [e.g., information][./; or]

[Before a material change of [his/her/its] position, knew or had reason to know that [it was/they were] [a] trade secret[s] and that knowledge of [it/them] had been acquired by accident or mistake.]

New December 2007; Revised December 2010

Directions for Use

Read this instruction with CACI No. 4401, *Misappropriation of Trade Secrets—Essential Factual Elements*, if the plaintiff claims that the defendant’s use of the information alleged to be a trade secret is a misappropriation.

If consent is at issue, CACI No. 1302, *Consent Explained*, and CACI No. 1303, *Invalid Consent*, may also be given.

In element 2, select the applicable statutory act(s) alleged to constitute misappropriation by use. (See Civ. Code, § 3624.1(b)(2).) If only one act is selected, omit the words “did any of the following.”

If either of the first two acts constituting misappropriation by disclosure is alleged, give also CACI No. 4408, *Improper Means of Acquiring Trade Secret*.

~~Each act of misappropriation based on improper use requires that the defendant have “knowledge of the trade secret.” (See Civ. Code, § 3426.1(b)(2).) No reported California state court decision has interpreted the meaning of “knowledge of the trade secret.”~~

Sources and Authority

- Civil Code section 3426.1(b)(2) provides:
 - (b) “Misappropriation” means:
 - (2) Disclosure or use of a trade secret of another without express or implied consent by a person who:
 - (A) Used improper means to acquire knowledge of the trade secret; or
 - (B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was:
 - (i) Derived from or through a person who had utilized improper means to acquire it;
 - (ii) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or
 - (iii) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or
 - (C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.
- Civil Code section 19 provides: “Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact.”
- “Under the plain terms of the Uniform Trade Secrets Act, defendants may be personally liable if: they used, through the corporation, [plaintiff]’s trade secrets; at the time of the use of the confidential information they knew or had reason to know that knowledge of the trade secrets was derived from or through a person who had improperly acquired the knowledge, or the secrets were obtained by a person who owed a duty to plaintiffs to maintain the secrecy. Employing the confidential information in manufacturing, production, research or development, marketing goods that embody the trade secret, or soliciting customers through the use of trade secret information, all constitute use. Use of a trade secret without knowledge it was acquired by improper means does not subject a person to liability unless the person receives notice that its use of the information is wrongful.” (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1383 [93 Cal.Rptr.2d 663], internal citations omitted.)
- “Under the UTSA, simple disclosure or use may suffice to create liability. It is no longer necessary, if it ever was, to prove that the purpose to which the acquired information is put is

outweighed by the interests of the trade secret holder or that use of a trade secret cannot be prohibited if it is infeasible to do so.” (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1527 [66 Cal.Rptr.2d 731].)

- “One clearly engages in the ‘use’ of a secret, in the ordinary sense, when one directly exploits it for his own advantage, e.g., by incorporating it into his own manufacturing technique or product. But ‘use’ in the ordinary sense is not present when the conduct consists entirely of possessing, and taking advantage of, something that was made using the secret. One who bakes a pie from a recipe certainly engages in the ‘use’ of the latter; but one who eats the pie does not, by virtue of that act alone, make ‘use’ of the recipe in any ordinary sense, and this is true even if the baker is accused of stealing the recipe from a competitor, and the diner knows of that accusation. Yet this is substantially the same situation as when one runs software that was compiled from allegedly stolen source code. The source code is the recipe from which the pie (executable program) is baked (compiled). Nor is the analogy weakened by the fact that a diner is not ordinarily said to make ‘use’ of something he eats. His metabolism may be said to do so, or the analogy may be adjusted to replace the pie with an instrument, such as a stopwatch. A coach who employs the latter to time a race certainly makes ‘use’ of it, but only a sophist could bring himself to say that coach ‘uses’ trade secrets involved in the manufacture of the watch.” (*Silvaco Data Systems v. Intel Corp.* (2010) 184 Cal.App.4th 210, 224 [109 Cal.Rptr.3d 27].)
- “Liability under CUTSA is not dependent on the defendant's ‘comprehension’ of the trade secret but does require ‘knowledge’ of it. So far as the record shows, [defendant] did not know and had no way to get the information constituting the trade secret. It therefore could not, within the contemplation of the act, ‘use’ that information.” (*Silvaco Data Systems, supra*, 184 Cal.App.4th at p. 229.)
- “‘Knowledge,’ of course, is ‘[t]he fact or condition of knowing,’ ... and in this context, ‘[t]he fact of knowing a thing, state, etc. ...’ (8 Oxford English Dict., *supra*, p. 517.) To ‘know’ a thing is to have information of that thing at one's command, in one's possession, subject to study, disclosure, and exploitation. To say that one ‘knows’ a fact is also to say that one *possesses information of that fact*. Thus, although the Restatement Third of Unfair Competition does not identify knowledge of the trade secret as an element of a trade secrets cause of action, the accompanying comments make it clear that liability presupposes the defendant's ‘possession’ of misappropriated information.” (*Silvaco, supra*, 184 Cal.App.4th at pp. 225–226, original italics.)
- “When a competitor hires a former employee of plaintiff who is likely to disclose trade secrets, ‘[i]t is a question of fact whether the competitor had constructive notice of the plaintiff's right in the secret.’ ” (*Ralph Andrews Productions, Inc. v. Paramount Pictures Corp.* (1990) 222 Cal.App.3d 676, 682–683 [271 Cal.Rptr. 797], internal citation omitted.)
- “Our Supreme Court has previously distinguished solicitation--which is actionable--from announcing a job change--which is not: ‘Merely informing customers of one's former employer of a change of employment, without more, is not solicitation. Neither does the willingness to discuss business upon invitation of another party constitute solicitation on the part of the invitee. Equity will not enjoin a former employee from receiving business from the customers of his former employer, even though the circumstances be such that he should be prohibited from soliciting

such business.’ ” (*Hilb v. Robb* (1995) 33 Cal.App.4th 1812, 1821 [39 Cal.Rptr. 2d 887], internal citation omitted; but see *Morlife, Inc., supra*, 56 Cal.App.4th at p. 1527, fn. 8 [“we need not decide whether the ‘professional announcement’ exception ... has continued vitality in light of the expansive definition of misappropriation under the UTSA”].)

- “[T]o prove misappropriation of a trade secret under the UTSA, a plaintiff must establish (among other things) that the defendant improperly ‘used’ the plaintiff’s trade secret. Thus, under Evidence Code sections 500 and 520, the plaintiff bears the burden of proof on that issue, both at the outset and during trial.” (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668 [3 Cal.Rptr.3d 279], internal citation omitted.)
- “[I]nformation relative to customers (e.g., their identities, locations, and individual preferences), obtained by a former employee in his contacts with them during his employment, may amount to ‘trade secrets’ which will warrant his being enjoined from exploitation or disclosure after leaving the employment. [¶] It is equally clear, however, that the proscriptions inhibiting the ex-employee reach only his use of such information, not to his mere possession or knowledge of it.” (*Golden State Linen Service, Inc. v. Vidalin* (1977) 69 Cal.App.3d 1, 7–8 [137 Cal.Rptr. 807], internal citations omitted.)
- “Since these ‘Marks’ likely encompass any trade secrets, it is reasonable to conclude that one party’s use of the trade secrets that affects the other party’s rights in the mark would constitute the misappropriation of the trade secrets ‘of another.’ ” (*Morton v. Rank Am., Inc.* (C.D. Cal. 1993), 812 F.Supp. 1062, 1074 [one can misappropriate trade secret jointly owned with another].)

Secondary Sources

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.53[1][b] (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.103[4][c] (Matthew Bender)

| Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2009⁵) Chs. 2, 6, 12

4500. Breach of Implied Warranty of Correctness of Plans and Specifications—Essential Factual Elements

[Name of plaintiff] claims that *[name of defendant]* provided plans and specifications for the **[project/describe construction project, e.g., kitchen remodeling]** that were not correct. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of defendant]* provided *[name of plaintiff]* with plans and specifications for *[name of defendant]*'s *[short name for project, e.g., remodeling]* project;
 2. That *[name of plaintiff]* was required to follow the plans and specifications provided by *[name of defendant]* in **[bidding on/ [and] constructing]** the *[e.g., remodeling]* project;
 3. That *[name of plaintiff]* reasonably relied on the plans and specifications for the *[e.g., remodeling]* project;
 4. That the plans and/or specifications provided by *[name of defendant]* were not correct; and
 5. That *[name of plaintiff]* was harmed because the plans or specifications were not correct.
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New December 2010

Directions for Use

This instruction should be given when a contractor makes a claim for breach of the implied warranty of correctness on the grounds that the plans and specifications provided by the owner for its construction project were not correct. Uncontested elements may be omitted. Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*, for other contested elements of a breach-of-contract claim.

The word “project” may be used if the meaning will be clear to the jury. Alternatively, describe the project in the first paragraph, and then select a shorter term for use thereafter.

This implied warranty also applies to a general contractor who is responsible for the correctness of plans and specifications that are provided to subcontractors. (See *Healy v. Brewster* (1967) 251 Cal.App.2d 541, 550 [59 Cal.Rptr. 752].)

An implied-warranty claim can arise when the contractor is required to rely on the owner’s plans and specifications in preparing a fixed price bid for a project. A claim can also arise when the contractor must follow the owner’s plans and specifications and, as a result, encounters difficulty in constructing the project. In either case, the contractor may assert a claim for breach of the implied warranty if the contractor is damaged by incorrect plans or specifications.

A breach of the implied warranty can also be asserted as an affirmative defense to an owner's claim for nonperformance (see CACI No. 4511, *Affirmative Defense—Contractor Followed Plans and Specifications*) if the contractor's alleged breach was caused by the owner's incorrect plans and specifications.

The implied warranty applies in particular to plans and specifications provided by public owners, who are required by statute to prepare accurate and complete plans and specification for public works projects. (See Public Contract Code, §§ 1104, 10120.) It can also apply to private construction projects if the owner requires the contractor to follow the plans and specifications that turn out to be incorrect. (See, e.g., *Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396, 404 [55 Cal.Rptr. 1, 420 P.2d 713].)

An owner's obligation to provide correct plans and specifications cannot be disclaimed by general language requiring the contractor to examine the plans and specifications for errors and omissions. (See *Warner Constr. Corp. v. L.A.* (1970) 2 Cal.3d 285, 292 [85 Cal.Rptr. 444, 466 P.2d 996].)

Sources and Authority

- Public Contract Code section 1104 (applicable to local government agencies) provides: “No local public entity, charter city, or charter county shall require a bidder to assume responsibility for the completeness and accuracy of architectural or engineering plans and specifications on public works projects, except on clearly designated design build projects. Nothing in this section shall be construed to prohibit a local public entity, charter city, or charter county from requiring a bidder to review architectural or engineering plans and specifications prior to submission of a bid, and report any errors and omissions noted by the contractor to the architect or owner. The review by the contractor shall be confined to the contractor's capacity as a contractor, and not as a licensed design professional.”
- Public Contract Code section 10120 (applicable to state agencies) provides: “Before entering into any contract for a project, the department shall prepare full, complete, and accurate plans and specifications and estimates of cost, giving such directions as will enable any competent mechanic or other builder to carry them out.”
- “[I]f the contractor is bound to build according to plans and specifications prepared by the owner, the contractor will not be responsible for the consequences of defects in the plans and specifications. This responsibility of the owner is not overcome by the usual clauses requiring builders to visit the site, to check the plans, and to inform themselves of the requirements of the work (*United States v. Spearin* (1918) 248 U.S. 132, 136 [39 S.Ct. 59, 63 L.Ed. 166], internal citations omitted.)
- “A contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than

as represented. This rule is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness. The fact that a breach is fraudulent does not make the rule inapplicable.” (*Souza & McCue Constr. Co. v. Superior Court of San Benito County* (1962) 57 Cal.2d 508, 510–511 [20 Cal.Rptr. 634, 370 P.2d 338], internal citations omitted.)

- “We have long recognized that ‘[a] contractor of public works who, acting reasonably, is misled by incorrect plans and specifications issued by the public authorities as the basis for bids and who, as a result, submits a bid which is lower than he would have otherwise made may recover in a contract action for extra work or expenses necessitated by the conditions being other than as represented.’ ” (*Los Angeles Unified School District v. Great American Ins. Co.* (2010) 49 Cal.4th 739, 744 [112 Cal.Rptr.3d 230, 234 P.3d 490].)
- “The responsibility of a governmental agency for positive representations it is deemed to have made through defective plans and specifications ‘is not overcome by the general clauses requiring the contractor, to examine the site, to check up the plans, and to assume responsibility for the work’ ” (*E. H. Morrill Co. v. State* (1967) 65 Cal.2d 787, 792–793 [56 Cal.Rptr. 479, 423 P.2d 551], internal citations omitted.)
- “If a contractor makes a misinformed bid because a public entity issued incorrect plans and specifications, precedent establishes that the contractor can sue for breach of the implied warranty that the plans and specifications are correct. The contractor may recover ‘for extra work or expenses necessitated by the conditions being other than as represented.’ ” (*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1401, fn. 5 [106 Cal.Rptr.3d 691].)
- “Courts have recognized a cause of action in contract against a public entity based upon the theory that ‘the furnishing of misleading plans and specifications by the public body constitutes a breach of implied warranty of their correctness.’ ” (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 551 [66 Cal.Rptr.3d 175].)
- “Second, [private owner] breached its contract by providing [contractor] with plans that were both erroneous and extremely late in issuance. Although construction started on May 1, 1976, lengthy drawing reviews became necessary and final drawings were still being furnished as late as July through September 1977. The furnishing of misleading plans and specifications by an owner is a breach of an implied warranty of their correctness.” (*C. Norman Peterson Co. v. Container Corp. of Am.* (1985) 172 Cal.App.3d 628, 643 [218 Cal.Rptr. 592], internal citations omitted.)
- “The trial court ... read the section 158 disclaimer to the jury, but instructed them that ‘if a public agency makes a positive and material representation as to a condition presumably within the knowledge of the agency and upon which the plaintiff had a right to rely, the agency is deemed to have warranted such facts despite a general provision

requiring an on-site inspection by the contractor.’ In submitting the issue of the effect of the section 158 disclaimer to the jury, and its instructions to the jury, the trial court complied with our decision in *Morrill*, and the verdict must be taken as resolving that issue against defendant.” (*Warner Constr. Corp., supra*, 2 Cal.3d at p. 292, fn. 2].)

