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REPORT TO THE JUDICIAL COUNCIL

For business meeting on: June 24, 2011

Title
Jury Instructions: Additions and Revisions to Civil Jury Instructions

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

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

Agenda Item Type
Action Required

Effective Date
June 24, 2011

Date of Report
May 17, 2011

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approval of the proposed additions and revisions to the *Judicial Council of California Civil Jury Instructions (CACI).* These changes will keep CACI current with statutory and case authority.

Recommendation

The advisory committee recommends that the Judicial Council, effective June 24, 2011, 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 June supplement to 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 59–266.

Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 6.58 of the California Rules of Court, which established the advisory committee's charge.[1] At its August 2003 meeting, the council voted to approve the *CACI* instructions pursuant to what is now 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 18th release of *CACI*.

The council approved *CACI* release 17 at its December 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 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.

The following 56 instructions and verdict forms are included in this proposal: 108, 112, 115, 116, 302, 303, 325, 333, VF-300, 417, VF-704, 1201, 1203, 1204, 1205, 1222, 1245, VF-1200, VF-1201, VF-1202, VF-1203, VF-1205, VF-1206, VF-2100, 2500, 2502, 2570, 2601, 2900, 2920, 2924, 3011, VF-3005, VF-3006, VF-3008, 3230, 3301, 3712, 3921, 3922, 4301, 4302, 4303, 4304, 4305, 4306, 4307, 4308, 4309, 4500, 4501, 4502, 4510, 5000, 5009, and 5018. Of these, 52 are revised and 4 are newly drafted.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved 35 additional instructions under a delegation of authority from the council to RUPRO.[2]

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

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

Under the implementing guidelines that RUPRO approved on December 14, 2006, 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 33 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.

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.

Class Actions

CACI No. 115, *"Class Action" Defined (Plaintiff Class),* is a proposed new instruction. A committee member who was trying a class action case came to realize that the jury did not understand the class-action process and how the trial differed from a standard civil action. In response to his concerns, the committee has drafted this instruction.

Electronic communications and research

CACI No. 116, *Why Electronic Communications and Research Are Prohibited,* is the committee's latest effort to address the problem of jurors conducting external research and engaging in external communications using the Internet and modern electronic devices.[3] The committee is very aware of the concerns that have been raised by many on this issue. A recent article on this subject published in *Trial* magazine[4] advocates that the policies behind why external electronic research and communications are not allowed should be clearly explained to jurors. Using some suggested language from the article as a starting point, the committee eventually developed this proposed instruction.

Res ipsa loquitur

Revisions are proposed to CACI No. 417, *Special Doctrines: Res ipsa loquitur,* in response to the recent case of *Howe v. Seven Forty Two Co., Inc.*[5] In *Howe,* the court clarified that even if the plaintiff fails to prove the elements of res ipsa loquitur, the jury may still return a verdict for the plaintiff.[6] The sentence in CACI No. 417 instructing the jury to find for the defendant if res ipsa loquitur was not proved has been deleted.

The committee also proposes revisions to the final paragraph of the instruction, which is statutorily required by Evidence Code section 646(c).[7] The committee felt that instructing the

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[3] In December 2009, the committee substantially revised CACI No. 100, *Preliminary Admonitions,* to more directly address use of the Internet and electronic research and communications. In this release, similar language is proposed for concluding CACI No. 5000, *Duties of Judge and Jury*.

[4] See Susan Macpherson & Beth Bonora, *The Wired Juror, Unplugged* (Nov. 2010) Trial, pp. 40–45.

[5] (2010) 189 Cal.App.4th 1155.

[6] *Id.* at pp. 1163–1164.

[7] "(c) If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury *to the effect that*:

(1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and

jury that it must carefully consider the evidence by both sides before making a decision merely states the jury's responsibility in all cases. The committee also felt that instructing the jury that it must not find for the plaintiff unless it believes after weighing all the evidence that it is more probable than not that defendant was negligent is not neutral language, even though the statute is phrased that way. The committee has redrafted this paragraph to cast the jury's responsibilities in a more neutral way, while still meeting the requirements of the statute.

Age discrimination

A recent case *Sandell v. Taylor-Listug, Inc.*[8] caused the committee to decide to draft a separate instruction for age discrimination under the Fair Employment and Housing Act. While currently age discrimination may be alleged under CACI No. 2500, *Disparate Treatment—Essential Factual Elements,* some unique aspects of age discrimination litigation indicated that a separate instruction would be helpful as a place to discuss these aspects. Under FEHA, age-discrimination cases require the employee to show that his or her job performance was satisfactory at the time of the adverse employment action as a part of his or her prima facie case.[9] However, whether or not the employee has met his or her prima facie burden is a question of law for the trial court, not a question of fact for the jury.[10] Therefore, the jury does not need to be instructed on satisfactory job performance. The Directions for Use to proposed new CACI No. 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements,* explains this dynamic.

Unlawful detainer: Manner of service

2010 legislation[11] amended Code of Civil Procedure section 1162 to change the manner of service for commercial tenancies in unlawful detainer cases. Substituted service by posting may now be done at the commercial property. This amendment required revisions to all of the unlawful detainer manner-of-service instructions.[12]

Directions to omit uncontested elements

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(2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant."

(Emphasis added).

[8](2010) 188 Cal.App.4th 297.

[9] *Id.* at p. 321.

[10] *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201.

[11]Assem. Bill 1263; Stats. 2010, ch. 144.

[12] See CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent,* No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement,* No. 4307, *Sufficiency and Service of Notice of Termination of Month-to-Month Tenancy,* and No. 4309, *Sufficiency and Service of Notice of Termination for Nuisance or Unlawful Use*.

Some instructions currently include a sentence in the Directions for Use to the effect that uncontested elements may be omitted. The committee now believes that this may not always be a wise course. Excluding uncontested elements may, in some cases, give the jury the impression that the plaintiff's burden to establish the cause of action is quite minimal.

The committee proposes removing this sentence from the Directions for Use for all instructions at this time.[13] Then, in the next edition, the Guide for Using Judicial Council of California Civil Jury Instructions in the publication's front matter will be revised to discuss several options for dealing with uncontested elements.[14] For example, omitting an element that is obvious and not crucial to the jury's understanding may be appropriate. The fact that the plaintiff is an elder or a dependent adult in an elder abuse case may be obvious, and omitting that element will not raise any issues with the jury. In other cases, omitting stipulated elements may confuse the jury. In these cases, the guide will suggest including the element, but noting that the parties have agreed that the element has been established.

Product liability—Reasonably foreseeable use

The committee proposes revising four strict product liability instructions[15] to remove the requirement that the plaintiff prove that he or she was injured while using the product in a reasonably foreseeable way. This proposal has proved to be quite controversial, eliciting numerous opposing comments from product manufacturers and their counsel.

The committee recognizes that manufacturers are not insurers of their products; they are liable in tort only if a defect in the manufacture or design of its product causes injury while the product is being used or misused in a reasonably foreseeable way.[16] But the question of where the burden of proof falls on product misuse is one that the committee has been considering for several years. The committee now proposes modifying the instructions to place the burden on the defendant to prove that the plaintiff's injuries occurred while the product was being misused in an unforeseeable way.

In October 2008, the committee received a memorandum from the Chief Justice of the California Supreme Court requesting some reevaluation of the question of subsequent modification of the injury-causing product. At that time, CACI Nos. 1203 and 1204 on design defect placed the

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[13] The following 14 instructions are included in this release only to remove this sentence: CACI Nos. 302, 303, 325, 2500, 2502, 2601, 2900, 2920, 3230, 4301, 4500, 4501, 4502, and 4510.

[14] Because this release will be a supplement only, the guide will not be included.

[15] CACI No. 1201, *Strict Liability—Manufacturing Defect—Essential Factual Elements,* No. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements,* No. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof,* and No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*.

[16] *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560, 568 fn. 5; see also *Wright v. Stang Mfg. Co.* (1997) 54 Cal.App.4th 1218, 1235 [a manufacturer must foresee some degree of misuse and abuse of its product, either by the user or by third parties, and must take reasonable precautions to minimize the harm that may result from misuse and abuse].

burden on the plaintiff to prove that at the time of injury, the product was substantially the same as when it left the defendant's possession or that any modifications were reasonably foreseeable to the defendant.[17] The court called the committee's attention to *Campbell v. Southern Pacific Co.,*[18] in which it had stated that "product misuse [is] a defense to strict products liability only when the defendant prove[s] that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused an injury."