“Since the plans and specifications were prepared by the owners’ architect and not by the subcontractor, and since the subcontractor undertook to do the work in accordance with his specific proposal, we cannot reasonably conclude that the subcontractor assumed responsibility for the adequacy of the plans and specifications The language upon which the plaintiff relies constituted a statement of the purpose sought to be achieved by means of the owners’ plans and specifications rather than an undertaking on the part of the subcontractor of responsibility for the adequacy of such plans and specifications as the design of a system capable of producing the desired result.” (*Kurland v. United Pacific Ins. Co.* (1967) 251 Cal.App.2d 112, 117 [59 Cal.Rptr. 258].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 998

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, §§ 6.73–6.76

5 Stein, Construction Law, Ch. 18, *Warranties*, § 18.02 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 440, *Construction Contract Remedies*, § 440.14 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.24 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 481, *Public Works*, § 481.311 (Matthew Bender)

10 Miller & Starr, California Real Estate (Thomson Reuters West 3d ed.) Ch. 27, *Construction Law and Contracting*, §§ 27:63–27:6

Acret, California Construction Law Manual (Thomson Reuters West 6th ed. 2005) Ch. 7, *Public Contracts*, § 7:78

3 Bruner & O’Connor on Construction Law (Thompson Reuters West 2002) Ch. 9, *Warranties*, §§9:78 and 9:84

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 4, *Breach of Contract by Owner*, §§ 4.06, 4.07

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 13, *Everything You Ever Wanted to Know About Extra Work and the Changes Clause*, pp. 99–100

4501. Owner's Liability for Failing to Disclose Important Information Regarding a Construction Project—Essential Factual Elements

[Name of plaintiff] claims that *[he/she/it]* was harmed because *[name of defendant]* failed to disclose important information regarding *[specify information that defendant failed to disclose or concealed, e.g., tidal conditions at the project site]*. To establish this claim, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* submitted *[his/her/its]* bid or agreed to perform without information regarding *[e.g., tidal conditions]* that materially affected performance costs;
2. That *[name of defendant]* had this information, and was aware that *[name of plaintiff]* did not know it and had no reason to obtain it;
3. That *[name of defendant]* failed to provide this information;
4. That the contract plans and specifications or other information furnished by *[name of defendant]* to *[name of plaintiff]* misled *[name of plaintiff]* or did not put *[him/her/it]* on notice to investigate further;
5. That *[name of plaintiff]* was harmed because of *[name of defendant]*'s failure to disclose the information.

[Name of plaintiff] does not have to prove that *[name of defendant]* intended to conceal the information.

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Directions for Use

Give this instruction if a contractor claims that the owner had important information regarding the project that it failed to disclose, and as a result, the contractor incurred greater costs than anticipated. Undisputed elements may be omitted. Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*, for other contested elements of a breach-of-contract claim.

With regard to undisclosed information, there is liability only if the failure to disclose materially affected the cost of performance and actually and justifiably misled the contractor in bidding on the contract. It is not necessary to show a fraudulent intent to conceal. (See *Los Angeles Unified School Dist. v. Great American Ins. Co.* (2010) 49 Cal.4th 739, 745 [112 Cal.Rptr.3d 230, 234 P.3d 490].)

This instruction applies principally to public owners awarding fixed price construction contracts to contractors required to submit bids based on information provided by the public owner. Government Code section 818.8 relieves public owners from tort liability for concealment and

similar tortious conduct. However, public owners remain liable in contract. (See *Warner Constr. Corp. v. L.A.* (1970) 2 Cal.3d 285, 294 [85 Cal.Rptr. 444, 466 P.2d 996].) Private owners remain liable in tort for concealment of important facts. (See CACI No. 1901, *Concealment*.)

Sources and Authority

- “[A] contractor need not prove an affirmative fraudulent intent to conceal. Rather ... a public entity may be required to provide extra compensation if it knew, but failed to disclose, material facts that would affect the contractor’s bid or performance. Because public entities do not insure contractors against their own negligence, relief for nondisclosure is appropriate only when (1) the contractor submitted its bid or undertook to perform without material information that affected performance costs; (2) the public entity was in possession of the information and was aware the contractor had no knowledge of, nor any reason to obtain, such information; (3) any contract specifications or other information furnished by the public entity to the contractor misled the contractor or did not put it on notice to inquire; and (4) the public entity failed to provide the relevant information.” (*Los Angeles Unified School Dist., supra*, 49 Cal.4th at p. 745.)
- “The circumstances affecting recovery may include, but are not limited to, positive warranties or disclaimers made by either party, the information provided by the plans and specifications and related documents, the difficulty of detecting the condition in question, any time constraints the public entity imposed on proposed bidders, and any unwarranted assumptions made by the contractor. The public entity may not be held liable for failing to disclose information a reasonable contractor in like circumstances would or should have discovered on its own, but may be found liable when the totality of the circumstances is such that the public entity knows, or has reason to know, a responsible contractor acting diligently would be unlikely to discover the condition that materially increased the cost of performance.” (*Los Angeles Unified School Dist., supra*, 49 Cal.4th at p. 754.)
- “[E]stablished law provides public entities substantial protection against careless bidding practices by contractors and forecloses the possibility that a public entity will be held liable when a contractor’s own lack of diligence prevented it from fully appreciating the costs of performance. This being so, protection against careless bidding practices does not require that we allow contractors damaged by a public entity’s misleading nondisclosure to recover only on a showing the public entity harbored a fraudulent intent.” (*Los Angeles Unified School Dist., supra*, 49 Cal.4th at p. 752.)
- “Nondisclosure is actionable ... only if the information at issue materially affects the cost of performance” (*Los Angeles Unified School Dist., supra*, 49 Cal.4th at p. 753.)
- “In transactions which do not involve fiduciary or confidential relations, a cause of action for non-disclosure of material facts may arise in at least three instances: (1) the defendant makes representations but does not disclose facts which materially qualify the facts disclosed, or which render his disclosure likely to mislead; (2) the facts are known or accessible only to defendant, and defendant knows they are not known to or reasonably

discoverable by the plaintiff; (3) the defendant actively conceals discovery from the plaintiff.” (*Warner Constr. Corp.*, *supra*, 2 Cal.3d at p. 294, footnotes omitted.)

- “But this does not mean ... that City could be liable simply by failing to supply complete plans and specifications. It does mean that careless failure to disclose information may form the basis for an implied warranty claim if the defendant possesses superior knowledge inaccessible to the contractor or where that which was disclosed is likely to mislead in the absence of the undisclosed information Thus, ... the general rule [is] that silence alone is not actionable.” (*Thompson Pacific Construction, Inc. v. City of Sunnyvale* (2007) 155 Cal.App.4th 525, 552 [66 Cal.Rptr.3d 175], internal citations omitted.)
- “It would be inequitable to permit defendant to enforce the literal terms of the contract which called for the excavation of ‘all materials’ necessary to complete the job when plaintiffs were induced by defendant's misrepresentation to submit a bid which was much lower than was warranted by the true facts. If instead of stating in the specifications that [contractor] would excavate to rough grade, defendant had stated the true facts of which it had knowledge -- that [contractor] was obligated by contract to excavate no lower than five feet above grade -- the present situation would not have arisen. Having failed to impart this knowledge to plaintiffs and having willfully or carelessly misrepresented the true situation, defendant is obligated to plaintiffs for the additional work occasioned.” (*Gogo v. Los Angeles County Flood Control Dist.* (1941) 45 Cal.App.2d 334, 341–342 [114 P.2d 65].)
- “It is the general rule that by failing to impart its knowledge of difficulties to be encountered in a project, the owner will be liable for misrepresentation if the contractor is unable to perform according to the contract provisions. [¶] In a factually similar case, the contractor encountered ‘unusual quantities of quicksand and extensive subsoil water conditions which had not been shown on the plans or specifications ... information as to which, although known to it, had been withheld by the city.’ An award of damages was affirmed because ... ‘[t]he withholding by the city of its knowledge...resulting in excessive cost of construction, forms actionable basis for plaintiff's claim for damages.’” (*Salinas v. Souza & McCue Constr. Co.* (1967) 66 Cal.2d 217, 222–223 [57 Cal.Rptr. 337, 424 P.2d 921], internal citations omitted.)
- “Here, the city argues that provisions in the contract specifications requiring that the bidders ‘examine carefully the site of the work,’ and stating that it is ‘mutually agreed that the submission of a proposal shall be considered prima facie evidence that the bidder has made such examination,’ prevents a holding that the city is liable for the consequences of its fraudulent representation. However, even if the language had specifically directed the bidders to examine *subsoil* conditions, which it did not, it is clear that such general provisions cannot excuse a governmental agency for its active concealment of conditions.” (*Salinas, supra*, 66 Cal.2d at p. 223, internal citations omitted.)
- “A fraudulent concealment often composes the basis for an action in tort, but tort actions

for misrepresentation against public agencies are barred by Government Code section 818.8. Plaintiff retains, however, a cause of action in contract. ‘It is the general rule that by failing to impart its knowledge of difficulties to be encountered in a project, the owner will be liable for misrepresentation if the contractor is unable to perform according to the contract provisions.’ As explained in *Souza & McCue Construction Co. v. Superior Court*, ... : ‘This rule is mainly based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness. The fact that a breach is fraudulent does not make the rule inapplicable.’ ” (*Warner Constr. Corp.*, *supra*, 2 Cal.3d at pp. 293–294, internal citations omitted.)

- “Under general principles of contract and tort law, a party who conceals or fails to disclose material information to another is liable for fraud. In the public construction contract context, however, the conduct of a public agency which would otherwise amount to a tortious [sic] misrepresentation is treated as a breach of contract. The underlying theory is that providing misleading plans and specifications constitutes a breach of the implied warranty of correctness. (*Howard Contracting, Inc. v. G. A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 55 [83 Cal.Rptr.2d 590].)
- “When there is no misrepresentation of factual matters within the state's knowledge or withholding of material information, and when both parties have equal access to information as to the nature of the tests which resulted in the state's findings, the contractor may not claim in the face of a pertinent disclaimer that the presentation of the information, or a reasonable summary thereof, amounts to a warranty of the conditions that will actually be found.” (*Wunderlich v. State* (1967) 65 Cal.2d 777, 786-787 [56 Cal.Rptr. 473, 423 P.2d 545].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 998

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, §§ 6.73–6.76

5 Stein, Construction Law, Ch. 18, *Warranties*, § 18.02 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 440, *Construction Contract Remedies*, § 440.15 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.24 (Matthew Bender)

42 California Forms of Pleading and Practice, Ch. 481, *Public Works*, § 481.311 (Matthew Bender)

10 Miller & Starr, California Real Estate (Thomson Reuters West 3d ed.) Ch. 27, *Construction Law and Contracting*, §§ 27:63–27:64

Acret, California Construction Law Manual (Thomson Reuters West 6th ed. 2005) Ch. 7, *Public Contracts*, § 7:12

3 Bruner & O'Connor on Construction Law (Thomson Reuters West 2002) Ch. 9, *Warranties*, §9:92

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 4, *Breach of Contract by Owner*, § 4.06.

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 13, *Everything You Ever Wanted to Know About Extra Work and the Changes Clause*, pp. 99–100

**4502. Breach of Implied Covenant to Provide Necessary Items Within Owner’s Control—
Essential Factual Elements**

In every construction contract, it is understood that the owner will provide access to the project site and do those things within the owner’s control that are necessary for the contractor to reasonably and timely perform its work. [Name of plaintiff] claims that [name of defendant] breached the contract by [specify what owner failed to do, e.g., failing to procure a disposal permit for hazardous materials]. To establish this claim, [name of plaintiff] must prove all of the following:

- 1. That [name of plaintiff] could not reasonably or timely perform [his/her/its] work without [insert short name for item, e.g., a disposal permit];**
 - 2. That [name of defendant] knew or reasonably should have known that [e.g., a disposal permit] was necessary for [name of plaintiff] to reasonably and timely perform the work;**
 - 3. That [name of defendant] had the ability to [e.g., procure a disposal permit];**
 - 4. That [name of plaintiff] could not [e.g., obtain a disposal permit] without [name of defendant]’s assistance;**
 - 5. That [name of defendant] failed to [e.g., procure a disposal permit] in a timely manner; and**
 - 6. That [name of plaintiff] was harmed by [name of defendant]’s failure.**
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Directions for Use

This instruction should be used when a contractor claims the owner breached an implied covenant to provide necessary access to the project site, easements, permits, or other things uniquely within the owner’s control in order for the contractor to reasonably and timely perform the contract. Undisputed elements may be omitted. Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*, for other contested elements of a breach-of-contract claim.

This implied covenant can arise in both private and public contracts unless it is expressly precluded by the contract documents. (See *Hensler v. City of Los Angeles* (1954) 124 Cal.App.2d 71, 82 [268 P.2d 12] [covenant is implied in every construction contract]; see also *Bomberger v. McKelvey* (1950) 35 Cal.2d 607, 613 [220 P.2d 729] [covenant implied in private contract].) This instruction may also be used when the contractor claims the owner breached a general duty of cooperation by failing to control and/or coordinate third parties, such as other contractors on the project site.

This instruction is based on CACI 325, *Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements*.

Sources and Authority

- Civil Code section 1655 provides: “Stipulations which are necessary to make a contract reasonable, or conformable to usage, are implied, in respect to matters concerning which the contract manifests no contrary intention.”
- Civil Code section 1656 provides: “All things that in law or usage are considered as incidental to a contract, or as necessary to carry it into effect, are implied therefrom, unless some of them are expressly mentioned therein, when all other things of the same class are deemed to be excluded.”
- “In every building contract which contains no express covenants on the subjects there are implied covenants to the effect that the contractor shall be permitted to proceed with the construction of the building in accordance with the other terms of the contract without interference by the owner and that he shall be given such possession of the premises as will enable him to adequately carry on the construction and complete the work agreed upon. Such terms are necessarily implied from the very nature of the contract and a failure to observe them not consented to by the contractor constitutes a breach of contract on the part of the owner entitling the contractor to rescind, although it may not amount to a technical prevention of performance.” (*Gray v. Bekins* (1921) 186 Cal. 389, 395 [199 P. 767], internal citations omitted.)
- “Under the contract as thus construed, there was an implied covenant that plaintiffs would be given possession of the premises for the agreed purpose at a reasonable time to be chosen by them. Defendant’s conduct in forbidding plaintiffs to enter, therefore, was sufficient not only to excuse their performance but also to constitute a breach or anticipatory breach of the contract.” (*Bomberger, supra*, 35 Cal.2d at p. 613, internal citations omitted.)
- “The rule is plain that in every construction contract the law implies a covenant, where necessary, that the owner will furnish the selected site of operations to the contractor in order to enable him ‘to adequately carry on the construction and complete the work agreed upon.’ The rule applies with equal force to construction contracts entered into by a municipality.” (*Hensler, supra*, 124 Cal.App.2d at p. 83, internal citations omitted.)
- “In general, where plans, specifications and conditions of contract do not otherwise provide, there is an implied covenant that the owner of the project is required to furnish whatever easements, permits or other documentation are reasonably required for the construction to proceed in an orderly manner.” (*COAC, Inc. v. Kennedy Engineers* (1977) 67 Cal.App.3d 916, 920 [136 Cal.Rptr. 890].)
- “The rule is well settled that in every construction contract the law implies a covenant that the owner will provide the contractor timely access to the project site to facilitate

performance of work. When necessary permits relating to the project are not available or access to the site is limited by the owner, the implied covenant is breached. The trial court found the delays were caused by the [defendant]’s breaches of contract and implied covenant in failing to disclose known restrictions on project performance, to obtain necessary permits, and to provide timely access to perform the work.” (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 50 [83 Cal.Rptr.2d 590], internal citations omitted.)

- “[A] contract includes not only the terms that have been expressly stated but those implied provisions indispensable to effectuate the intention of the parties. ... [¶] Clearly an implied term of the contract herein was that once the notice to proceed was issued, the dredge would be available for work on the project ... [¶] [Plaintiff], acting as a reasonable public works contractor, was misled by this incorrect implied representation in its submission of a bid. [Plaintiff] justifiably relied on this representation in determining the cost of constructing the seawall. Accordingly, it did not include in its bid the cost of maintaining the seawall for an indefinite period of time while awaiting the arrival of the dredge. As the [defendant] impliedly warranted the correctness of these representations, it is liable for the cost of extra work which was necessitated by the dredge’s failure to arrive.” (*Tonkin Constr. Co. v. County of Humboldt* (1987) 188 Cal.App.3d 828, 832 [233 Cal.Rptr. 587], internal citations omitted.)
- “ ‘[T]he covenant is implied as a *supplement* to the express contractual covenants, to prevent a contracting party from engaging in conduct which (while not technically transgressing the express covenants) frustrates the other party’s rights to the benefits of the contract.’ ” (*Racine & Laramie, Ltd. v. Department of Parks & Recreation* (1992) 11 Cal.App.4th 1026, 1031–1032 [14 Cal.Rptr.2d 335], original italics.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 803

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 6, *Public Contracts: Disputes and Remedies*, § 6.84, 6:85

5 Stein, Construction Law, Ch. 18, *Warranties*, § 18.02 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 140, *Contracts*, § 140.45 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.24 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.242 (Matthew Bender)

Acret, California Construction Law Manual (Thomson Reuters West 6th ed. 2005) Ch. 7, *Public Contracts*, §§ 7:48, 7:77

3 Bruner & O'Connor on Construction Law (Thompson Reuters West 2002) Ch. 9, *Warranties*, §9:99

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) p. 10

4510. Breach of Implied Covenant to Perform Work in a Good and Competent Manner— Essential Factual Elements

[Name of plaintiff] claims that [name of defendant] failed to [perform the work for the [project/describe construction project, e.g., kitchen remodeling] competently/ [or] use the proper materials for the [project/ e.g., kitchen remodeling]]. To establish this claim, [name of plaintiff] must prove all of the following:

1. That [name of defendant] failed to [perform [his/her/its] work competently/ [or] provide the proper materials] by [describe alleged breach, e.g., failing to apply sufficient coats of paint or failing to complete the project in substantial conformity with the plans and specifications]; and
 2. That [name of plaintiff] was harmed by [name of defendant]’s failure.
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Directions for Use

This instruction is for use if an owner claims that the contractor breached the contract by failing to perform the work on the project competently so that the result did not meet what was expected under the contract. This is sometimes referred to as the implied covenant that the work performed will be fit and proper for its intended use. (See *Kuitems v. Covell* (1951) 104 Cal.App.2d 482, 485 [231 P.2d 552].) The implied covenant encompasses the quality of both the work and materials. (See *Aced v. Hobbs-Sesack Plumbing Co.* (1961) 55 Cal.2d 573, 582–583 [12 Cal.Rptr. 257, 360 P.2d 897].)

Uncontested elements may be omitted. Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*.

The word “project” may be used if the meaning will be clear to the jury. Alternatively, describe the project in the first paragraph, and then select a shorter term for use thereafter.

This instruction is based on CACI No. 325, *Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements*. It should be given in conjunction with CACI No. 4530, *Owner’s Damages for Breach of Construction Contract—Work Does Not Conform to Contract*, which provides the proper measure of damages recoverable for a breach of the implied covenant to perform work fit for its intended use.

Sources and Authority

- “[A]lthough [general contractor] ... had a contractual relationship with the City, it also had a duty of care to perform in a competent manner.” (*Willdan v. Sialic Contractors Corp.* (2007) 158 Cal.App.4th 47, 57 [69 Cal.Rptr.3d 633].)
- “The defect complained of and the alleged breach of the warranty relate solely to fabrication and workmanship—the seams opened and the edges raveled. The failure of the carpet to last for the period warranted was occasioned by the defective sewing of the

seams and binding of the edges, constituting a breach of the warranty as it related to good workmanship in assembling and installing it, but not as to the quality of the carpet itself.” (*Southern California Enterprises, Inc. v. D. N. & E. Walter & Co.* (1947) 78 Cal.App.2d 750, 753–754 [178 P.2d 785], superceded by statute as stated in *Cardinal Health 301, Inc., supra*, 169 Cal.App.4th at p. 132.)

- “[Subcontractor] agreed to perform the waterproofing and drainage work on the retaining walls built by [contractor] and had the duty to perform those tasks in a good and workmanlike manner.” (*Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 749 [50 Cal.Rptr.3d 709].)
- “ ‘Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of the contract.’ The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement.” (*Kuitems, supra*, 104 Cal.App.2d at p. 485.)
- “Obviously, the statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed ‘shall be fit and proper for its said intended use’” (*Kuitems, supra*, 104 Cal.App.2d at p. 485.)
- “[N]o warranty other than that of good workmanship can be implied where the contractor faithfully complies with plans and specifications supplied by the owner” (*Sunbeam Constr. Co. v. Fisci* (1969) 2 Cal.App.3d 181, 186 [82 Cal.Rptr. 446], internal citations omitted.)
- “[A] contract to build an entire building is essentially a contract for material and labor, and there is an implied warranty protecting the owner from defective construction. Clearly, it would be anomalous to imply a warranty of quality when construction is pursuant to a contract with the owner—but fail to recognize a similar warranty when the sale follows completion of construction.” (*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 378–379 [115 Cal.Rptr. 648, 525 P.2d 88], internal citations omitted.)
- “Several cases dealing with construction contracts and other contracts for labor and material show that ordinarily such contracts give rise to an implied warranty that the product will be fit for its intended use both as to workmanship and materials. These cases support the proposition that although the provisions of the Uniform Sales Act with respect to implied warranty (Civ. Code, §§ 1734–1736) apply only to sales, similar warranties may be implied in other contracts not governed by such statutory provisions when the contracts are of such a nature that the implication is justified. ... [¶] The reference in the stipulation to merchantability, a term generally used in connection with sales, does not preclude reliance on breach of warranty although the contract is one for labor and material. With respect to sales, merchantability requires among other things

that the substance sold be reasonably suitable for the ordinary uses it was manufactured to meet. The defect of which [plaintiff] complains is that the tubing was not reasonably suitable for its ordinary use, and his cause of action may properly be considered as one for breach of a warranty of merchantability. There is no justification for refusing to imply a warranty of suitability for ordinary uses merely because an article is furnished in connection with a construction contract rather than one of sale. The evidence, if taken in the light most favorable to [plaintiff], would support a determination that there was an implied warranty of merchantability.” (*Aced, supra*, 55 Cal.2d at p. 583, internal citations omitted.)

- “[P]ublic policy imposes on contractors in various circumstances the duty to finish a project with diligence and to avoid injury to the person or property of third parties.” (*Ott v. Alfa-Laval Agri, Inc.* (1995) 31 Cal.App.4th 1439, 1450 [37 Cal.Rptr.2d 790].)

Secondary Sources

2 Cal. Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, § 9.93

2 Stein, Construction Law, Ch. 5B, *Contractor's and Construction Manager's Rights and Duties*, § 5B.01[2][b] (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.42 (Matthew Bender)

29 California Legal Forms, Ch. 89, *Home Improvement and Specialty Contracts*, § 89.14 (Matthew Bender)

11 Miller & Starr, California Real Estate (Thomson Reuters West 3d ed.) Ch. 29, *Defective Construction*, § 29:5

3 Bruner & O'Connor on Construction Law (Thomson Reuters West 2002) Ch. 9, *Warranties*, §§9:67-70

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 5, *Breach of Contract by Contractor*, § 5.01

4511. Affirmative Defense—Contractor Followed Plans and Specifications

[Name of plaintiff] claims that *[name of defendant]* failed to [perform the work for the [project/describe construction project, e.g., kitchen remodeling] competently/ [or] use the proper materials for the [project/ e.g., kitchen remodeling]]. *[Name of defendant]* claims that [he/she/it] followed the plans and specifications and that *[specify alleged defect in the work or materials]* was because of the plans and specifications that *[name of plaintiff]* provided to *[name of defendant]* for the project.

To succeed on this defense, *[name of defendant]* must prove all the following:

1. That *[name of plaintiff]* provided *[name of defendant]* with the plans and specifications for the project;
 2. That *[name of plaintiff]* required *[name of defendant]* to follow the plans and specifications in constructing the project;
 3. That *[name of defendant]* substantially complied with the plans and specifications that *[name of plaintiff]* provided for the project; and
 4. That *[specify alleged defect in the work and/or deficiency in performance]* was because of *[name of defendant's]* use of the plans and specifications.
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Directions for Use

This instruction is a contractor's affirmative defense to the owner's claims that there is a defect in the work or deficiency in the contractor's performance. (See CACI No. 4510, *Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Essential Factual Elements*.) The contractor asserts that any alleged defect or deficient performance was caused by following the plans and specifications that were provided by the owner because the plans and specifications were inaccurate or incomplete. This instruction may be modified for use in the contractor's action for compensation from the owner if the owner alleges poor quality work as a defense to payment.

Sources and Authority

- “[T]he authorities hold that where the plans and specifications were prepared by the owner’s architect and not by the subcontractor, and since the subcontractor undertook to do the work in accordance with the specific proposal, it cannot reasonably be concluded that the subcontractor assumed responsibility for the adequacy of the plans and specifications to meet the purpose of the owner, and where the contractor faithfully performs the work as specified, there cannot be an implied warranty that the contractor will supplement the inadequacy of the plans.” (*Sunbeam Construction Co. v. Fisci* (1969) 2 Cal.App.3d 181, 184–185 [82 Cal.Rptr. 446].)

- “There is no basis for an implied warranty of fitness of the installation since the work was done in accordance with the plans and specifications supplied by the owner. ... ‘In other words, as to the refrigerating plant, defendants got precisely what they contracted for, and there was no implied warranty that the machine would answer the particular purpose for which the buyers intended to use it.’ ” (*Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Cavanaugh* (1963) 217 Cal.App.2d 492, 508–509 [32 Cal.Rptr. 144].)
- “[T]he contractor’s responsibility for any completed portion of the work, so done under the direction and to the satisfaction of the engineers, relieves him from responsibility for such an accident as that which befell. ...” (*McConnell v. Corona City Water Co.* (1906) 149 Cal. 60, 63 [85 P. 929].)