In response to the Supreme Court's memorandum, the committee reevaluated its product liability instructions. It decided to remove the element requiring absence of unforeseeable modifications from the plaintiff's burden of proof, and it drafted a new instruction, CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. CACI No. 1245 was based on *Campbell* and provided a complete defense if the defendant could prove that the product was misused or modified in a way that was not reasonably foreseeable, and that the misuse or modification was the sole cause of the plaintiff's injury. The committee also divided former CACI No. 1207, *Strict Liability—Comparative Fault—Contributory Negligence,* into two separate instructions[19] and noted in the Directions for Use of both that subsequent misuse or modification may be considered in determining comparative fault if it contributed to, but was not the sole cause of, the injury-producing event.[20] After a public-comment period, the Judicial Council adopted all of these proposed changes at its April 2009 meeting.

At the time of the Supreme Court's memorandum, the CACI strict liability instructions also required the plaintiff to prove that the product was used or misused in a way that was reasonably foreseeable to the defendant.[21] But the committee's new CACI No. 1245 required the defendant to prove that there was misuse that was not reasonably foreseeable. Many committee members were concerned that this was an untenable position, which placed the burden of proof with regard to misuse on each side to prove or disprove the same thing. Nevertheless, there was authority on both sides.[22] There was speculation in the committee that there could be differences between the plaintiff's burden to prove reasonably foreseeable use and the defendant's burden to prove unforeseeable misuse, though no authority that presented a distinction was found. The

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[17] See *Judicial Council of California Civil Jury Instructions* (2009 ed.) CACI No. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements,* and CACI No. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof.*

[18] (1978) 22 Cal.3d 51, 56.

[19] CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

[20] See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 17.

[21] See *Judicial Council of California Civil Jury Instructions* (2009 ed.) CACI No. 1201 element 3, No. 1203 element 4, No. 1204 element 3, and No. 1205 element 6.

[22] See, e.g., *Bernal v. Richard Wolf Medical Instruments Corp.* (1990) 221 Cal.App.3d 1326, 1332 fn. 5, overruled on other grounds in *Soule, supra,* 8 Cal.4th at p. 574 ["Obviously, plaintiff must also prove the product was used in a reasonably foreseeable manner."].

committee was unwilling to remove reasonably foreseeable use as an element of the plaintiff's burden of proof at that time.[23]

In 2010, the question was returned to the agenda for further consideration. At its July meeting, the committee finally reached a sufficient consensus to remove reasonably foreseeable use as an element of the plaintiff's burden of proof. The majority decided that what the plaintiff was doing with the product at the time of injury had to be viewed as the traditional tort defense of contributory negligence, now comparative fault. The committee recognized that manufacturers were not liable for injuries resulting from unforeseeable misuse, but decided that it was the defendant's burden to prove unforeseeable misuse, either as comparative fault or as the complete defense of CACI No. 1245.

But while the proposed revisions were circulating for public comment, a new case, *Perez v. VAS S.p.A.,*[24] was published. *Perez* involved the very issues of product misuse and burden of proof that the committee had been debating for the last year. Therefore, the committee withdrew the product liability instructions from the pending release so that they could be reconsidered in light of *Perez*.

According to the court in *Perez*:

> [T]he plaintiff bears an initial burden of making "a prima facie showing that the injury was proximately caused by the product's design." This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product.[25]

Perez presents an explanation for the seemingly conflicting burdens of proof in prior cases. The plaintiff's burden is only to present some evidence (a prima facie case) of reasonably foreseeable use to avoid summary judgment or nonsuit. If the case survives to the jury, the burden is solely on the defendant to prove that the plaintiff's use or misuse of the product at the time of injury was not reasonably foreseeable. Therefore, the jury should not be instructed that the plaintiff has

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[23] The instructions were, however, modified to combine the reasonably-foreseeable-use element and the harm element. This was done only to shorten the instructions and not for any substantive reason.

[24] (2010) 188 Cal.App.4th 658.

[25] *Perez, supra,* 188 Cal.App.4th at p. 678, original italics, internal citations omitted.

the burden to prove reasonably foreseeable use. In light of *Perez,* the committee unanimously decided to remove reasonably foreseeable use as an element of the plaintiff's case.

Product liability—Misuse or modification as sole or superseding cause

In *Perez,* the court criticized, or at least questioned, CACI No. 1245 as adopted in April of 2009, stating:[26]

> [A]s recognized in the Directions for Use for CACI No. 1245, product misuse may serve as a complete defense when the misuse "was so unforeseeable that it should be deemed the sole *or* superseding cause." … As the Supreme Court made clear in *Soule v. General Motors Corp., supra,* 8 Cal.4th at page 573, footnote 9: "[T]he defense of 'superseding cause …" … absolves a tortfeasor, *even though his [or her] conduct was a substantial contributing factor,* when an independent event intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible. [Citations.] 7
>
> FOOTNOTES
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> "7 Thus, in that regard CACI No. 1245 provides an incomplete and potentially misleading statement of the relevant law."

The ways in which CACI No. 1245 might be incomplete and misleading were not further discussed in the opinion.

The committee construed the italicizing of the word "or" ("sole *or* superseding") as indicating that the court viewed sole cause as set forth in CACI No. 1245 and *Campbell, supra,* and superseding cause as two separate defenses, and that the instruction was deficient in not including superseding cause in the body of the instruction text.

At its July meeting, the committee addressed this criticism by importing the elements of CACI No. 432, *Causation: Third Party Conduct as Superseding Cause,* into CACI No. 1245. This approach generated much criticism in the public comments received. The two principal criticisms were that (1) unforeseeable misuse was included twice, once as an element of the existing sole-cause defense and again as an element of superseding cause; and (2) the element of superseding cause—that the kind of harm resulting from the plaintiff's or a third person's misuse was different from the kind of harm that could have been reasonably expected—should not apply to product liability. As explained by one commentator, it may be quite foreseeable that one will suffer a particular severe injury if a product is misused in a certain way. For example, standing in a wood chipper may foreseeably produce lacerations to the lower body. So it should be only the misuse, not the resulting harm that must be unforeseeable. Moreover, in *Perez,* the court found that the plaintiff's misuse of the product was a superseding cause without considering

[26] *Perez, supra,* 188 Cal.App.4th at p. 685, original italics.

whether the actual injury suffered was unforeseeable.[27] Several commentators expressed the view that there is a single defense, which has been labeled by some courts as "sole cause" and by others as "superseding cause."

The committee concluded that to the extent the affirmative defense of product misuse has been labeled "superseding cause," there is insufficient authority to import the elements of the defense from CACI No. 432. Several committee members noted that superseding cause as a general tort principle (as set forth in CACI No. 432) involves a later act by a third party independent of the events between the plaintiff and defendant. Product misuse involves the event between the plaintiff and defendant. In short, product misuse as superseding cause is not necessarily the same thing as an intervening third-party act as superseding cause.

The committee decided that neither "sole cause" nor "superseding cause" is a good label. "Sole cause" is inaccurate for the reasons noted by the court in *Perez*. The product defect may well have been a substantial factor in causing injury, so unforeseeable misuse is not truly the *sole* cause. "Superseding cause" suffers from the problem of describing a separate tort doctrine that is significantly different from product misuse. Also, it is a term that a jury would not be expected to understand without a plain-language translation.

The committee has opted instead to express the defense in terms used originally in *Landeros v. Flood*[28] and cited in both *Torres* and *Perez*. "Third party negligence which is the immediate cause of an injury may be viewed as a superseding cause when it is so *highly extraordinary as to be unforeseeable*."[29] As applied in *Perez,* the committee believes that the jury may find that the misuse of the product was so highly extraordinary so as to be completely unforeseeable. If so, it should be considered as the "sole cause," and gives the manufacturer a complete defense. If misuse falls short of this level, it may still be considered as comparative fault under CACI No. 1207A or CACI No. 1207B.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from February 1 to March 12, 2011. Comments were received from 24 different commentators. The committee evaluated all comments and revised some of the instructions as a result. A chart with summaries of all comments received and the committee's responses is attached at pages 11–58.

Of the comments received, over half addressed the proposed changes to the products liability instructions discussed above.

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[27] *Perez, supra,* 188 Cal.App.4th at p. 685.

[28](1976)[28] 17 Cal.3d 399, 411 [not a product liability case].

[29] *Torres, supra,* 49 Cal.App.4th at p. 18; *Perez, supra,* 188 Cal.App.4th at p.681, empahsis added.

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 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). Other licensing agreements with other publishers provide additional royalties.