Secondary Sources

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, §§ 5.97, 5.98

3 Stein, Construction Law, Ch. 11, *Remedies and Damages*, § 11.02 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.42, 104.254 (Matthew Bender)

11 Miller & Starr, California Real Estate (Thomson Reuters West 3d ed.) Ch. 29, *Defective Construction*, § 29:3

3 Bruner & O’Connor on Construction Law (Thompson Reuters West 2002) Ch. 9, *Warranties*, §9:83

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 5, *Breach of Contract by Contractor*, § 5.01

4520. Contractor's Claim for Changed or Extra Work

[Name of plaintiff] claims that *[name of defendant]* required **[him/her/it]** to perform **[changed/ [or] extra] work beyond that required by the contract.** *[Name of plaintiff]* claims that **[[he/she/it] should be compensated/ [and] should have been given a time extension] [under the contract].**

To succeed on this claim, *[name of plaintiff]* must prove all of the following:

1. That the **[changed/ [or] extra] work was [not included in/ [or] in addition to that required under] the original contract;**
 2. That *[name of defendant]* directed *[name of plaintiff]* to perform the **[changed/ [or] extra] work;**
 3. That *[name of plaintiff]* performed the **[changed/ [or] extra] work; and**
 4. That *[name of plaintiff]* was harmed because *[name of defendant]* required the **[changed/ [or] extra] work.**
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Directions for Use

This instruction may be used for claims for changed or extra work by the contractor against the owner, or for analogous claims asserted by a subcontractor against the general contractor.

Most construction contracts allow the owner to direct changes in the work and provide that the contractor will be paid and sometimes receive a time extension for performing the changed or extra work. Under certain circumstances, extra or changed work may be priced in the contract (e.g., by unit price or agreed labor rates and material costs). If so, include “under the contract” in the opening paragraph.

This instruction is based on CACI No. 303, *Breach of Contract—Essential Factual Elements*, and CACI No. 350, *Introduction to Contract Damages*. If the claim is based on an implied contract for the work, also give CACI No. 305, *Implied-in-Fact Contract*.

Sources and Authority

- “Extra work as used in connection with a building contract means work arising outside of and entirely independent of the contract—something not required in its performance, not contemplated by the parties, and not controlled by the contract.” (*C.F. Bolster Co. v. J.C. Boesflug Constr. Co.* (1959) 167 Cal.App.2d 143, 151 [334 P.2d 247].)

- “Where the extra work and materials furnished are of the same character as the work and materials named in the contract, the general rule is that they are to be paid for according to the schedule of prices fixed by the contract.” (*Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council* (1954) 128 Cal.App.2d 676, 684 [276 P.2d 52].)
- “Where the extras are of a different character from the work called for in the contract and no price is agreed on for extra work, their reasonable value may be recovered.” (*C.F. Bolster Co., supra*, 167 Cal.App.2d at p. 151.)
- “What *Coleman* [*Coleman Engineering Co. v. North American Aviation, Inc.* (1966) 65 Cal.2d 396 [55 Cal. Rptr. 1, 420 P.2d 713]] does not expressly address is whether a contractor faced with a substantial change in its originally contracted scope of work, who is unable to successfully negotiate a price for that additional work, may elect to continue to work and reserve its right to subsequently obtain a judicial determination as to the value of the changes. The trial court concluded that it may and we agree. So long as the other contracting party continues to demand performance of the increased scope of work, and in the absence of any conflicting provision of the contract, the contractor may continue to work after unsuccessful negotiations and subsequently recover the value of that work. To hold otherwise would compel a contractor to walk off the job in the face of what it believes to be major changes in the scope of work required of it, with significant consequences if its judgment is later proven wrong, or alternatively forfeit any right to seek compensation for that work, regardless of the extent of the additional burdens imposed. . . . The interpretation urged by [defendant] is also impractical and economically inefficient. Construction projects pose complex time management challenges, requiring multiple contractors and subcontractors to coordinate their efforts as numerous design revisions and change orders inevitably arise. To complete these projects efficiently, the parties must be able to continue working despite contract disputes with reasonable assurances of the ability to ultimately obtain a fair resolution of those disputes. (*Ted Jacob Engineering Group, Inc. v. The Ratcliff Architects* (2010) 187 Cal.App.4th 945, 966 [-- Cal.Rptr.3d --].)

Secondary Sources

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.38 et seq.

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, § 9.66 et seq.

1 Stein, Construction Law, Ch. 41, *Modification and Termination of Construction Contracts*, § 41.06 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 440, *Construction Contract Remedies*, § 440.14 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.15, 104.215

(Matthew Bender)

15 California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts*, § 30D.14
(Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.40 (Matthew Bender)

1 Bruner & O'Connor on Construction Law (Thompson Reuters West 2002) Ch. 4, *Contract
"Changes" and "Extras"*, §§4:23 and 4:41

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 13, *Everything
You Ever Wanted to Know About Extra Work and the Changes Clause*

4521. Owner's Claim That Contract Procedures Regarding Change Orders Were Not Followed

The contract between the parties provided for certain procedures that had to be followed if [name of plaintiff] wanted to be paid for changed or additional work that was not required by the contract. These procedures are called “change-order requirements.” [The change-order requirements of the contract provide as follows: [specify].]

[Name of plaintiff] seeks additional compensation beyond that provided for in the contract for [specify, e.g., fill and grading] because [specify, e.g., the soil conditions at the project site were not as represented]. [Name of defendant] claims that [name of plaintiff] failed to comply with the contract's change-order requirements, and that therefore [he/she/it] is not entitled to payment for the changed or additional work that [he/she/it] performed.

To obtain additional compensation, [name of plaintiff] must prove that [he/she/it] [followed/was excused from having to follow] the change-order requirements.

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Directions for Use

This instruction should be given if the owner claims that the contract required the contractor to request a change order for any claimed changed or additional work before performing the work as a condition precedent to being permitted to assert a claim for additional compensation. It is an adaptation of CACI No. 321, *Existence of Condition Precedent Disputed*, and CACI No. 322, *Occurrence of Agreed Condition Precedent*.

The owner's claim for strict compliance with the contract's change-order procedures is potentially subject to several recognized defenses, including waiver (see CACI No. 4522, *Waiver of Written Approval or Notice Requirements for Changed or Additional Work*), estoppel, and oral modification (see CACI No. 313, *Modification*; Civ. Code, § 1698; *Girard v. Bell* (1981) 125 Cal.App.3d 772, 785 [178 Cal.Rptr. 406].) If one of these defenses is asserted, select “was excused from having to follow” in the last paragraph and give the appropriate instruction on the excuse from performance that is at issue.

Sources and Authority

- Civil Code section 1698 provides:
 - (a) A contract in writing may be modified by a contract in writing.
 - (b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.

- (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (section 1624) is required to be satisfied if the as contact modified is within its provisions;
- (d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.
- “California courts generally have upheld the necessity of compliance with contractual provisions regarding written ‘change orders’ ”. (*Weeshoff Constr. Co. v. Los Angeles County Flood Control Dist.* (1979) 88 Cal.App.3d 579, 589 [152 Cal.Rptr. 19].)
 - “Compliance with contractual provisions for written orders is indispensable in order to recover for alleged extra work.” (*Acoustics, Inc. v. Trepte Construction* (1971) 14 Cal.App.3d 887, 912 [92 Cal.Rptr. 723].)
 - “It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance. Similarly, where defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired.” (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524], internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 155

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.44

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, § 9.68

1 Stein, Construction Law, Ch. 3, *Construction and Design Contracts*, § 3.05 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.15 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.40 (Matthew Bender)

15 California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts*, § 30D.14 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch.15, *Attacking or Defending Existence of Contract--Failure to Comply With Applicable Formalities*, 15.25

1 Bruner & O'Connor on Construction Law (Thompson Reuters West 2002) Ch. 4, *Contract "Changes" and "Extras"*, §§4:35-47

Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 13, *Everything You Ever Wanted to Know About Extra Work and the Changes Clause*, pp. 100–103

4522. Waiver of Written Approval or Notice Requirements for Changed or Additional Work

The contract between the parties required [name of plaintiff] [to obtain [name of defendant]’s written approval/to give written notice to [name of defendant]] in order to be paid for changed or additional work that [he/she/it] performed.

[Name of defendant] claims that [name of plaintiff] failed to comply with the contract’s [written approval/ notice] requirements, and that therefore [name of plaintiff] is not entitled to payment for the changed or additional work that [he/she/it] performed. [Name of plaintiff] claims that [he/she/it] was not required to comply with the contract’s [written approval/notice] requirement because [name of defendant] gave up [his/her/its] right to insist on [written approval/ notice]. Giving up a contract right is called a “waiver.”

To succeed on this waiver claim, [name of plaintiff] must prove [by clear and convincing evidence] that [name of defendant] freely and knowingly gave up [his/her/its] right to require [name of plaintiff] to follow the contract’s [written approval/notice] requirements.

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

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Directions for Use

This instruction is a variation of CACI No. 336, *Affirmative Defense—Waiver*. Use of this instruction may be limited to private contract disputes. (See *Katsura v. City of San Buenaventura* (2007) 155 Cal.App.4th 104, 111 [65 Cal.Rptr.3d 762]; cf. *Weeshoff Constr. Co. v. Los Angeles County Flood Control Dist.* (1979) 88 Cal.App.3d 579, 589 [152 Cal.Rptr. 19] [public agency may waive written change order requirements]; see also *City Street Improv. Co. v. Kroh* (1910) 158 Cal. 308, 322–326 [110 P. 933].)

When a contractor asserts a claim for compensation for changed or additional work (see CACI No. 4520, *Contractor’s Claim for Changed or Extra Work*), the owner may assert that the contractor is not entitled to payment because it failed to obtain the owner’s written approval or failed to give written notice before performing the changed or additional work. (See CACI No. 4521, *Owner’s Claim That Contract Procedures Regarding Change Orders Were Not Followed*.) The contractor is entitled to counter this defense by showing that the owner expressly or impliedly waived the contract’s requirements.

The general rule of contract law is that waiver must be proved by clear and convincing evidence. (*Ukiah v. Fones* (1966) 64 Cal.2d 104, 107–108 [48 Cal.Rptr. 865, 410 P.2d 369].) Some construction law cases, however, have not mentioned this requirement, though there was no discussion of the burden of proof. (See *Healy v. Brewster* (1967) 251 Cal.App.2d 541, 552 [59 Cal.Rptr. 752]; *Howard J. White, Inc. v. Varian Associates* (1960) 178 Cal.App.2d 348, 353–355 [2 Cal.Rptr. 871].) If the clear-and-convincing-evidence requirement is included, also give

CACI No. 201, *More Likely True—Clear and Convincing Proof*.

Sources and Authority

- Civil Code section 1698 provides:
 - (a) A contract in writing may be modified by a contract in writing.
 - (b) A contract in writing may be modified by an oral agreement to the extent that the oral agreement is executed by the parties.
 - (c) Unless the contract otherwise expressly provides, a contract in writing may be modified by an oral agreement supported by new consideration. The statute of frauds (Section 1624) is required to be satisfied if the contract as modified is within its provisions.
 - (d) Nothing in this section precludes in an appropriate case the application of rules of law concerning estoppel, oral novation and substitution of a new agreement, rescission of a written contract by an oral agreement, waiver of a provision of a written contract, or oral independent collateral contracts.
- “[W]aiver is the intentional relinquishment of a known right after knowledge of the facts.’ ... The burden ... is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and ‘doubtful cases will be decided against a waiver.’ ... The waiver may be either express, based on the words of the waiving party, or implied, based on conduct indicating an intent to relinquish the right.” (*Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 31 [44 Cal.Rptr.2d 370, 900 P.2d 619], internal citations omitted.)
- Business and Professions Code section 7159.6, applicable to “home improvement contractors” as defined in Business and Professions Code section 7150.1, provides:
 - (a) An extra work or change order is not enforceable against a buyer unless the change order sets forth all of the following:
 - (1) The scope of work encompassed by the order.
 - (2) The amount to be added or subtracted from the contract.
 - (3) The effect the order will make in the progress payments or the completion date.
 - (b) The buyer may not require a contractor to perform extra or change-order work without providing written authorization.
 - (c) Failure to comply with the requirements of this section does not preclude the recovery of compensation for work performed based upon legal or equitable remedies designed to

prevent unjust enrichment.

(d) This section shall become operative on January 1, 2006.

- “It is settled law that the parties may by their conduct waive the requirement of a written contract that no extra work shall be done except upon written order. ... [¶¶] ‘Waiver may be shown by conduct, and it may be the result of an act which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished.’ ” (*Howard J. White, Inc. v. Varian Associates* (1960) 178 Cal.App.2d 348, 353–355 [2 Cal.Rptr. 871].)
- “Where the terms of a written contract require that extra work be approved in writing, such provision may be altered or waived by an executed oral modification of the contract.” (*Healy v. Brewster* (1967) 251 Cal.App.2d 541, 552 [59 Cal.Rptr. 752], internal citations omitted.)
- “[Defendant] places reliance on the provision of the subcontract which provides that any work involving extra compensation shall not be proceeded with unless written authority is given by [defendant]. But under section 1698 of the Civil Code, an executed oral agreement may alter an agreement in writing, even though, as here, the original contract provides that extra work must be approved in writing. The oral request for and approval of extra work by [defendant] was, when fully performed, an oral modification of the written June 8th subcontract. ... [¶] Whether a written contract has been modified by an executed oral agreement is a question of fact, and the finding, in the instant case, is supported by substantial evidence. ... [¶] Defendant cannot be heard to say that a written order was not first obtained as required under the subcontract. [Defendant] by its acts and conduct waived and is estopped to rely upon the subcontract provision requiring its prior written approval before proceeding with work involving extra compensation.” (*MacIsaac & Menke Co. v. Cardox Corp.* (1961) 193 Cal.App.2d 661, 669–670 [14 Cal.Rptr. 523], internal citations omitted.)
- “The written contract provided that the defendant should not be charged for ‘extras’ unless ordered in writing. Upon this basis defendant contends that recovery for the ‘extras’ furnished by plaintiff is barred. The provision in a building contract that an owner may be charged only for ‘extras’ which are ordered in writing may be waived or modified by an executed oral agreement. As a consequence, recovery by the contractor for the reasonable value of ‘extras’ has been upheld where they have been furnished at the request of the owner, became a part of the construction work generally described in the building contract, and are accepted by him, even though the request therefor was oral and the building contract provided that he should be chargeable only for such ‘extras’ as were requested in writing.” (*1st Olympic Corp. v. Hawryluk* (1960) 185 Cal.App.2d 832, 841 [8 Cal.Rptr. 728], internal citations omitted.)
- “Defendants concede that the labor for which payment is sought was actually performed and that the backfill was supplied. They accept the finding that the charges were reasonable, and the record discloses that the benefits of the labor and material have accrued to the premises. Defendants rest their contentions on the provision of the contract requiring written change

orders. The parties may, by their conduct, waive such a provision with the result that the subcontractor does extra work without a written order. If the circumstances indicate that the parties intended to waive the provision, the subcontractor will be protected.” (*Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council* (1954) 128 Cal.App.2d 676, 682–683 [276 P.2d 52], internal citations omitted.)

- “The record shows that extras were ordered and approved by [cross-defendant] in the amount of \$8,097.50. Under the law this amounted to a modification of the written contract. [Cross-defendant] places great reliance on the provision of the contract which provides that alterations must be in writing, and points out here that he only approved one alteration in writing. But under section 1698 of the Civil Code, an executed oral agreement may alter an agreement in writing, even though, as here, the original contract provides that all changes must be approved in writing. This is so because the executed oral agreement may alter or modify that provision of the contract as well as other portions.” (*Miller v. Brown* (1955) 136 Cal.App.2d 763, 775 [289 P.2d 572], internal citation omitted.)
- “The evidence showed that the extra work on the building was done with the knowledge and consent of defendant and his agent, and that they waived the written stipulation that a separate written estimate of extra work should be submitted, by orally agreeing to and countenancing the work without written estimates. Had it not been for defendant's consent thus given, the work would not have been thus done. He will not now be permitted to repudiate work done in the manner that he consented to, on any ground that it was not done in accordance with a previous written agreement.” (*Wyman v. Hooker* (1905) 2 Cal.App. 36, 41 [83 P. 79].)
- “California courts generally have upheld the necessity of compliance with contractual provisions regarding written ‘change orders.’ ... However, California decisions have also established that particular circumstances may provide waivers of written ‘change order’ requirements. If the parties, by their conduct, clearly assent to a change or addition to the contractor's required performance, a written ‘change order’ requirement may be waived.” (*Weeshoff Constr. Co.*, *supra*, 88 Cal.App.3d at p. 589, internal citations omitted.)
- “In addition to being factually inapposite, the continuing viability of *Weeshoff* is questionable. In pronouncing that ‘California decisions have also established that particular circumstances may provide waivers of written “change order” requirements,’ and ‘[i]f the parties, by their conduct, clearly assent to a change or addition to the contractor's required performance, a written “change order” requirement may be waived,’ the court cited cases involving private parties, not public agencies Since its publication 28 years ago, no case has cited *Weeshoff* for this point. This is understandable as it is contrary to the great weight of authority, cited above, to the contrary.” (*Katsura*, *supra*, 155 Cal.App.4th at p. 111, internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 969

- 1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, §§ 5.44–5.47
- 2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, § 9.69
- 1 Stein, Construction Law, Ch. 3, *Construction and Design Contracts*, & 3.02 (Matthew Bender)
- 10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.15 (Matthew Bender)
- 5 California Points and Authorities, Ch. 50, *Contracts*, § 50.522 et seq. (Matthew Bender)
- 15 California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts*, § 30D.14 (Matthew Bender)
- 1 Bruner & O’Connor on Construction Law (Thompson Reuters West 2002) Ch. 4, *Contract “Changes” and “Extras”*, §§4:39-40
- Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 13, *Everything You Ever Wanted to Know About Extra Work and the Changes Clause*, pp. 103–106
- Kamine, Public Works Construction Manual (BNI Publications, Inc. 1996) Ch. 16, *Written Extra Work Order Gotcha*

4523. Contractor’s Claim for Additional Compensation—Abandonment of Contract

The contract between the parties provided for certain procedures to be followed if [name of plaintiff] wanted to be paid for changed or additional work that was not initially required by the contract. These procedures are called “change-order requirements.”

[Name of plaintiff] claims that the [name of defendant] required many changes and that the parties consistently ignored the contract’s change-order requirements. Therefore, [name of plaintiff] claims that the contract was abandoned and that the change-order requirements no longer applied.

To establish this claim, [name of plaintiff] must prove the following:

1. That the parties through their conduct consistently disregarded the contract’s change-order requirements; and
 2. That the scope of work under the original contract had been altered by the changes so much that the final project was significantly different from the original project.
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Directions for Use

This instruction is a contractor’s response if the owner asserts that the contractor is not entitled to additional compensation for changed or additional work. (See CACI No. 4521, *Owner’s Claim That Contract Procedures Regarding Change Orders Were Not Followed*.) It should be given if the contractor claims that through their conduct, the parties acted in a manner that indicated that they had entirely abandoned their original contract.

For instructions on damages after it has been established that the contract was abandoned, see CACI No. 4541, *Contractor’s Damages for Breach of Construction Contract—Change Orders/Extra Work—Total Cost Recovery*, and CACI No. 4542, *Contractor’s Damages for Abandoned Construction Contract—Quantum Meruit Recovery*.

This instruction may not be used against a public entity. A contractor may not claim that a public entity has abandoned the applicable contract change order procedures on a project subject to competitive bidding in such a way as to increase the contract price because doing so would violate the public policy regarding competitive bidding. (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 239 [115 Cal.Rptr.2d 900, 38 P.3d 1120].)

Sources and Authority

- “[T]his court has not generally allowed quantum meruit recovery for extra work performed beyond the contract requirements.” (*Amelco Electric, supra*, 27 Cal.4th at p.

234.)

- “[W]hen an owner imposes upon the contractor an excessive number of changes such that it can fairly be said that the scope of the work under the original contract has been altered, an abandonment of contract properly may be found.” (*C. Norman Peterson Co. v. Container Corp. of Am.* (1985) 172 Cal.App.3d 628, 640 [218 Cal.Rptr. 592].)
- “Abandonment of a contract may be implied from the acts of the parties. Abandonment of the contract can occur in instances where the scope of the work when undertaken greatly exceeds that called for under the contract. . . . In the instant case the parties consistently ignored the procedures provided by the contract for the doing of extra work.” (*Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 156 [92 Cal Rptr. 120], internal citation omitted.)
- “Under the abandonment doctrine, once the parties cease to follow the contract’s change order process, and the final project has become materially different from the project contracted for, the entire contract—including its notice, documentation, changes and cost provisions—is deemed inapplicable or abandoned, and the plaintiff may recover the reasonable value for all of its work. Were we to conclude such a theory applied in the public works context, the notion of competitive bidding would become meaningless.” (*Amelco Electric, supra*, 27 Cal.4th at p. 239.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 1000

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.56

2 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 9, *Handling Disputes During Construction*, §§ 9.81–9.87

1 Stein, Construction Law, Ch. 3, *Construction and Design Contracts*, § 3.10 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.15, 104.230 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.470 (Matthew Bender)

1 Bruner & O’Connor on Construction Law (Thompson Reuters West 2002) Ch. 4, *Contract “Changes” and “Extras”*, §4:14

4524. Contractor's Claim for Compensation Due Under Contract—Substantial Performance

[Name of defendant] claims that *[name of plaintiff]* did not fully perform all of the things that *[he/she/it]* was required to do under the *[terms of the contract/plans and specifications]*, and therefore *[name of defendant]* did not have to *[specify owner's obligations under the contract, e.g., pay the contract balance]*. *[Name of plaintiff]* claims that *[he/she/it]* did substantially all of the things required of *[him/her/it]* under the contract.

To succeed, *[name of plaintiff]* must prove all of the following:

1. That *[name of plaintiff]* made a good-faith effort to comply with the terms of the contract and did not willfully depart from them;
2. That *[name of plaintiff]* did not omit any essential requirement in the contract; and
3. That the *[name of defendant]* received essentially what the contract called for because *[name of plaintiff]*'s failures, if any, were so trivial that they could have been easily fixed.

If you find that *[name of plaintiff]* substantially performed the contract, the cost of completing unfinished work must be deducted from the contract price.

New December 2010

Directions for Use

This instruction is a variation of CACI No. 312, *Substantial Performance*. It should be used if the issue is whether the contractor performed all of the requirements of the construction contract, including the plans and specifications. If the owner withholds some or all of the contract price because it claims that the contractor did not perform the work completely or correctly, the contractor may assert that it “substantially performed.”

Sources and Authority

- “ ‘At common law, recovery under a contract for work done was dependent upon complete performance, although hardship might be avoided by permitting recovery in *quantum meruit*. The prevailing doctrine today, which finds its application chiefly in building contracts, is that *substantial performance* is sufficient, and justifies an action on the contract, although the other party is entitled to a reduction in the amount called for by the contract, to compensate for the defects. What constitutes substantial performance is a question of fact, but it is essential that there be no wilful departure from the terms of the contract, and that the defects be such as may be easily remedied or compensated, so that

the promisee may get practically what the contract calls for.’ ” (*Posner v. Grunwald-Marx, Inc.* (1961) 56 Cal.2d 169, 186–187 [14 Cal.Rptr. 297, 363 P.2d 313], original italics, internal citation omitted.)

- “ ‘Substantial performance means that there has been no willful departure from the terms of the contract, and no omission of any of its essential parts, and that the contractor has in good faith performed all of its substantive terms. If so, he will not be held to have forfeited his right to a recovery by reason of trivial defects or imperfections in the work performed.’ ” (*Connell v. Higgins* (1915) 170 Cal. 541, 556 [150 P. 769], internal citation omitted.)
- “ ‘What constitutes ‘substantial performance’ ‘is always a question of fact, a matter of degree, a question that must be determined relatively to all the other complex factors that exist in every instance.’ ” (*Tolstoy Constr. Co. v. Minter* (1978) 78 Cal.App.3d 665, 672 [143 Cal.Rptr. 570], internal citation omitted.)
- “ ‘Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact.’ ” (*Connell, supra*, 170 Cal. at pp. 556–557, internal citation omitted.)
- “ ‘The general rule on the subject of [contractual] performance is that “[w]here a person agrees to do a thing for another for a specified sum of money to be paid on full performance, he is not entitled to any part of the sum until he has himself done the thing he agreed to do, unless full performance has been excused, prevented, or delayed by the act of the other party, or by operation of law, or by the act of God or the public enemy.” [Citation.] ... [I]t is settled, especially in the case of building contracts where the owner has taken possession of the building and is enjoying the fruits of the contractor's work in the performance of the contract, that if there has been a substantial performance thereof by the contractor in good faith, where the failure to make full performance can be compensated in damages to be deducted from the price or allowed as a counterclaim, and the omissions and deviations were not willful or fraudulent and do not substantially affect the usefulness of the building for the purposes for which it was intended, the contractor may, in an action upon the contract, recover the amount unpaid of his contract price, less the amount allowed as damages for the failure in strict performance. [Citations.]’ ” (*Murray's Iron Works, Inc. v. Boyce* (2008) 158 Cal.App.4th 1279, 1291-1292 [71 Cal.Rptr.3d 317].)
- “ ‘[T]here is a substantial performance where the variance from the specifications of the contract does not impair the building or structure as a whole, and where after it is erected the building is actually used for the intended purpose, or where the defects can be remedied without great expenditure and without material damage to other parts of the structure, but that the defects must not run through the whole work so that the object of the owner in having the work done in a particular way is not accomplished, or be such that a new contract is not substituted for the original one, nor be so substantial as not to be capable of a remedy and the allowance out of the contract price will not give the owner essentially what he contracted for.’ ” (*Murray's Iron Works, Inc., supra*, 158

Cal.App.4th at p. 1292.)

- “The rule of substantial performance was intended to cover situations where the defects are slight or trivial, or where the imperfections do not affect a substantive part of the work, but it was not intended to cover cases where the departures or deviations from the plans are major, where it takes a major operation to remedy the defects, or where the work as constructed is of no real value.” (*Bause v. Anthony Pools, Inc.* (1962) 205 Cal.App.2d 606, 613 [23 Cal.Rptr. 265].)
- “[A]lthough in a few minor and trivial matters the building did not strictly and technically comply with the terms of the contract, the departure was not willful nor intentional on the part of the defendant, and the defects were capable of being easily remedied to conform to the terms of the contract Thereupon the court concluded that the defendant was entitled to have the contract enforced in his favor, with an abatement . . . on the contract price on account of the defects found to exist” (*Rischar v. Miller* (1920) 182 Cal. 351, 352–353 [188 P. 50].)
- “[The] performance rendered may be held to be less than substantial by reason of the accumulation of many defects, any one of which standing alone would be minor in character.’ ” (*Tolstoy Constr. Co., supra*, 78 Cal.App.3d at p. 673, footnote omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 818-819

1 California Construction Contracts, Defects, and Litigation (Cont.Ed.Bar) Ch. 5, *Private Contracts: Disputes and Remedies*, § 5.99

13 California Forms of Pleadings and Practices, Ch. 140, *Contracts*, § 140.23 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.30, 50.31 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.08[2], 22.16[2], 22.37, 22.69

5 Bruner & O’Connor on Construction Law (Thompson Reuters West 2002) Ch. 18, *Contract Breach & Termination*, §18:12

4530. Owner's Damages for Breach of Construction Contract—Work Does Not Conform to Contract

If you decide that [name of plaintiff] has proved [his/her] claim against [name of defendant] for failure to properly build the [project/describe construction project, e.g., apartment building], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called “damages.”

To recover damages, [name of plaintiff] must prove the reasonable cost of repairing the [project/short term for project, e.g., building] so that it complies with the terms of the contract, including the plans and specifications, agreed to by the parties.