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. 11–58
2. Full text of new and revised *CACI* instructions at pp. 59–266

CACI 11-01
New and Revised CACI Instructions
All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Committee Response
115, "Class Action" Defined	California Judges Association	SUPPORT: The proposed revisions let jurors know, generally, the definition of a class action law suit, which should better inform their understanding of the case at hand.	No response required.
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees that an instruction explaining what a "class action" means would be useful and agrees with the language of the instruction, with the exception of the sentence "You may assume that the evidence at this trial applies to all class members." We believe that that this statement is overbroad. Particular evidence may or may not apply to all class members, and it very likely will not be true that all of the evidence will apply to all class members. "Most class actions involve individual issues as well as the required common questions. Individual issues may arise in connection with any phase of a class controversy, including proofs of legal violation or breach of legal duty, causation or fact of damage, relief entitlement, nature, and amount, unique defenses, and other issues." (3 Newberg on Class Actions (4th ed. 2010) § 9.58.)	The committee has revised this sentence to account for the possibility that class evidence and individual evidence will be received together.
	Christopher S. Yates, Latham & Watkins, San Francisco	Change: "Because of the large number of claims that are at issue in this case," to "Because the interests of the class members are being represented by the named plaintiffs,". The change is necessary because not all members of a class testify because that is the purpose of the class action device rather than as a function of the number of claims. Indeed,	Numerosity is a class action requirement. The committee believes that the current language explains to the jury in plain English why a few are allowed to represent many.

CACI 11-01
New and Revised CACI Instructions
All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Committee Response
		talking about a large number of claims is both pejorative and prejudicial to a defendant since it suggests to the jury that there are many aggrieved persons.	
116, Why Electronic Communications and Research Are Prohibited	California Judges Association	SUPPORT: Within the pretrial instructions, CACI 100 includes a prohibition on jurors conducting outside research and investigation, including electronic communications and research. A similar admonition appears in closing instruction CACI 5000. It appears that new CACI 116 and amended CACI 5000 are in response to last year's AB 2217, which was vetoed and reintroduced this year as AB 141. Those bills would mandate this type of admonition in the Code of Civil Procedure and Penal Code. CJA has previously taken the position that while it helps to further admonish jurors about the use of electronic communications, the appropriate source for such admonishments is the judiciary, not the legislature. The proposed changes align with CJA's previous position and simply reemphasize the pretrial admonition more forcefully than has been done before. Recent cases involving jurors' e-mails and internet research during the case suggest the need to strengthen the admonition. The change is useful and noncontroversial, and it addresses the issue without need for further legislation.	No response required.
	Hon. Jacqueline Connor, Los Angeles County Superior Court	The commentator has written her own instructions on the subject of electronic communications and research. One she gives to the prospective jurors before voir dire; the other she gives the selected panel.	The committee appreciates Judge Connor's submissions and recognizes that on this topic, there are many possible approaches that are appropriate. The committee feels that its proposed instruction accomplishes

CACI 11-01
New and Revised CACI Instructions
All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Committee Response
			the objective in fewer words.
	Ronald Rives, Attorney at Law, Pittsburg	The commentator submitted a revised draft that reorganized the sentences and shortened the language a bit without changing any of the meaning of the instruction.	The committee has adopted most of the commentator's proposed revisions.
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Disagree. The preliminary admonitions in CACI No. 100 are quite extensive, particularly when considered together with the other pretrial instructions. We believe that further explanation of the reasons for the rule prohibiting electronic communications is unnecessary and that the marginal benefit of this proposed instruction would likely be outweighed by the diminished juror attention resulting from so many lengthy pretrial instructions.	The committee did consider this point. However, there have been numerous articles and presentations nationally on this subject, and most are of the view that it is important that jurors be told why they are prohibited from electronic research and communications.
333. Affirmative Defense—Economic Duress	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The four elements set forth in *Perez v. Uline, Inc.* (2007) 157 Cal.App.4th 953 seem to be only a specific application of the same three elements stated in the instruction. We suggest that the Directions for Use state that the court may modify the instruction to describe particular ways that the defendant's conduct would be wrongful in the circumstances, citing "see" *Perez,* in lieu of the proposed language.	The committee believes that in a settlement rescission case, a significantly different instruction would be required. It would be more than just a modification of the current elements.
		The second bullet point in the Sources and Authority contains the same quoted language as the sixth, except that the sixth includes an additional sentence. We suggest striking the second bullet point and retaining the sixth.	The committee agreed and removed the sixth case excerpt under Sources and Authority.
		The fifth and seventh bullet points regarding policy considerations and the courts' reluctance to apply the economic duress	The committee believes that these case excerpts are relevant to the application of economic duress to rescinding a settlement,

CACI 11-01
New and Revised CACI Instructions
All comments are paraphrased unless indicated by quotation marks.

Instruction	Commentator	Summary of Comment	Committee Response
		doctrine do not seem relevant to this jury instruction, so we would strike both bullet points.	which is now mentioned in the Directions for Use
		We believe that the quoted language in the final bullet point does not merit inclusion in the Sources and Authority, and would strike it.	This excerpt from *Perez* presents the elements to invalidate a settlement agreement for a debt. Because this is mentioned as a possible modification in the Directions for Use, the elements should be stated in the Sources and Authority.
417, Special Doctrines: Res ipsa loquitur	California Judges Association	OPPOSE: The revision is an unnecessary deletion, which in some ways is inconsistent with the analysis articled in *Howe v. Seventy Forty Two Co., Inc.* (2010) 189 Cal.App.4th 1155. *Howe* does not reinterpret res ipsa loquitur. To the contrary, it simply further discusses with approval the current state of the law as to the doctrine.	As *Howe* makes clear, the failure to prove res ipsa does not mean that the defendant wins. The plaintiff still may proceed, but without the benefit of the presumption. The sentence that states that if res ipsa is not proved, the verdict must be for defendant must be revised in light of *Howe*.
	Orange County Bar Association, by John C Hueston, President	Please consider adding: [If the court determines that evidence has been introduced that is sufficient to support a finding that defendant was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the presumptive effect of the res ipsa loquitur doctrine vanishes and the court may, and upon request shall, instruct the jury:] [that which is already in the instruction at the third paragraph, to wit: "If you decide that [*name of plaintiff*] proved all of these three things, you may but are not required	The committee agrees that Evidence Code section 646(c)(2) compels that the last paragraph cannot be deleted entirely and has restored a revised version of it[BG1]. The statute does not compel the current first sentence of the last paragraph of the isntruction, which tells the jury to carefully consider the evidence presented by both parties. The rest of the paragraph has been revised to cast it in a more neutral way.

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		to, find that [*name of defendant*] was negligent or that [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm, or both." [or, better yet, after including the above bracked "If court determines…" statement, replace the existing third paragraph with: If you decide that [*name of plaintiff]* proved all of these three things, you should weigh the evidence and determine whether it is more probable than not that [*name of defendant*] was negligent in light of the other instructions I have read and, if so, whether it is more probable than not that [*name of defendant*]'s negligence, if any, was a substantial factor in causing [*name of plaintiff*]'s harm"	
		In the Directions for Use, please consider replacing "but the defendant presented rebuttal evidence…" with "but the defendant presented sufficient evidence that would support a finding defendant was not negligent or that any negligence on defendant's part was not a proximate cause of the occurrence…" [Evidence Code 646(c)].	The Directions for Use have been revised substantially, and now include this language from the statute.
		Please consider adding to the Directions for Use:	The Directions for Use now include a citation to the Law Revision Comment that the defendant's failure to present evidence

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		If plaintiff establishes the 3 predicate facts for res ipsa loquitur and the court concludes defendant has failed to present *sufficient evidence* to support a finding that defendant was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the res ipsa loquitur presumption (that "a proximate cause of the occurrence was some negligent conduct on the part of the defendant") arises and the trier of fact need not be instructed to weigh the evidence or make findings in that regard because the fact is presumed.	means that the plaintiff wins if res ipsa is established.
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	This instruction is appropriate only if the defendant presents evidence to rebut the presumption that the defendant's negligence caused the plaintiff's harm, i.e., evidence that could support a finding that the defendant was not negligent or that the defendant's negligence was not a proximate cause of the occurrence. The Directions for Use suggest that the instruction is appropriate only in those circumstances, but this could be stated more clearly.	Only the last part of the instruction is dependent on the defense having presented rebuttal evidence. The Directions for Use have been revised to attempt to state this more clearly.

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		The committee suggests that either this instruction or a separate instruction should provide for the situation in which the defendant presents no rebuttal evidence and the jury must be instructed that if it finds that the three conditions exist (i.e., that the presumption is established), it must find that the presumed fact is established (i.e., that the defendant's negligence caused the plaintiff's harm). The California Law Revision Commission has explained what is required in this situation, known as conditional res ipsa loquitur: Where the basic facts of res ipsa are contested by evidence, but there is no rebuttal evidence, the court should instruct the jury that, if it finds that the basic facts have been established by a preponderance of the evidence, then it must also find that the accident was caused by some negligent conduct on the part of the defendant." (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1995 ed.) foll. § 646, pp. 200-201.)	While the committee believes that it will be a rare case in which no rebuttal evidence is presented, the point is now covered in the Directions for Use.
		If the defendant presents evidence rebutting the presumption, the court, on request, must instruct the jury on two points. (Evid. Code, § 646(c).) The revised instruction includes the first point: if the jury finds that the three conditions exist, it may infer that a proximate cause of the occurrence was negligent conduct by the defendant. But the revised instruction omits the second point: the jury can find that	As discussed above, a modified version of the last paragraph has been restored.

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		the defendant's negligence was a proximate cause of the occurrence only if it believes, after weighing all of the evidence and drawing any inferences that are warranted, that it is more probable than not that this fact is true. It appears that the second point is intended to counterbalance the first point and dispel any impression that the inference could be made based solely on the facts giving rise to the presumption without considering all of the evidence, including rebuttal evidence. (See Cal. Law Revision Com. com., 29B West's Ann. Evid. Code, *supra*, p. 201.) The last paragraph of the existing instruction includes this second point, and it should not be deleted.	
		The prefatory language in the instruction "In this case" is superfluous and should be omitted.	The committee agrees, and this language has been deleted.
1201, *Strict Liability—Manufacturing Defect—Essential Factual Elements;* 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements;* 1204, *Strict*	Association of Defense Counsel of Northern California and Nevada, by Michael S. Burke, board member Gordon & Rees, San Francisco, by James G. Scadden	The proposed changes to all the product liability instructions with regard to the elimination of the requirement that plaintiff prove that he or she was using the product in a reasonably foreseeable way when injured are not required by *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658. *Perez* does not say it is changing the law, or that these CACI instructions are wrong (except for a quibble about the use note to CACI 1245). Thus, to change these instructions based on *Perez* is unfounded.	*Perez* provides a plausible harmonization of the issue that the committee has been looking at for several years. If product misuse is an affirmative defense, either as a sole or superseding cause (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56; CACI No. 1245) or as comparative fault (CACI Nos. 1207A and 1207B), then why should the plaintiff have to prove his or her own use or misuse of the product at the time of injury was reasonably foreseeable? According to *Perez,* the answer is that the plaintiff need only make a prima facie showing of his or her own reasonably

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Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof; 1205, *Strict Liability—Failure to Warn—Essential Factual Elements ;* and 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements*			foreseeable use of the product. That showing creates a prima facie case, which will survive summary judgment or directed verdict. If the case gets to the jury, the defense must establish unforeseeable misuse as an affirmative defense. So the jury need not be instructed on the plaintiff's prima facie burden.
		Perez affirms that reasonably foreseeable use of the product is a proper element of plaintiff's case in chief. Plaintiff's burden of establishing reasonable use is not just one of production. The proposed use notes wrongly talk about it as production of evidence only, though neither *Barker v. Lull Eng.'g Co.* (1978) 20 Cal.3d 413 nor *Perez* so hold.	Whether expressed as an element of plaintiff's "case in chief" or "prima facie" case (as used in *Perez*), the plaintiff must produce some evidence of his or reasonably foreseeable use, in opposition to a motion for summary judgment or a motion for directed verdict after the plaintiff puts on his or her case at trial. The court rules whether a sufficient showing has been made to send the case to the jury. The jury will never have to decide whether the plaintiff has made this showing. It then passes to the defendant to prove misuse as an affirmative defense.
		To the extent the cited *Perez* analysis may differ a bit from existing law, it should be disregarded because it is inconsistent with *Barker*. *Barker* expressly recognized the requirement that "plaintiff proves that the product failed to perform ... when used in an intended or reasonably foreseeable manner." (*Barker, supra,* 20 Cal.3d at p. 432.)	*Perez* is not inconsistent with *Barker*. *Barker* speaks to the general principle that a manufacturer is liable only for defects that cause injury from reasonably foreseeable use. This is not the same thing as whether the plaintiff at the time of injury was using the product in a reasonably foreseeable way.
		The burden-shifting discussion in *Perez* is dicta. "Here, there is *no reasonable probability that the result would have been different had the court used the burden-*	The court in *Perez* found that the trial court erred in not applying the proper burden-shifting analysis. When an appellate court states that the trial court erred, the committee

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		shifting analysis, because the trial court expressly found that the credible evidence established that the finishing process was an unforeseeable misuse of the VAS rewinder--in substance, a superseding cause of injury." (*Perez, supra,* 188 Cal.App.4th at p. 685, emphasis added.)	believes jury instructions should be drafted accordingly, even if the court finds that the error was harmless.
		It is not just for the judge, but also for the jury, to know plaintiff's burden. So burden and required elements should be in jury instructions.	The jury should be instructed only on those matters that are within their charge. A prima facie case is not within the jury's charge.
		If there is a risk of something, but it is not the cause of injury, plaintiff should not get to recover. But that is the effect of the proposed changes that move "reasonably foreseeable" from a description of what the plaintiff was doing when harmed to a purported definition of "defect." "[M]anufacturers are not insurers of their products; they are liable in tort only when 'defects' in their products cause injury." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 568, fn. 5.)	The committee does not believe that the question of who has the burden of proof regarding use or misuse is related to causation. Causation is a separate element that the plaintiff must prove. The plaintiff's use or misuse determines whether or not the product is defective. If it is not defective because of unforeseeable misuse, then causation is not reached. If it is defective because the manufacturer should have foreseen the plaintiff's misuse, the plaintiff still has to prove that the defective product caused the injury.
		The revisions improperly dilute the defense of comparative fault by suggesting that the jury may not attribute 100 percent fault to plaintiffs unless defendant also establishes the elements of "superseding cause." The affirmative defense of superseding cause, and the requirement that a plaintiff prove he was injured by a defect in the product while used in a reasonably foreseeable manner, are two different things.	As discussed in the committee's responses to comments to CACI No. 1245, *Affirmative Defense—Product Misuse or Modification,* below, the committee has removed reference to superseding cause from the instruction text of 1245. The committee has also removed the word "superseding" from the Directions for Use in the other instructions. However, the committee does not believe

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			that the defense of comparative fault is diluted in any way by any of the proposed changes to any of the product liability instructions concerning who has the burden of proof on misuse. CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and 1207B, *Strict Liability—Comparative Fault of Third Person,* are unchanged.
		The effect is to require defendants to prove one or more affirmative defenses without plaintiffs having to first prove their case in chief. But the law is that a defendant need not establish an affirmative defense unless and until plaintiff has established the case in chief. The proposed changes would reduce plaintiffs' burden on the front end, which flips the burden and makes it harder to get a nonsuit. The defense should not have to prove an affirmative defense to get a nonsuit.	Unforeseeable misuse or modification is an affirmative defense. Regardless of the extent of the showing that the court requires of the plaintiff to avoid nonsuit, only the affirmative defense is a jury issue.
		The proposed changes would create inconsistent burdens of proof depending on whether the plaintiff proceeds under CACI 1201 or 1204, as opposed to CACI 1203, 1205 or 1222.	CACI Nos. 1203, 1205, and 1222 all include reasonably foreseeable use in other elements that address what the manufacturer or the consumer should be expected to anticipate. 1201 and 1204 do not mention reasonably foreseeable use in any other element. Nevertheless, there is no inconsistency. In all instructions, that the plaintiff was actually misusing the product at the time of injury is for the defense to prove to the jury.
	Consumer Attorneys of California, by Paloma Perez, Associate Legislative Counsel	CAOC has reviewed the proposed changes to the CACI Instructions that relate to products liability matters, specifically Instruction Nos. 1201, 1203, 1204, 1205, and 1222. Consumer Attorneys greatly appreciates Judicial Council	No response required.

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		and the Advisory Committee's efforts in drafting the proposed revisions to the CACI instructions and believe they reflect an accurate statement of the law.	
	Michael B. Gurien, Waters, Kraus & Paul, El Segundo	The language in the new sentence of the Directions for Use, that "the plaintiff has the initial burden of producing evidence that he or she was injured while using the product in an intended or reasonably foreseeable manner," is potentially misleading because it suggests that the plaintiff had to actually be using the product in order to recover for his or her injury, as opposed to being a bystander.	The committee has modified the sentence slightly to incorporate injury to a bystander.
		To avoid any confusion regarding the ability of bystanders to recover in strict liability for injuries caused by defective products, I believe that relevant case quotations regarding bystander recovery should be included in the "Sources and Authority" section.	The committee agrees that authority on liability to bystanders should be included in the Sources and Authority. But rather than add excerpts to all of the instructions on specific theories of liability, one has been added to CACI No. 1200. *Strict Liability—Essential Factual Elements*.
	3M Company, by Thomas A. Packer of Gordon & Reese, San Francisco	The proposed revisions seek to eliminate plaintiff's burden of proving that he or she was harmed "while using the product in a reasonably foreseeable way." Yet, well-settled California law establishes that an essential element of plaintiff's prima facie claim for products liability is proving that he or she was injured while using the product in a reasonably foreseeable way. (See, e.g., *Barker v. Lull Eng'g Co.*(1978), 20 Cal.3d 413; *Campbell v. General Motors Corp*. (1982) 32 Cal.3d 112, 125–126.) Indeed, *Perez,* upon which the proposed amendments are based, affirms that reasonably foreseeable	The committee agrees that manufacturers are only liable for defects that cause injury when used (or misused) in a reasonably foreseeable way. *Barker* and many other cases establish that this is in fact well settled. But that is not the issue; the issue is who has the burden of proof on misuse. If the case gets to the jury, the defendant has the burden of proof. *Barker* does not say anything to the contrary.