If, however, [name of defendant] proves that the cost of repair is unreasonable in light of the damage to the property and the property's value after repair, then [name of plaintiff] is entitled only to the difference between the value of the [project/short term for project, e.g., remodeling] as it was performed by [name of defendant] and what it would be worth if it had been completed according to the contract, including the plans and specifications, agreed to by the parties. The cost of repair may be unreasonable if the repair would require the destruction of a substantial part of [name of defendant]'s work.

New December 2010

Directions for Use

This instruction should be used when the owner claims that the contractor has breached the construction contract by failing to meet the requirements of the contract or its plans and specifications. If the owner claims that the contractor breached the contract by failing to complete all work required by the contract, see CACI No. 4531, *Owner's Damages for Breach of Construction Contract—Failure to Complete Work*.

The basic measure of damages is the cost of repair to bring the project into compliance with the contract. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev.* (1977) 66 Cal.App.3d 101, 123–124 [135 Cal.Rptr. 802].) However, the contractor may attempt to prove that the cost of repair is unreasonable in light of the damage to the property and the value of the property after repair. (*Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687 [266 Cal.Rptr. 193]; see *Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 366 [330 P.2d 817] [burden of proof on contractor].) If the cost of repair is unreasonable, the measure of damages is the diminution in the value of the property because of the defective work. (*Shell, supra*, 164 Cal.App.2d at pp. 360–361.)

There is no cap, however, at diminution of value. The cost of repair may be awarded even if greater than diminution in value if the owner has a personal reason for wanting to repair and the costs are not unreasonable in light of the damage to the property and the value after repair (*Orndorff, supra*, 217 Cal.App.3d at p. 687.)

For a related instruction on damages for tortious injury to property, see CACI No. 3903F, *Damage to*

Real Property (Economic Damage). For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- Civil Code section 3300 provides: “For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.”
- Civil Code section 3359 provides: “Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.”
- “The available damages for defective construction are limited to the cost of repairing the home, including lost use or relocation expenses, or the diminution in value.” (*Elrich v. Menezes* (1999) 21 Cal.4th 543, 561 [87 Cal.Rptr.2d 886, 981 P.2d 978].)
- “The proper measure of damages for breach of a contract to construct improvements on real property where the work is to be done on plaintiff’s property is ordinarily the reasonable cost to the plaintiff of completing the work and not the difference between the value of the property and its value had the improvements been constructed. A different rule applies, however, where improvements are to be made on property not owned by the injured party. ‘In that event the injured party is unable to complete the work himself and, subject to the restrictions of sections 3300 and 3359 of the Civil Code, the proper measure of damages is the difference in value of the property with and without the promised performance, since that is the contractual benefit of which the injured party is deprived.’ ” (*Glendale Fed. Sav. & Loan Assn.*, *supra*, 66 Cal.App.3d at pp. 123–124 , internal citations omitted.)
- “[E]ven where the repair costs are reasonable in relation to the value of the property, those costs must also be reasonable in relation to the harm caused. Here the trial court’s finding that fill settlement was likely to continue and the [plaintiff]’s appraiser’s opinion the home was worth only \$67,500 in its present condition, suggest the damage sustained was indeed significant. Plainly this is not a case where the tortfeasors’ conduct improved the value of the real property or only diminished it slightly. Rather we believe where, as here, the damage to a home has deprived it of most of its value, an award of substantial repair costs is appropriate.” (*Orndorff*, *supra*, 217 Cal.App.3d at pp. 690–691.)
- “[T]he defendant did not prove, or offer to prove, the other factors of the American Jurisprudence rule, to wit: ‘a substantial part of what has been done must be undone.’ To the contrary, defendant’s expert witness ... testified that it would not be necessary to undo any of the work. ¶¶ As quoted, Professor Corbin argues that the burden is on the defendant to affirmatively and convincingly prove that economic waste would result from the replacement of the omissions and defects. In all fairness this would appear proper as it is the defendant who is seeking to prove a situation whereby he will get equitable relief from a rule of law. The same reasoning would apply as to proof that a substantial part of what has been done must be undone.” (*Shell*, *supra*, 164

Cal.App.2d at p. 366.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 909

2 Stein, Construction Law, Ch. 5B, *Contractor's and Construction Manager's Rights and Duties*, § 5B.01 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.25 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.47 (Matthew Bender)

11 Miller & Starr, California Real Estate (Thomson Reuters West 3d ed.) Ch. 29, *Defective Construction*, § 29:10

6 Bruner & O'Connor on Construction Law (Thompson Reuters West 2002) Ch. 19, *Remedies and Damage Measures*, §§19:57-61

4531. Owner's Damages for Breach of Construction Contract—Failure to Complete Work

If you decide that [name of plaintiff] has proved [his/her/its] claim against [name of defendant] for failure to complete the [project/describe construction project, e.g., kitchen remodeling], you also must decide how much money will reasonably compensate [name of plaintiff] for the harm. This compensation is called “damages.”

To recover damages, [name of plaintiff] must prove the reasonable cost of completing the [project/short term for project, e.g., remodeling] so that it complies with the terms of the contract, including the plans and specifications, agreed to by the parties.

New December 2010

Directions for Use

This instruction should be used when the owner claims that the contractor has breached the construction contract by failing to complete all the work required by the contract. For an instruction for use if the owner claims that the contractor breached the contract by failing to complete the work in conformity with the contract, see CACI No. 4530, *Owner's Damages for Breach of Construction Contract—Work Does Not Conform to Contract*.

The basic measure of damages for failing to complete a construction project is ordinarily the reasonable cost to the owner of completing the work. (*Glendale Fed. Sav. & Loan Assn. v. Marina View Heights Dev. Co.* (1977) 66 Cal.App.3d 101, 123 [135 Cal.Rptr. 802].) With regard to defective or nonconforming work, the contractor may attempt to prove that the cost or repair is unreasonable in light of the damage to the property and the value of the property after repair. If the cost of repair is unreasonable, the measure of damages is the diminution in the value of the property because of the defective work. (*Shell v. Schmidt* (1958) 164 Cal.App.2d 350, 366 [330 P.2d 817]; see also *Orndorff v. Christiana Community Builders* (1990) 217 Cal.App.3d 683, 687 [266 Cal.Rptr. 193] [cost of repair may exceed diminution in value if owner has personal reason for wanting repairs].)

No reported case has been found that applies a reasonableness limitation on the cost of completing a contract, though the Restatement Second of Contracts requires that the cost of completion not be clearly disproportionate to the probable loss in value. (See Rest.2d of Contracts, § 348(2).) The last paragraph of CACI No. 4530 may be adapted to provide for a reasonableness limitation on cost of repair. There may, however, be different concerns regarding the cost of completing a contract as opposed to the cost of repairing construction defects. It might be argued that the owner is entitled to have the work completed as required by the contract, regardless of any unexpected increases in the cost of completion.

For a related instruction on damages for tortious injury to property, see CACI No. 3903F, *Damage to Real Property (Economic Damage)*. For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- Civil Code section 3300 provides: “For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom.”
- Civil Code section 3359 provides: “Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered.”
- “The measure of damages for breach of contract to construct improvements on real property where the work is to be done on plaintiff’s property is the reasonable cost to the plaintiff to finish the work in accordance with the contract.” (*Walker v. Signal Companies, Inc.* (1978) 84 Cal.App.3d 982, 993 [149 Cal.Rptr. 119].)
- “Although the defendants inferentially contend to the contrary, the plaintiff was entitled to recover damages from them for their breach of the contract even though [plaintiff] had not completed the work in question.” (*Fairlane Estates, Inc. v. Carrico Constr. Co.* (1964) 228 Cal.App.2d 65, 72–73 [39 Cal.Rptr. 35].)
- Restatement Second of Contracts, section 348(2) provides: “If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on: (a) the diminution in the market price of the property caused by the breach, or (b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.”

Secondary Sources

3 Construction Law, Ch. 11, *Remedies and Damages*, & 11.02 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.256 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.41 (Matthew Bender)

11 Miller & Starr, California Real Estate (Thomson Reuters West 3d ed.) Ch. 29, *Defective Construction*, § 29:10

6 Bruner & O’Connor on Construction Law (Thompson Reuters West 2002) Ch. 19, *Remedies and Damage Measures*, §19:56

4532. Owner's Damages for Breach of Construction Contract—Liquidated Damages Under Contract for Delay

[Name of plaintiff] claims that [name of defendant] breached the parties' contract by failing to [substantially] complete the [project/describe construction project, e.g., apartment building] by the completion date required by the contract. If you find that [name of plaintiff] has proven this claim, the parties' contract calls for damages in the amount of \$ _____ for each day between [insert contract completion date] and the date on which the project was [substantially] completed. You will be asked to find the date on which the project was [substantially] completed. I will then calculate the amount of damages.

[If you find that [name of plaintiff] granted or should have granted time extensions to [name of defendant], you will be asked to find the number of days of the time extension and add these days to the completion date set forth in the contract. I will then calculate [name of plaintiff]'s total damages.]

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Directions for Use

This instruction should be used when the owner seeks to recover liquidated damages against the contractor for delay in completing the project under a provision of the contract. Include the optional second paragraph if there is a dispute over whether the contractor is entitled to an extension of time. Give CACI 4520, *Contractor's Claim for Changed or Extra Work*, to guide the jury on how to determine if the contractor is entitled to a time extension for extra work. A special instruction may be required to guide the jury on how to determine if the contractor is entitled to a time extension for excusable or compensable delays.

Include "substantially" throughout if there is a dispute of fact as to when the project should be considered as finished. Unless otherwise defined by the contract to mean actual completion or some other measure of completion (see, e.g., *London Guarantee & Acci. Co. v. Las Lomitas School Dist.* (1961) 191 Cal.App.2d 423, 427 [12 Cal.Rptr. 598]), "completion" for the purpose of determining liquidated damages ordinarily is understood to mean "substantial completion." (See *Vrgora v. L.A. Unified Sch. Dist.* (1984) 152 Cal.App.3d 1178, 1186 [200 Cal.Rptr. 130]; see generally *Perini Corp. v. Greate Bay Hotel & Casino, Inc.* (1992) 129 N.J. 479, 500–501, overruled on other grounds in *Tretina v. Fitzpatrick & Assocs.* (1994) 135 N.J. 349, 358 [discussing standard practices in the construction industry].)

There are few or no general principles set forth in California case law as to what may constitute substantial completion. It would seem to be dependent on the unique facts of each case. (See, e.g., *Continental Illinois Nat'l Bank & Trust Co. v. United States* (1952) 121 Ct.Cl. 203, 243–244.) The related doctrine of substantial performance, which allows the contractor to obtain payment for its work even if there are some minor or trivial deviations from the contract requirements, may perhaps be looked to for guidance for when a project is substantially complete for purposes of stopping the running of the clock on liquidated damages. (See CACI No. 4524, *Substantial Performance—Contractor's Claim for*

Compensation Due Under Contract.) But they are separate doctrines. Substantial performance focuses on *what* was done. Substantial completion focuses on *when* it was done. (See *Hill v. Clark* (1908) 7 Cal.App. 609, 612 [95 P. 382] [only substantial performance, not substantial completion, was at issue].)

If the liquidated damages provision is found to be unenforceable because its enforcement would constitute a penalty rather than an approximation of actual damages that are difficult to ascertain, the owner may be entitled to recover its general and special damages, as those damages are defined in CACI No. 350, *Introduction to Contract Damages*, and CACI No. 351, *Special Damages*.

Sources and Authority

- Civil Code section 1671(b) provides: “Except as provided in subdivision (c), a provision in a contract liquidating the damages for the breach of the contract is valid unless the party seeking to invalidate the provision establishes that the provision was unreasonable under the circumstances existing at the time the contract was made.”
- Public Contract Code section 10226 provides: “Every contract shall contain a provision in regard to the time when the whole or any specified portion of the work contemplated shall be completed, and shall provide that for each day completion is delayed beyond the specified time, the contractor shall forfeit and pay to the state a specified sum of money, to be deducted from any payments due or to become due to the contractor. The sum so specified is valid as liquidated damages unless manifestly unreasonable under the circumstances existing at the time the contract was made. A contract for a road project, flood control project, or project involving facilities of the State Water Resources Development System may also provide for the payment of extra compensation to the contractor, as a bonus for completion prior to the specified time, the provision, if used, to be included in the specifications and to clearly set forth the basis for the payment.”
- “Liquidated damage clauses in public contracts are frequently validated precisely because delay in the completion of projects such as highways ‘would cause incalculable inconvenience and damage to the public.’ ... Thus, it is accepted that damage in the nature of inconvenience and loss of use by the public are real but often, as a matter of law, not measurable.” (*Westinghouse Electric Corp. v. County of Los Angeles* (1982) 129 Cal.App.3d 771, 782–783 [181 Cal.Rptr. 332], internal citations omitted.)
- “[I]n the absence of a contractual provision for extensions of time, the rule generally followed is that an owner is precluded from obtaining liquidated damages not only for late completion caused entirely by him but also for a delay to which he has contributed, even though the contractor has caused some or most of the delay. ... Acceptance of the reasoning urged by defendant would mean that, solely because there has been noncompliance with an extension-of-time provision, the position of an owner could be completely changed so that he could withhold liquidated damages for all of the period of late completion even though he alone caused the delay.” (*Peter Kiewit Sons' Co. v. Pasadena City Junior College Dist.* (1963) 59 Cal.2d 241, 245 [28 Cal.Rptr. 714, 379 P.2d 18], internal citation omitted.)
- “[A]cceptance may not be arbitrarily delayed to the prejudice of a contractor, and work should be

viewed as accepted when it is finished even though a governmental body specifies a later date.” (*Peter Kiewit Sons’ Co.*, *supra*, 59 Cal.2d at p. 246.)