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		use is a prima facie element of plaintiff's claim for which plaintiff bears the burden of proof:	
		The proposed changes to the Directions for Use improperly suggest that plaintiff's burden is only one of ***producing evidence*** that he or she was injured while using the product in an intended or reasonably foreseeable manner. Plaintiff bears the clear burden to ***prove by a preponderance of evidence*** that he or she was injured while using the allegedly defective product in an intended or reasonably foreseeable manner – not simply to produce some evidence. (See, e.g., *Lunghi v. Clark Equip. Co.* (1984) 153 Cal.App.3d 485, 49 ("[I]n a strict products liability case based on design defect, the plaintiff has the burden of establishing that the injury was caused by the product's design, and that once this prima facie showing is made, the defendant must then prove that the product is not defective".)	See responses above. Whether the plaintiff must "prove" his or her prima facie case or merely produce enough evidence to proceed is a question that makes no difference with regard to jury instructions. Either a failure of proof or a failure to produce sufficient evidence means that the issue does not go to the jury.
		This proposed change makes plaintiff's "use" of the product a part of the definition of the product's alleged defect instead of a part of the harm. Although use of a product may involve a risk of harm, strict liability cannot be imposed unless the product's defect actually causes harm while being used in a "reasonably foreseeable way." (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1149 ("The doctrine of strict liability imposes legal responsibility, without proof of negligence, upon a manufacturer of a product that is placed on the market and proves to have a	See responses above.

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		defect ***that causes injury***."), emphasis added.)	
1201, 1203, 1204, and 1205	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The proposed revision to the instruction would delete that portion of the essential elements stating that the plaintiff must have been harmed "while using the [product] in a reasonably foreseeable way." The only authority cited to support this change is *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658. We believe that *Perez* is not on point and that the language in the instruction should be retained. *Perez* discusses the burden of proof with respect to the affirmative defense of product misuse as a superseding cause. According to *Perez,* the plaintiff has the burden of producing evidence that he or she was injured while using the product in a reasonably foreseeable way. If the plaintiff satisfies this burden, the burden of proof shifts to the defendant to show that the plaintiff's injury "resulted from a misuse of the product." (*Perez, supra,* 188 Cal.App.4th at p. 678; see also id. at p. 679.) This quoted language in *Perez* refers to proof that the defect was a superseding cause of the injury, which is an affirmative defense. (See *id.* at p. 663 ["the burden of proof shifted to VAS to prove that Perez's use of the machine was so unforeseeable as to constitute a superseding cause of the injury"], pp. 679-682 [discussing the law of superseding cause].) Product misuse may be a substantial factor	See responses above. The committee believes that the comment is substantially correct in its analysis, but reaches the wrong conclusion. It fails to take into account the difference between a prima facie case and what the burden is at trial before the jury.

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		resulting in the plaintiff's injury without being a superseding cause. The Directions for Use for CACI Nos. 1207A and 1207B recognize this distinction. That the defendant has the burden to prove misuse as a superseding cause does not compel the conclusion that the plaintiff has no burden to prove that his or her use was reasonably foreseeable. We believe that the existing instruction is consistent with case law suggesting, if not definitively holding, that the plaintiff has the burden to prove a reasonably foreseeable use. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560; *Greenman v. Yuba Power Products, Inc.* (1963) 59 Cal.2d 57, 64.) Perhaps the Directions for Use should acknowledge that the issue has not been definitively decided, if that is the case. (See Madden & Owen on Products Liability (2010) § 14:4; American Law of Products Liability 3d (2011), § 42:6; Annotation, Products Liability: Product Misuse Defense (1988) 65 A.L.R.4th 263, §§ 5, 6.)	
1201, 1203, 1205, 1222	Michael B. Gurien, Waters, Kraus & Paul, El Segundo	In the Directions for Use, the proposed new first two sentences actually concern strict liability for design defect under the risk-benefit theory, including the burden-shifting approach used in that theory. This is made clear by the supporting parenthetical citation to *Perez v. VAS S.p.A* (2010) 188 Cal. App. 4th 658, 678, which involved the risk-benefit theory of liability only. CACI No. 1201, however, is for a manufacturing defect, CACI	The committee recognizes that *Perez* is a design-defect risk-benefit case, and is not direct authority for other theories of product liability. But because product misuse can be a defense to all product liability theories of action, the committee believes that it is reasonable to assume that the plaintiff has the same prima facie burden for all claims, not just strict liability risk-benefit.

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		No. 1203 is for design defect under the consumer expectation test. Because the first two sentences relate to an entirely different theory of liability, they should be deleted, along with the parenthetical citations; otherwise, this language might cause confusion and/or lead to errors.	The committee has added a parenthetical to the *Perez* citation for the other four instructions (1201, 1203, 1205, 1222) to alert the user that it is a strict liability design defect-risk-benefit case.
		In the "Sources and Authority", the new excerpt from *Perez, supra,* 188 Cal.App.4th at p. 678, should be deleted because, as noted, *Perez* addresses strict liability for design defect under the risk-benefit theory, and the included quotation contains language specific to that theory, including the unique burden-shifting approach used to determine product defect under that theory.	The committee has removed the *Perez* excerpt for manufacturing defect and failure to warnbut, has retained it in CACI 1203 on design defect-consumer expectation. The excerpt references design defect without limitation to risk-benefit.
1201 and 1204	James Ballidis, Attorney at Law, Newport Beach	On use of instructions 1201 and 1204, foreseeability of misuse or modification will need to be evaluated by the jury through the use of 1245; the drafted proposal is adequate.	No response required.
	California Judges Association	The legal basis for the change in these instructions appears to be based on an apparently incorrect reading of *Perez v. VAS* (2010) 188 Cal.App.4th 658 and *Saller v. Crown* (2010) 187 Cal.App.4th 1220. Neither case supports removal of the language: "while using the [*product*] in a reasonably foreseeable way." (*Perez* quotes *Baker* as requiring evidence "that the plaintiff was injured while using the product in an intended or reasonably foreseeable manner…" (*Perez, supra,* 188 Cal.App.4th at p. 678.) It should also be noted that *Saller* directed that CACI 1203 be given without comment that the	As noted above, the plaintiff must establish a prima facie case to the court to avoid summary judgment or nonsuit. Once the case gets to the jury, misuse is an affirmative defense.

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		instruction should be modified in any way. (*Saller, supra,* 187 Cal.App.4th at p. 1237.) It appears that the confusion results from the idea that misuse of a product is an affirmative defense, which it is, and therefore the burden shifts to the defense once the plaintiff establishes a prima facie case. Such is the status of the law. It does not appear, however, that the "reasonable foreseeable manner" language has been eliminated as an element of the prima facie case that the plaintiff must establish.	
	O'Melveny & Myers, Los Angeles, by A. Patricia Ursea	CACI instructions 1201 and 1204—as presently worded—accurately reflect the law, which places the initial burden on plaintiff to show that he or she was injured while using the product in a reasonably foreseeable manner. (See, e.g., *Perez v. VAS S.p.A.* (2010) 188 Cal. App. 4th 658, 678. Indeed, the Advisory Committee acknowledges this fact by proposing the inclusion of language to this effect in the Directions for Use: We believe that it is confusing to on the one hand, delete the foreseeability requirement from these instructions, and on the other, add law to the "Directions for Use" that stands for the proposition that foreseeability is a necessary requirement.	See responses above.
	DrinkerBiddle&Reath, San Francisco, by Alan J. Lazarus and Siobhan Cullen	The manufacturer has a duty to design its product so that it performs safely when used as intended and according to the instructions, and not just when used in a manner which	The instructions as revised do not contemplate that the manufacturer is liable for injuries caused by unforeseeable misuse. The question is not under what

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		deviates from the intended use and instructions in a reasonably foreseeable way. If it also is liable when the product is used in a manner that the manufacturer would not have reasonably foreseen, as the proposed instructions contemplate, then the manufacturer is effectively an insurer of the safe use of the product, under all circumstances.	circumstances the defendant is liable, but only as to how the burden of proof should fall on use and misuse.
		The proposal relies primarily on dicta in a single flawed court of appeal case, *Perez v. V.A.S.* (2010) 188 Cal.App.4th 658. *Perez* was cited in one federal District Court opinion, but that court did not endorse the proposition that a manufacturer's design or manufacturing duties extend to unforeseeable uses. (See *Cortez v. Global Ground Support, LLC* (N.D. Cal. 2010) No. 09-4138 SC, 2010 WL 5173861, *4, *6.) The District Court did not address the subsequent error of the *Perez* court in conflating the affirmative defense of product misuse or alteration, a causation concept, with the plaintiff's burden of establishing at the threshold that the injury resulted from manifestation of a potential design flaw under circumstances of a foreseeable use. Indeed, in a later portion of the opinion under the heading "Superseding Cause", the court cited *Perez* for the proposition that "[a] defendant may rebut a plaintiff's prima facie showing of a product defect through proof of a superseding cause of the injury." (*Id.*, at p. *5.)	See response above. *Perez* in no way suggested that a manufacturer's design or manufacturing duties extend to unforeseeable uses, nor do the instructions as revised.
		In *Perez,* the court failed to account for the	There is no expansion of the manufacturer's

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		differences between the issues of defect, prima facie causation, and superseding cause. Only the latter is truly the defendant's burden of proof. The fact that the manufacturer bears the burden of proving the complete defense that a defect that contributed to the injury was superseded as a cause by unforeseeable misuse of the product does not justify expanding the manufacturer's design duty as to the scope of the risks against which the manufacturer must reasonably be required to guard.	duty as to the scope of the risks. But the fact that the manufacturer bears the burden of proving the complete defense that a defect that contributed to the injury was superseded as a cause by unforeseeable misuse does mean that the plaintiff must prove to a jury that he or she was using the product in a reasonably foreseeable way at the time of injury. Even if there is no complete defense, the defense can still raise misuse as comparative fault.
1203, 1205, and 1222	James Ballidis, Attorney at Law, Newport Beach	The existing and proposed 1245 instruction reintroduces foreseeability of misuse (but not modification) as a defense to the claim, while plaintiff has already met the burden in the prima facia case of foreseeable misuse, an area that may cause confusion for the jury.	The committee shares the commentator's concern that there is an apparent conflict between giving the plaintiff the burden of showing foreseeable use or misuse, even as only part of the prima facie case, while imposing on the defendant the burden of proving misuse or modification as an affirmative defense. But the jury will only be confused if it is instructed on both burdens of proof. The proposed revisions should avoid confusion rather than create it.
	Civil Justice Association of California, by Kim Stone, President	We recognize that existing law permits the imposition of liability even if there is some degree of reasonably anticipated abuse or misuse of a product strict product liability actions (*Wright v. Stang Mfg. Co.* (1997) 54 Cal.App.4th 1218), the proposed addition of the words "when used **or misused** in an intended or reasonably foreseeable way" is likely to confuse the jury. The instruction would be clearer if it omitted "or misused." Foreseeable uses would encompass	The rule from *Wright* compels the inclusion of "or misused." These elements do not address the plaintiff's actual use or misuse, which is an affirmative defense, but rather to what one might reasonably expect or anticipate. The manufacturer must anticipate reasonably foreseeable misuse.

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		anticipated misuses. The inclusion of the words "or misused" in the instruction makes the instruction ambiguous, especially since misuse of the product is an affirmative defense.	
	DrinkerBiddle&Reath, San Francisco, by Alan J. Lazarus and Siobhan Cullen	In contrast to the risk-benefit instruction, in the failure to warn instruction, CACI 1205, and the consumer expectations instruction, CACI 1203, the intended or reasonably foreseeable use element is not entirely eliminated, but it is shifted in a way that attenuates the link between the alleged defect and plaintiff's manner of use. Under the previous instruction, the manner of use was linked to the way the plaintiff was harmed; now it is only linked to defining the scope of risks to be warned against (that the unwarned-against risks "presented a substantial danger to persons using or misusing the product in an intended or reasonably foreseeable way") or the objective performance benchmark defining the ordinary user's safety expectations. This both lightens plaintiff's burden without justification and introduces unwarranted ambiguity. Existing law plainly requires that plaintiff demonstrate that the injury resulted from a reasonably foreseeable use of the product (See, e.g., *Soule, supra,* 8 Cal.4th at p, 560) and that the product either failed to perform as safely as the ordinary consumer would expect when used in a reasonably foreseeable manner (in a consumer expectations case) (See e.g., *Saller v. Crown Cork & Seal Co.* (2010) 187 Cal.App.4th	See responses above. The scope of the manufacturer's duties with regard to what might reasonably be expected is for plaintiff to prove. What the plaintiff was actually doing at the time of injury is for the defense to prove.

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		1220, 1231–1232.) or failed to include warning concerning a risk presented by a reasonably foreseeable use of the product (in an inadequate warnings case) (See e.g., *Aguayo, supra,* 183 Cal.App.3d at p. 1042.)	
[SRM2][BG3]		*Perez,* though cited and quoted liberally as supporting authority, had nothing to do with application of the consumer expectations test or failure to warn standards, and the quoted material is entirely inapposite to these standards and instructions.	The committee recognizes that *Perez* is a design-defect risk-benefit case, and is not direct authority for other theories of product liability. But because product misuse can be a defense to all product liability theories of action, the committee believes that it is reasonable to assume that the plaintiff has the same prima facie burden for all claims, not just strict liability risk-benefit. The committee has added a parenthetical to the *Perez* citation for the other four instructions (1201, 1203, 1205, 1222) to alert the user that it is a strict liability design defect-risk-benefit case.
1203	Association of Southern California Defense Counsel, by Bowman & Brooke, Gardina Product Liability Advisory Council, by Hugh F. Young Jr., President (endorsing comments of ASCDC[BG4])[SRM5] Toyota Motor Sales, U.S.A., by G. Webster Burns, Vice President and	Under the Directions for Use, the trial court is directed to send the issue of whether the consumer expectation test applies to the jury in close cases. The applicability of the consumer expectation test is well-defined as a question of law for the court. The "trial court must determine, as a question of foundation and in the context of the facts and circumstances of the particular case, whether the product is one about which the ordinary consumer can form reasonable minimum safety expectations.' (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1125-1126, fn.7; see also *Soule v.*	The Directions for Use only suggest that there may be a jury question as to the applicability of the test. *Saller* says: "If… the trial court finds there is sufficient evidence to support a finding that the ordinary consumer can form reasonable minimum safety expectations, the court should instruct the jury, consistent with Evidence Code section 403, subdivision (c), to determine whether the consumer expectation test applies to the product at issue in the circumstances of the case [or] to disregard the evidence about consumer expectations unless the jury finds that the

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	Asst General Counsel (The ASCDC and Toyota comments are substantially the same and therefore are combined here.)	*General Motors Corp.* (1994) 8 Cal.4th 548, 568 ("the jury may not be left free to find a violation of ordinary consumer expectations whenever it chooses . . . [¶] Instructions based on the ordinary consumer expectations prong of *Barker* are not appropriate where, as a matter of law, the evidence would not support a jury verdict on that theory").	test is applicable."
		In the Sources and Authority, an excerpt has been added that states: "The use of asbestos insulation is a product that is within the understanding of ordinary lay consumers." (*Saller, supra,* 187 Cal.App.4th at p. 1236.) This is not appropriate, as the determination as to whether to use the consumer expectation test depends on the facts of the case, a point acknowledged by *Saller,* which merely observed that "[s]everal cases have applied the consumer expectation test to asbestos-containing products." (*Id.* at p. 1234.) This is a distinction with a difference, as "**[t]he crucial question in each individual case** is whether the circumstances of the product's failure permit an inference that the product's design performed below the legitimate, commonly accepted minimum safety assumptions of its ordinary consumers." *Soule, supra,* 8 Cal.4th at pp. 568-569 (emphasis added.)	The excerpt is a direct quote from *Saller*. Given the prominence of asbestos in product liability litigation, the committee believes that it is helpful. The excerpts in the Sources and Authority do not necessarily need to be tight statements of settled law, but points of interest that a user might want to look into further.
	Gordon & Rees, San Francisco, by James G. Scadden	We support the proposed modification to the "Directions For Use" for CACI 1203. The proposed use note reads: "The court must make an initial determination as to whether	No response required.

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		the consumer-expectation test applies to the product. In some cases, the court may determine that the product is one to which the test may, but not necessarily does, apply, leaving the determination to the jury. [Citation omitted.] In such a case, modify the instruction to advise the jury that it must first determine whether the product is one about which an ordinary consumer can form reasonable minimum safety expectations." The proposed revision would reflect better practice in trial courts today. Both sides should be allowed to argue to the jury which of the two defect tests, consumer expectation or risk/benefit, applies in a given case.	
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The consumer expectations test applies only if "the minimum safety of a product is within the common knowledge of lay jurors." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 567.) The committee believes that this is a question of law for the court to decide (*id.* at p. 568) and suggests that the second paragraph of the Directions for Use, including the citation to *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, be replaced with language to this effect.	The *Soule* opinion does not say that whether the consumer expectation test applies is always to be determined as a matter of law. Thus nothing forecloses the court from sending to the jury the issue of whether the product is one about which an ordinary consumer can form reasonable minimum safety expectations.
		The last excerpt added to the Sources and Authority, that "the use of asbestos insulation is a product that is within the understanding of ordinary lay jurors" is out of place and no effort should be made either to catalog products for which the consumer expectation test may be appropriate or to single out only	See response immediately above.