- “Lacking any authority, appellant asserts ‘that something is wrong here’ and ‘[it] does not make sense to compensate the owner for the loss of use of something that it is actually using.’ For all practical purposes, we perceive appellant as attempting to invoke the equitable doctrine of unjust enrichment and therein seek a setoff. The No. 1 problem with the applicability of said theory is that although [defendant] may have benefitted by using the facility, the fact that the facility had not been fully or even substantially completed suggests that the enrichment obtained is de minimis or is at best undefinable.” (*Vrgora*, *supra*, 152 Cal.App.3d at p. 1186, footnote omitted.)
- “Was the contract completed on September 5, 1953? The trial court did not find that the building was completed on that date. It found that it was ‘substantially completed.’ On September 8, 1953, the uncontradicted evidence shows that some of the class rooms were insufficiently complete to be used; the plumbing was not complete; and the fencing of the playground had not been started. There were workmen in the building and there was grading equipment in the yard area. The salary of the inspector for the school district, who was required by state law, had to be paid until October 22, 1953. The inspector's report made on September 1, 1953, showed that the work was 94 per cent complete as of that time. His report made on September 16, 1953 showed the work to be 96 per cent complete. On September 16 there was admittedly about \$ 9,800 worth of work yet to be done. The contract called for a complete building and not a substantially complete one. [¶] The fact that the school district occupied portions of the building on September 8, 1953, does not change the situation. [The contract] provides that occupancy of any portion of the building ‘ . . . shall not constitute an acceptance of any part of the work, unless so stated in writing by the Board of the District.’ The board of the district did not so state.” (*London Guarantee & Acci. Co.*, *supra*, 191 Cal.App.2d at pp. 426-427.)
- “In *London Guar. & Acc. Co. v. Las Lomitas School Dist.*, *supra*, 191 Cal.App.2d 423, the appellate court reviewed the efficacy of an ‘adjusted’ liquidated damages award by the trial court on the basis of the date of ‘substantial completion’ as opposed to ‘actual completion.’ . . . The appellate court reversed the trial court's judgment, finding no validity to the argument employed at trial, that once the contractor had substantially performed his obligation (96 percent completion of the building), the school district was not entitled to liquidated damages. In effect, the court held that since the parties contracted for ‘actual’ performance in the form of a ‘ . . . complete building and not a substantially complete one’, liquidated damages were appropriate.” (*Vrgora*, *supra*, 152 Cal.App.3d at p. 1187.)
- “We perceive no error in the action of the court sustaining the objection to a question asked defendant, as follows: ‘Can you state to the court how much and to what extent you have been injured by the failure of the plaintiff to complete this work; the question is, can you tell?’ The contract provided for a fixed sum as liquidated damages for delay in the completion of the work beyond the time specified in the contract. No issue was presented as to the amount of the liquidated damages, or claim on account thereof, and the question objected to could have no reference thereto; and the court finding that the contract was substantially completed, there was no room for inquiry as to the damages, and no prejudice could result to defendant from such ruling.” (*Hill*, *supra*, 7 Cal.App. at p. 612.)

- “Finding 51 shows that the work ... was 99.6% complete on December 30, as of which day liquidated damages began, and that the only work remaining to be done had to do with the boiler house equipment, and certain ‘punch list items’ which are usually minor adjustments which recur for an indefinite time after the completion of an extensive building project. The boiler house work would, apparently, not have interfered with the occupancy of the houses by tenants, and tenants in new houses expect to be troubled for a while by adjustments due to tests. Two hundred dollars a day was a severe penalty for so slight an asserted delinquency and our observation of other cases tells us that it is not customary to draw the line so strictly. The refusal, which we hold unjustified, of the Government to accept the project on December 30, 1936, subjected the contractor, not only to the liquidated damages discussed above, but to continued expenditures for coal, light, power and fire insurance in the amount of \$2,454.75. The plaintiff may recover this amount. (*Continental Illinois Nat'l Bank & Trust Co.*, *supra*, 121 Ct.Cl. at pp. 243–244.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 503 et seq.

3 Construction Law, Ch. 11, *Remedies and Damages*, § 11.02 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 434, *Government Contracts*, § 434.41 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, §§ 104.27, 104.226 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.211 (Matthew Bender)

15 California Legal Forms, Ch. 30D, *Construction Contracts and Subcontracts*, § 30D.224 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.243 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.05[3]

10 Miller & Starr, California Real Estate (Thomson Reuters West 3d ed.) Ch. 27, *Construction Law and Contracting*, § 27:81

5 Bruner & O'Connor on Construction Law (Thomson Reuters West 2002) Ch. 15, *Risks of Construction Time: Delay, Suspension, Acceleration and Disruption*, § 15:15

5 Bruner & O'Connor on Construction Law (Thompson Reuters West 2002) Ch. 15, *Risk of Time*, §§ 15:15, 15:82

Gibbs & Hunt, California Construction Law (Aspen Pub. 16th ed. 1999) Ch. 5, *Breach of Contract by*

Contractor, § 5.02

4540. Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work

[Name of plaintiff] contends that [name of defendant] increased or changed the scope of the [project/describe construction project, e.g., apartment building] beyond what was required by the parties' contract. If you find that [name of plaintiff] is entitled to compensation for this extra work, you may award damages to [name of plaintiff] based on [the agreed price provided in the parties' contract for/the reasonable value of] the extra work.

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner for extra work that the owner required and that was not provided for in the contract. In the last sentence, give the first alternative if there was evidence that the parties agreed, in writing or otherwise, on compensation for the extra work. Otherwise give the second option for the reasonable value of the work.

Under very limited circumstances, the contractor may obtain a “total-cost” recovery for extra work, meaning that instead of proving the costs associated with all of the changes, the contractor computes the total cost of the project and subtracts the contract price. For an instruction on total-cost recovery, see CACI No. 4541, *Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work—Total Cost Recovery*.

Under other circumstances, the contractor may attempt to establish that the contract was mutually abandoned and that the recovery should be in quantum meruit. For an instruction on damages on abandonment, see CACI No. 4542, *Contractor's Damages for Abandoned Construction Contract—Quantum Meruit Recovery*.

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- “Extra work as used in connection with a building contract means work arising outside of and entirely independent of the contract—something not required in its performance, not contemplated by the parties, and not controlled by the contract. Extra work may be performed by the contractor for the owner or by the subcontractor for the general contractor. Where the extras are of a different character from the work called for in the contract and no price is agreed on for extra work, their reasonable value may be recovered.” (*C. F. Bolster Co. v. J. C. Boespflug Constr. Co.* (1959) 167 Cal.App.2d 143, 151 [334 P.2d 247], internal citations omitted.)
- “Whether a contractor is entitled to additional compensation for extra work depends generally on the construction of the particular contract and whether it is included in the contract price. The construction placed on the contract by the parties is of great weight, and where they agree on

additional compensation for certain work it precludes a claim that the original contract requires the performance of such work.” (*Frank T. Hickey, Inc. v. Los Angeles Jewish Community Council* (1954) 128 Cal.App.2d 676, 683 [276 P.2d 52].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 910

1 Stein, Construction Law, Ch. 4, *Modification and Termination of Construction Contracts*, § 4.03 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 440, *Construction Contract Remedies*, § 440.14 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.15 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.40 (Matthew Bender)

1 Bruner & O’Connor on Construction Law (Thompson Reuters West 2002) Ch. 4, *Contract “Changes” and “Extras”*, §4:16

**4541. Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work—
Total Cost Recovery**

[Name of plaintiff] claims that [name of defendant] breached the parties' contract by increasing or changing the scope of the [project/describe construction project, e.g., apartment building] beyond what was required by the contract. [Name of plaintiff], therefore, seeks to recover the total cost of all of [his/her/its] work on the [project/e.g., apartment building].

In order to recover the total cost of all of [his/her/its] work, [name of plaintiff] must prove all of the following:

- 1. That the scope of work under the original contract had been altered by the changes so much that the final project was significantly different from the original project;**
- 2. That because of the scope of the changes, it is not practical to prove the actual additional costs caused by each change demanded by [name of defendant];**
- 3. That [name of plaintiff]'s original bid that was accepted by [name of defendant] was reasonable;**
- 4. That [name of plaintiff]'s actual costs were reasonable; and**
- 5. That [name of plaintiff] was not responsible for incurring the additional costs.**

If you find that [name of plaintiff] has established all of the above, determine [name of plaintiff]'s damages by subtracting the contract price from the total cost of [name of plaintiff]'s performance of the work.

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner if the contractor claims that changes demanded by the owner were such that damages must be measured by computing the total cost to the contractor to complete the contract minus the contract price. (Cf. CACI No. 4540, *Contractor's Damages for Breach of Construction Contract—Change Orders/Extra Work*.) The difference is then considered to be the costs associated with all of the changes. For an instruction on quantum meruit recovery under the related but different theory of contract abandonment, see CACI No. 4542, *Contractor's Damages for Abandoned Construction Contract—Quantum Meruit Recovery*.

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- “Under [the total-cost] method, damages are determined by ‘subtracting the contract amount from the total cost of performance.’ ” (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 243 [115 Cal.Rptr.2d 900, 38 P.3d 1130].)
- “Although the total cost theory of proving damages in a contract case is not generally favored, under proper safeguards and where there is no better proof it has been upheld.” (*C. Norman Peterson Co. v. Container Corp. of Am.* (1985) 172 Cal.App.3d 628, 646 [218 Cal.Rptr. 592].)
- “This [total-cost recovery] method may be used only after the trial court determines the following can be shown: (1) it is impractical for the contractor to prove actual losses directly; (2) the contractor’s bid was reasonable; (3) its actual costs were reasonable; and (4) it was not responsible for the added costs. If some of the contractor’s costs were unreasonable or caused by its own errors or omissions, then those costs are subtracted from the damages to arrive at a modified total cost. ‘If prima facie evidence under this test is established, the trier of fact then applies the same test to determine the amount of total cost or modified total cost damages to which the plaintiff is entitled.’ ” (*Dillingham-Ray Wilson v. City of Los Angeles* (2010) 182 Cal.App.4th 1396, 1408 [106 Cal.Rptr.3d 691], internal citations omitted.)
- “ ‘The total cost method is not a substitute for proof of causation,’ and ‘should be applied only to the smallest affected portion of the contractual relationship that can be clearly identified.’ As the United States Court of Appeals for the Federal Circuit has stated, ‘Clearly, the “actual cost method” is preferred because it provides the court ... with documented underlying expenses, ensuring that the final amount of the equitable adjustment will be just that—equitable—and not a windfall for either the government or the contractor.’ ” (*Amelco Electric, supra*, 27 Cal.4th at p. 244, internal citations omitted.)
- “We conclude [plaintiff] failed to adduce substantial evidence to warrant instructing the jury on the four-part total cost theory of damages. In particular, [plaintiff] failed to adduce evidence to satisfy at least the fourth element of the four-part test, i.e., that it was not responsible for the added expenses. A corollary of this element of the test is that the contractor must demonstrate the defendant, and not anyone else, is responsible for the additional cost.” (*Amelco Electric, supra*, 27 Cal.4th at p. 245.)
- “[W]e do not determine whether total cost damages are ever appropriate in a breach of public contract case” (*Amelco Electric, supra*, 27 Cal.4th at p. 242.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 910

3 Stein, Construction Law, Ch. 11, *Remedies and Damages*, § 11.02 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 440, *Construction Contract Remedies*, § 440.14 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.14 (Matthew Bender)

6 Bruner & O'Connor on Construction Law (Thompson Reuters West 2002) Ch. 19, *Remedies and Damage Measures*, §§19:39, 19:94–19.95

4542. Contractor’s Damages for Abandoned Construction Contract—Quantum Meruit Recovery

[Name of plaintiff] claims that the parties consistently disregarded the contract’s change-order process and that the final project was significantly different from the original project. If you find that the parties abandoned the contract, [name of plaintiff] is entitled to recover the reasonable value of all of [his/her/its] work on the project rather than the contract price.

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner if the contractor’s claim is that the parties effectively abandoned the contract and that the contractor should therefore receive a quantum meruit measure of damages for the reasonable value of its work. (See CACI No. 4523, *Contractor’s Claim for Additional Compensation—Abandonment of Contract*.)

Contract abandonment cannot be alleged with regard to a public works contract. (*Amelco Electric v. City of Thousand Oaks* (2002) 27 Cal.4th 228, 238–239 [115 Cal.Rptr.2d 900, 38 P.3d 1120].)

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series.

Sources and Authority

- “[O]nce the parties cease to follow the contract’s change order process, and the final project is materially different from the project contracted for, the contract is deemed inapplicable or abandoned and is set aside. The plaintiff may then recover the reasonable costs for all of its work.” (*Amelco Elec.*, *supra*, 27 Cal.4th at p. 238.)
- “The contractor was ... entitled, under the factual circumstances of this case [abandonment], to recover the reasonable value of the work it performed on a quantum meruit basis, without being limited by the original contract amount.” (*C. Norman Peterson Co. v. Container Corp. of Am.* (1985) 172 Cal.App.3d 628, 639 [218 Cal.Rptr. 592].)
- “In the specific context of construction contracts ..., it has been held that when an owner imposes upon the contractor an excessive number of changes such that it can fairly be said that the scope of the work under the original contract has been altered, an abandonment of contract properly may be found. In these cases, the contractor, with the full approval and expectation of the owner, may complete the project. Although the *contract* may be abandoned, the *work* is not.” (*C. Norman Peterson Co.*, *supra*, 172 Cal.App.3d at p. 640, original italics, internal citations omitted.)
- “There was a triable issue of fact as to whether these changes for which plaintiff was seeking compensation were required. Moreover, because of the tremendous number of changes, there was an issue as to whether the contract had been abandoned by the parties and they proceeded apart from the contract. There was evidence that the job was completely redesigned after the contract

was entered into.” (*Daugherty Co. v. Kimberly-Clark Corp.* (1971) 14 Cal.App.3d 151, 156 [92 Cal.Rptr. 120].)