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		one such product. Moreover, "[t]he critical question, in assessing the applicability of the consumer expectation test, is not whether the product, when considered in isolation, is beyond the ordinary knowledge of the consumer, but whether the product, in the context of the facts and circumstances of its failure, is one about which the ordinary consumers can form minimum safety expectations." (*McCabe v. American Honda Motor Co.* (2002) 100 Cal.App.4th 1111, 1124.)	
1204	Association of Southern California Defense Counsel, by Bowman & Brooke, Gardina Product Liability Advisory Council, by Hugh F. Young Jr., President (endorsing comments of ASCDC) Toyota Motor Sales, U.S.A., by G. Webster Burns, Vice President and Asst General Counsel	In what appears to be an unprecedented wholesale departure from over 30 years of consistent application of product liability law, the proposed revision of CACI No. 1204 completely eliminates the reasonable-foreseeability element, based on *dicta* articulated in *Perez*. The Directions for Use for the proposed revision of CACI No. 1204 posit that "To make a prima facie case, the plaintiff has the initial burden of producing evidence that he or she was injured while using the product in a **reasonably foreseeable manner**. If this *prima facie* burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product." (*Perez*, *supra*, at p. 678 (emphasis added.). This citation to *Perez* in the Directions for Use is taken wholly out of context and misconstrues plaintiff's burden. *Perez* suggests that plaintiff bears only a "burden of producing evidence that injury occurred while	See responses above. *Bernal* does say in a footnote that the plaintiff must prove his or her own foreseeable use at the time of injury. But the committee believes that in light of the authority that misuse is an affirmative defense, *Bernal* can be explained as referring to the prima facie case, as the court did in *Perez*.

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		the product was being used in an intended or reasonably foreseeable manner [but this burden is] distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Id.*) No support is offered by the *Perez* court for this conclusion as to the limits of plaintiff's initial burden. *Bernal v. Richard Wolf Medical Instruments Corp.* (1990) 221 Cal.App.3d 1326, 1332, overruled on other grounds in *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 574, states in fn 5: "Obviously, plaintiff must also prove the product was used in a reasonably foreseeable manner") While the current version of CACI No. 1204 cites to *Bernal* with approval, the proposed revisions to for CACI No. 1204 tellingly eliminate the reference to *Bernal*.	
		The proposed revision would appear to adopt a "bursting bubble" approach to plaintiff's initial burden. Plaintiff must only overcome (simply by meeting a burden of production) an initial presumption that the product was not being used in a reasonably foreseeable way. Once plaintiff presents any evidence that the product was being used in a reasonably foreseeable way, the presumption disappears and it becomes defendant's burden to prove the product was misused. The proposed revision contains no provision	The prima facie case is not a presumption that the product was not being used in a reasonably foreseeable way. Even if it were a presumption, the burden of producing evidence is not something that goes in a jury instruction.

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		whatsoever instructing the jury as to what plaintiff's initial burden of production actually is. It gives the presumption too slight an effect.	
		We are also concerned that the proposed Directions for Use for CACI No. 1204 refer to CACI No. 1245 in support of the proposed "superseding cause" revision. The proposed changes to CACI No. 1245 are unwarrantedly based on *Perez.*	The committee agrees that because it has removed reference to superseding cause in CACI No. 1245, references to "or superseding" should also be removed from the Directions for Use for the rest of the instructions where *Perez* is discussed.
	Civil Justice Association of California, by Kim Stone, President	The risk-benefit test's factors only have weight because they are related to the product's performance/use compared to alternatives that would allow it to achieve similar results. Courts have upheld instructions that provide that the manufacturer must take the use of a product or "event" that happened as a reasonably foreseeable occurrence involving the product (*Fierro v. International Harvester Co.* (1982) 127 Cal.App.3d 862.) The proposed elimination of the "reasonably foreseeable" language from the current jury instructions is at odds with the established law, which acknowledges that it is anticipated that products will be used in a variety of ways. The proposed change will result in a dilution of existing law.	See responses above. There is a difference between reasonably foreseeable use as a general limitation on liability and the plaintiff's particular use of the product at the time of injury.
	Michael B. Gurien, Waters, Kraus & Paul, El Segundo	In the "Sources and Authority," the new excerpt from *Perez*, *supra*, 188 Cal. App. 4th at 678, is potentially misleading because the italicized portion of the quotation, stating that there must be "evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner*," suggests	While the commentator is correct with regard to injury to a bystander, the Sources and Authority are direct excerpts of quoted material from cases. The fact that the excerpt might not be completely accurate under all facts does not mean that it is not helpful to the user to have access to it.

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		that liability will lie only if the plaintiff was injured while actually using the product, as opposed to suffering injury as a bystander. As explained, however, California law clearly allows a bystander to recover for injury caused by a defective product. (*See Finn*, *supra*, 35 Cal. 3d at 715; *Barker*, *supra*, 20 Cal. 3d at 434; *Price*, *supra*, 2 Cal. 3d at 250-251; *Elmore*, *supra*, 70 Cal. 2d at 585-586; *Nelson*, *supra*, 144 Cal. App. 4th at 694-696.)	
1205	Consumer Attorneys of California, by Paloma Perez, Associate Legislative Counsel Michael B. Gurien, Waters, Kraus & Paul, El Segundo	We recommend a clarification to element 3, which currently reads: "That the potential [risk/side effects/allergic reactions] presented a substantial danger to persons using or misusing the [*product*] in an intended or reasonably foreseeable way." This language could be construed in a manner that does not account for bystanders. It is well-settled that California law allows recovery to a bystander for injury caused by a defective product. (See e.g., *Nelson v. Superior Court* (2006) 144 Cal.App.4th 689, 694–696.) In order to avoid any potential confusion that failure to warn for products liability does not apply to bystanders, we would recommend the following revision to element 3: "That the potential [risks/side effects/allergic reactions] presented a substantial danger from use or misuse of the [product] in an intended or reasonably foreseeable way."	The committee agrees and has conformed 1205 to 1203 and 1222, which do not specify to whom the product is dangerous.

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		We believe that by using this language, there will be no question that the instruction will apply to both users and or bystanders	
	Gordon & Rees, San Francisco, by James G. Scadden	Since its inception, this instruction has had a major flaw that the Judicial Council could and should take this opportunity to correct. Under *Anderson v. Owens Corning* (1991) 53 Cal.3d 987 (excerpted in Sources and Authority), the instruction is supposed to say that: "The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution." Instead, the instruction now says only "That the product had potential side effects that were know or knowable by the use of scientific knowledge available at the time of manufacturer." It does not have the "generally recognized and prevailing best scientific knowledge" from *Anderson*. The existing instruction allows anything that can be dressed up as "scientific knowledge" paraded in front of a jury as establishing "knowledge" or perspective that all defendants should have, regardless of how extreme, outré, poorly-founded or little-recognized that "knowledge" might be.	This comment is outside of the scope of the current proposed revisions. The committee has not had the opportunity to consider it. It will be addressed in the next release cycle.
	Michael B. Gurien, Waters, Kraus & Paul, El	In the "Sources and Authority," the new excerpt from *Taylor v. Elliott*	The excerpt is an accurate quotation from *Taylor*, and review was denied. It states the

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	Segundo	*Turbomachinery Co., Inc.* (2009) 171 Cal. App. 4th 564, 578, that a manufacturer does not have a duty to warn about the hazards of other manufacturers' products, is misleading and should be deleted. It does not represent a complete or fully accurate statement of California law. Other California cases have held that manufacturers can have liability for failure to warn of hazards from products of other manufacturers. These cases include *Tellez-Cordova v. Campbell-Hausfeld/Scott Fetzger Co.* (2004) 129 Cal. App. 4th 577, *Wright v. Stang Mfg. Co.* (1997) 54 Cal. App. 4th 1218, and *DeLeon v. Commercial Mfg. and Supply Co.* (1983) 148 Cal. App. 3d 336. Alternatively, quotations from or references to these other cases (i.e., *Tellez-Cordova, Wright,* and *DeLeon*) should be included in order to provide a complete and accurate view of the law on this subject. (The California Supreme Court will decide whether *Taylor* is a correct statement of California law when it addresses the issue in *O'Neil v. Crane Co.*, previously published at 177 Cal. App. 4th 1019.)	basic fundamental principle, that one manufacturer cannot be liable for another's product. The question before the California Supreme Court in *O'Neil* is how to apply that rule when a product contains another manufacturer's asbestos. Even if the court affirms *O'Neil* and disapproves *Taylor*, the excerpt is likely to remain good law. The committee has added a cf citation to *O'Neil* and noted the grant of review.
1222	Michael B. Gurien, Waters, Kraus & Paul, El Segundo	The proposed new excerpt from the Restatement (Third) Of Torts, Products Liability, § 2 should be deleted because those statements pertain to strict liability, not negligence, which is the subject of CACI No. 1222.	While there are differences between strictly liability for failure to warn and negligent failure to warn, the committee believes that the quoted material from the Restatement Third of Torts would be applicable to either theory of liability.
	State Bar Litigation Section Jury Instructions	References to the Restatement Second of Torts in the Sources and Authority should not	The committee believes that it should cite the Restatement only if it says something