- “[A]bandonment requires a finding that *both* parties intended to disregard the contract, and abandonment may be implied from the acts of the parties.” (*C. Norman Peterson Co., supra*, 172 Cal.App.3d at p. 643, original italics.)
- “ ‘Once the plaintiff has established the amount which he has been induced to expend, the defendant must show that the expenses of the party injured have been extravagant and unnecessary for the purpose of carrying out the contract.’ ” (*C. Norman Peterson Co., supra*, 172 Cal.App.3d at p. 647.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 1000, 1036

3 Stein, Construction Law, Ch. 11, *Remedies and Damages*, & 11.03 (Matthew Bender)

12 California Real Estate Law and Practice, Ch. 440, *Construction Contract Remedies*, § 440.12 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.224 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 9, *Seeking or Opposing Quantum Meruit or Quantum Valebant Recovery in Contract Actions*, 9.05 et seq.

6 Bruner & O’Connor on Construction Law (Thompson Reuters West 2002) Ch. 19, *Remedies and Damage Measures*, §19:39

4543. Contractor's Damages for Breach of Construction Contract—Owner-Caused Delay or Acceleration

[Name of plaintiff] claims that [name of defendant] breached the parties' contract by [delaying/accelerating] [name of plaintiff]'s work, causing [name of plaintiff] harm. If you find that [name of defendant] [delayed/accelerated] the work, you may award damages to [name of plaintiff] for all harm caused by the [delay/acceleration], including the following:

- 1. Expenditures that [name of plaintiff] made for labor, services, equipment, or materials that [he/she/it] otherwise would not have made but for the [delay/acceleration];**
 - 2. Overhead that [name of plaintiff] otherwise would not have incurred but for the [delay/acceleration]; and**
 - 3. Increase in the cost of labor, services, equipment, or materials already required under the contract that resulted from the [delay/acceleration].**
-

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner for economic loss incurred because the owner either delayed or demanded acceleration of the work.

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series, particularly CACI No. 351, *Special Damages*.

Sources and Authority

- Public Contract Code, section 7102 provides in part: “Contract provisions in construction contracts of public agencies and subcontracts thereunder which limit the contractee's liability to an extension of time for delay for which the contractee is responsible and which delay is unreasonable under the circumstances involved, and not within the contemplation of the parties, shall not be construed to preclude the recovery of damages by the contractor or subcontractor.”
- “Overhead expense allocable to the period of delay is allowed to the extent the evidence shows an increase in overhead because of the breach; or where other jobs, but for the delay, would have been obtained to absorb such overhead.” (*A. A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 158 [88 Cal.Rptr. 842], internal citations omitted.)
- “[A] contractor cannot recover on a claim for unabsorbed office overhead where it is able to meet the original contract deadline or finish early despite a government-caused delay. An exception applies where the contractor demonstrates from the outset an intent to complete the work early, a capacity to do so, and a likelihood of early completion but for the government's delay. Application

of the three-prong test requirement ... , however, is required only where the contractor finishes the work by the original specified contract completion date or earlier.” (*Howard Contracting, Inc. v. G.A. MacDonald Construction Co.* (1998) 71 Cal.App.4th 38, 54–55, [83 Cal.Rptr.2d 590].)

Secondary Sources

1 Witkin, *Summary of California Law* (10th ed. 2005) Contracts, § 999

12 *California Real Estate Law and Practice*, Ch. 434, *Government Contracts*, § 434.90 (Matthew Bender)

42 *California Forms of Pleading and Practice*, Ch. 481, *Public Works*, § 481.90 (Matthew Bender)

6 Bruner & O’Connor on Construction Law (Thompson Reuters West 2002) Ch. 19, *Remedies and Damage Measures*, § 19:73

Gibbs & Hunt, *California Construction Law* (Aspen Pub. 16th ed. 1999), Ch. 4, *Breach of Contract by Owner*, § 4.10

Kamine, *Public Works Construction Manual* (BNI Publications, Inc. 1996) Ch. 19, *Recovery of Delay Damages When the Owner Prevents Early Completion*

4544. Contractor’s Damages for Breach of Construction Contract—Inefficiency Because of Owner Conduct

[Name of plaintiff] claims that [name of defendant] breached the parties’ contract by [delaying/disrupting/ [or] interfering] with [name of plaintiff]’s work, causing [name of plaintiff]’s work to be less efficient than it would have been. If you find that [name of defendant] [delayed/disrupted/ [or] interfered] with [name of plaintiff]’s work, you may award damages to [name of plaintiff] for all harm caused by the [delay/disruption/ [or] interference].

You may also award damages for lost profits that [name of plaintiff] would have received from other jobs but for the [delay/disruption/ [or] interference]. To recover damages for lost profits, [name of plaintiff] must prove the following:

- 1. That it is reasonably certain that [name of plaintiff] would have earned those profits but for [name of defendant]’s [delay/disruption/ [or] interference]; and**
- 2. That it was [actually foreseen/reasonably foreseeable] at the time the parties entered into the contract that [name of plaintiff] would have earned those profits.**

The amount of lost profits must be proved to a reasonable certainty. Damages for lost profits that are speculative or remote cannot be recovered.

New December 2010

Directions for Use

This instruction should be used in an action by the contractor against the owner for economic loss incurred because the owner delayed, disrupted, or interfered with the contractor’s work in a way that caused the contractor calculable economic loss.

Lost profits from other work that the contractor could have earned but for the owner’s breach are special damages, which must have been either actually foreseen or reasonably foreseeable to the parties at the time when the contract was entered into. (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 977 [22 Cal.Rptr.3d 340, 102 P.3d 257].) In element 2, select either “actually foreseen” or “reasonably foreseeable” depending on what was communicated when the contract was signed.

For additional instructions on contract damages generally, see CACI No. 350 et seq. in the Contracts series. See particularly CACI No. 351, *Special Damages*.

Sources and Authority

- “Lost anticipated profits cannot be recovered if it is uncertain whether any profit would have been derived at all from the proposed undertaking. But lost prospective net profits may be recovered if the evidence shows, with reasonable certainty, both their occurrence and extent. It is enough to

demonstrate a reasonable probability that profits would have been earned except for the defendant's conduct. The plaintiff has the burden to produce the best evidence available in the circumstances to attempt to establish a claim for loss of profits.” (*S. C. Anderson v. Bank of America* (1994) 24 Cal.App.4th 529, 536 [30 Cal.Rptr.2d 286], internal citations omitted.)

- “Unearned profits can sometimes be used as the measure of general damages for breach of contract. Damages measured by lost profits have been upheld for breach of a construction contract when the breaching party's conduct prevented the other side from undertaking performance. The profits involved in [the cases cited], however, were purely profits unearned on the very contract that was breached.” (*Lewis Jorge Construction Management, Inc.*, *supra*, 34 Cal.4th at p. 971, internal citations omitted.)
- “Lost profits, if recoverable, are more commonly special rather than general damages, and subject to various limitations. Not only must such damages be pled with particularity, but they must also be proven to be certain both as to their occurrence and their extent, albeit not with ‘mathematical precision.’ ‘When the contractor's claim is extended to profits allegedly lost on *other* jobs because of the defendant's breach’ that ‘claim is clearly a claim for special damages.’ ” (*Lewis Jorge Construction Management, Inc.*, *supra*, 34 Cal.4th at p. 975, original italics, internal citations omitted.)
- “It is indisputable that the [defendant]’s termination of the school construction contract was the first event in a series of misfortunes that culminated in [plaintiff]’s closing down its construction business. Such disastrous consequences, however, are not the natural and necessary result of the breach of every construction contract involving bonding. Therefore, ... lost profits are not general damages here. Nor were they actually foreseen or foreseeable as reasonably probable to result from the [defendant]’s breach. Thus, they are not special damages in this case.” (*Lewis Jorge Construction Management, Inc.*, *supra*, 34 Cal.4th at p. 977.)
- “As to the reasonableness of the assumptions underlying the experts’ lost profit analysis, criticisms of an expert's method of calculation is a matter for the jury's consideration in weighing that evidence. ‘It is for the trier of fact to accept or reject this evidence, and this evidence not being inherently improbable provides a substantial basis for the trial court's award of lost profits’ ” (*Arntz Contracting Co. v. St. Paul Fire & Marine Ins. Co.* (1996) 47 Cal.App.4th 464, 489–490 [54 Cal.Rptr.2d 888], internal citations omitted.)
- “Overhead expense allocable to the period of delay is allowed to the extent the evidence shows an increase in overhead because of the breach; or where other jobs, but for the delay, would have been obtained to absorb such overhead.” (*A. A. Baxter Corp. v. Colt Industries, Inc.* (1970) 10 Cal.App.3d 144, 158 [88 Cal.Rptr. 842], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 882

3 Construction Law, Ch. 11, *Remedies and Damages*, & 11.02 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.79 (Matthew Bender)

6 California Points and Authorities, Ch. 65, *Damages: Contract*, § 65.21 (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 7, *Seeking or Opposing Damages in Contract Actions*, 7.04

6 Bruner & O'Connor on Construction Law (Thompson Reuters West 2002) Ch. 19, *Remedies and Damage Measures*, §§ 19:87-19.90

5018. Audio or Video Recording and Transcript

A [sound/video] recording has been admitted into evidence, and a transcript of the recording has been provided to you. The recording itself is the evidence. The transcript may not be completely accurate. It may contain errors, omissions, or notations of inaudible portions of the recording. Therefore, you should use the transcript only as a guide to help you in following along with the recording. If there is a discrepancy between your understanding of the recording and the transcript, your understanding of the recording must prevail.

[[Portions of the recording have been deleted.] [The transcript [also] contains strikeouts or other deletions.] You must disregard any deleted portions of the recording or transcript and must not speculate as to why there are deletions or guess what might have been said or done.]

[For the video deposition(s) of [name(s) of deponent(s)], the transcript is the official record that you should consider as evidence.]

New December 2010

Directions for Use

Give this instruction if an audio or a video recording was played at trial and accepted into evidence. Include the second paragraph if only a portion of the recording was received into evidence or if parts of the transcript have been redacted. Give the last paragraph if a transcript of a deposition was provided to the jury. (See Code Civ. Proc., § 2025.510(g); see also CACI No. 208, *Deposition as Substantive Evidence*.)

Sources and Authority

- “Defendant contends the trial court erred in permitting the prosecution to provide the jury with a written transcript of the tape recording, because the transcript was not properly authenticated as an accurate rendition of the tape recording. [¶] Following the testimony of [witness] during the prosecution's case-in-chief, the prosecutor proposed to play the tape recording to the jury. Defense counsel suggested the jury should be informed that portions of the tape recording were unintelligible. When the trial court observed that a transcript of the tape recording would be submitted to the jury, defense counsel voiced concern that the jury would follow the transcript rather than independently consider the tape recording. The trial court indicated it would listen to the tape recording and, in the event the court determined that the transcript would assist the jury in its understanding of the interview, a copy of the transcript would be provided to the jury at the time of its deliberations. . . . The trial court instructed the jury that in the event there was any discrepancy between the jury's understanding of the tape recording and the typed transcript, the jury's understanding of the recording should control.” (*People v. Sims* (1993) 5 Cal.4th 405, 448 [20 Cal.Rptr.2d 537, 853 P.2d 992], internal citation omitted.)
- “To be admissible, tape recordings need not be completely intelligible for the entire

conversation as long as enough is intelligible to be relevant without creating an inference of speculation or unfairness.’ [¶] Thus, partially unintelligible tape is admissible unless the audible portions of the tape are so incomplete the tape’s relevance is destroyed. The fact a tape recording ‘may not be clear in its entirety does not of itself require its exclusion from evidence since a witness may testify to part of a conversation if that is all he heard and it appears to be intelligible.’” (*People v. Polk* (1996) 47 Cal.App.4th 944, 952–953 [54 Cal.Rptr.2d 921], internal citations omitted.)

- “[T]ranscripts of admissible tape recordings are only prejudicial if it is shown they are so inaccurate that the jury might be misled into convicting an innocent man.” (*Polk, supra*, 47 Cal.App.4th at p. 955.)
- “During closing arguments all counsel cautioned the jury the transcript was only a guide and to just listen to the tape. Before the jury left to deliberate, the court again instructed it to disregard the transcript and sent that instruction into the jury room. We presume the jurors followed the court’s instructions regarding the tape and the use of the transcript.” (*People v. Brown* (1990) 225 Cal.App.3d 585, 598 [275 Cal.Rptr. 268].)
- “Cal. Rules of Court, Rule 2.1040 provides:
 - (a) **Transcript of electronic recording** Unless otherwise ordered by the trial judge, a party offering into evidence an electronic sound or sound-and-video recording must tender to the court and to opposing parties a typewritten transcript of the electronic recording. The transcript must be marked for identification. A duplicate of the transcript, as defined in Evidence Code section 260, must be filed by the clerk and must be part of the clerk’s transcript in the event of an appeal. Any other recording transcript provided to the jury must also be marked for identification, and a duplicate must be filed by the clerk and made part of the clerk’s transcript in the event of an appeal.
 - (b) **Transcription by court reporter not required** Unless otherwise ordered by the trial judge, the court reporter need not take down or transcribe an electronic recording that is admitted into evidence.

Secondary Sources

3 Witkin, California Evidence (4th ed. 2010) Presentation at Trial, § 148

5 California Trial Guide, Unit 100, *The Oral Deposition*, § 100.27 (Matthew Bender)

16 California Forms of Pleading and Practice, Ch. 193, *Discovery: Depositions*, §§ 193.70 et seq., 193.172 (Matthew Bender)