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	Committee, by Reuben A. Ginsberg, Chair	be replaced with references to the Restatement Third of Torts, Products Liability. Section 2 of the Restatement Third has not been adopted by the California courts, and the Restatement Third generally has not supplanted the Restatement Second as an authoritative source.	about an issue that is unresolved under California law. There is nothing in the Restatement 2d excerpts that qualifies under that standard. In contrast, the new excerpt from the Restatement 3d contains helpful language about reasonably foreseeable use.
		Also, we suggest that "make" in the second line of the instruction be changed to the past tense "made" consistent with other instructions.	The committee agrees and has made this change.
1245, Affirmative Defense—Product Misuse or Modification	Association of Southern California Defense Counsel, by Bowman & Brooke, Gardina	The proposed Directions for Use for the proposed revision to CACI No 1245 improperly dilute the defense of comparative fault by suggesting that the jury may not attribute 100 percent fault to a plaintiff unless defendant also establishes the elements of "superseding cause.	The committee does not believe that the availability of comparative fault has been diluted in any way. No changes have been made to the comparative fault instructions 1207A and 1207B. And the Directions for Use to all instructions still cross refer to these instructions. Nothing forecloses a defendant from requesting a comparative fault instruction and CACI No. 1245 for a complete defense in the alternative.
	Association of Southern California Defense Counsel, by Bowman & Brooke, Gardina Toyota Motor Sales, U.S.A., by G. Webster Burns, Vice President and Asst General Counsel	The superseding cause test was misapplied in *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, and no authority was cited in the case for engrafting this test onto the misuse or modification affirmative defense. In fact, we have not located a single published case in California (other than *Perez*) which posits that "superseding cause" is the appropriate test for measuring if there is product misuse.	*Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 15–21 is a case that says that superseding cause may be a complete defense based on product misuse or modification. However, the committee has come to agree with this commentator and others who are opposed to importing the standards for superseding cause from CACI No. 432, *Causation: Third-Party Conduct as Superseding Cause,* into CACI No. 1245.

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			While *Torres, Perez,* and other cases do address product misuse and modification under the label of "superseding cause" (and *Perez* presents it as something different from "sole cause" as used in *Campbell, .supra*), no case specifically analyzes product liability under the standards applicable to a third-party intervening act in CACI No. 432. Instead, the committee has combined elements 2 and 3 to incorporate the "highly unusual" aspect of superseding cause (revised as "highly extraordinary), and to thereby define what is meant by "sole cause." The committee has also revised the Directions for Use substantially to address the possible applicability of superseding cause as a complete defense that may be different from sole cause.
		Under the proposed revision to CACI No. 1245, the defense of product misuse/modification will be a nullity as it would not be possible to meet the standard. The kind of harm that could reasonably be expected would always be the same with or without the product misuse/modification. As an illustration, in a catastrophic personal injury case, if a plaintiff drives into a bridge abutment at 100 mph, absent a miracle, the plaintiff will be dead. Unfortunately, dead is dead, and the manufacturer will have no way to establish how there could be a different kind of harm than if the driver of an automobile was killed while driving at 25 miles per hour. Moreover, in *Perez*, it was	Several commentators make this point. *Torres* says that "third party negligence which is the immediate cause of an injury may be viewed as a superseding cause when it is so highly extraordinary as to be unforeseeable. … It must appear that the intervening act has produced harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible." (*Torres, supra,* 49 Cal.App.4th at p. 18.) So there is authority for the proposed revision. Nevertheless, as stated above, the committee believes that the whole question of superseding cause as applied to product

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		conceded that the kind of harm -- from a pinch point of the machine in question -- was clearly foreseeable. The necessary focus on foreseeable use, not type of injury, is eliminated.	misuse or modification is unclear and with unresolved issues, and therefore, it is withdrawing the changes to the instruction text that were originally proposed in favor of a more minor change.
	James Ballidis, Attorney at Law, Newport Beach	Whether a sole or superseding cause, foreseeability of misuse or modification seems to be the same inquiry. Yet the proposed instruction uses different wording from the original and proposed change to instruction 1245, possibly causing confusion.	The court in *Perez* appears to view sole cause and superseding cause as different defenses. But *Perez* did not elaborate further on what the differences might be. Because both have unforeseeability at the core of the defense, the committee shares the commentator's concern that they might in reality be the same inquiry. The minor revisions that the committee has made are designed to harmonize the "sole cause" label from *Campbell, supra,* (22 Cal.3d at p. 56) with the "superseding cause" label from *Torres.*
	Civil Justice Association of California, by Kim Stone, President	The proposed three-step test for superseding cause, taken from *Perez,* an irregular case, would create an almost impossible burden to meet and would gut this legal defense. In *Springmeyer v. Ford Motor Co.* (1998) 60 Cal.App.4th 154, the court stated "[a] third party's failure to prevent harm threatened by the defendant's conduct is sometimes held to constitute a superseding cause of that harm (Rest.2d Torts, § 452), but it is impossible to state any comprehensive rule as to when such a decision will be made." However, under the proposed jury instruction, the defense would not be available because manufacturers are all too aware of the unfortunate statistics bearing	See responses to comment above.

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		out the disregard third-parties have in such situations.	
		Requiring that the kind of harm be different than reasonably expected would significantly narrow the use of this defense. For example, in *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 71 Cal.Rptr.2d 817, GE supplied bulk silicone to a manufacturer of breast implants. The manufacturer processed the silicone in a manufacturing process over which GE had no control. GE shipped the product with a disclaimer, disclaiming any responsibility for determining whether the material was suitable for medical applications but GE was still sued under product liability for failure to warn. The court found that GE had no liability for failure to warn the ultimate user because it did not exercise any control over the design, testing, or labeling of the implants. However, under the proposed jury instructions, the superseding cause of another manufacturer using silicone for breast implants would not be highly unusual, would likely be known by GE and the harm would not be different from that expected.	See responses to comment above.
	DrinkerBiddle&Reath, San Francisco, by Alan J. Lazarus and Siobhan Cullen	CACI 1245 requires that the manufacturer establish that the misuse or modification of the product was the sole or superseding cause of the injury. The instruction overstates the manufacturer's burden because it fails to differentiate between traditional intervening acts by a third party which sever the causal connection between the tortfeasor's misconduct and the plaintiff's harm	See responses to comment above.

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		(superseding cause) and the misuse of a product by the plaintiff or the user of the product which produced the injury. The defenses are separate and distinct, and they should not be packed into the same instruction. The traditional superseding causation standards usually applied to third-party intervening conduct are quite rigorous, as they are used to "absolve a tortfeasor, even though his conduct was a substantial contributing factor, when an independent event intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible." *Soule*, 8 Cal.4th at 573 n.9. While in an appropriate case this general tort law defense may be available to a product manufacturer, this is not the ordinary defense of product misuse or modification, and the two should not be conflated. The cases cited in *Perez* opinion are inapposite. None support importing third party superseding cause standards into the misuse or modification defense, which is specific to the product liability context.	
	Mary T. McKelvey and William J. Sayers, McKenna, Long & Aldridge, Los Angeles	The proposed revision to CACI No. 1245 mistakenly forces the jury to find twice (in different terms, but not by different standards) whether the misuse or modification is foreseeable: first, as the second element of the	The committee agrees with this comment, but it is moot in light of the decision to drop the definition of "superseding cause" from the instruction.

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		first paragraph; then again as the second element of the second paragraph. If CACI 432 on superseding cause is to be appended to CACI 1245, unforeseeable use (i.e., "defendant did not know and had no reason to expect") should be stricken as the requisite foreseeability finding will necessarily have been made already.	
	O'Melveny & Myers, Los Angeles, by A. Patricia Ursea	The third superseding cause element—the requirement of an unforeseeable harm—should not be included as it does not accurately reflect the courts' application of the superseding cause principle. The apparent authority for this prong of the test is *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678, which the committee proposes to cite in the "Sources and Authority" section of the instruction. But *Perez* does not stand for the proposition that defendant must prove that the harm was unforeseeable for purposes of showing superseding cause. Indeed, in *Perez*, the harm was arguably exactly the type of harm that the defendant should have foreseen—plaintiff severed a finger using a "paper rewinder." Nevertheless, the court found superseding cause. The case law is admittedly confusing in that it sometimes frames the superseding cause principle in context of the foreseeability of the harm. But the application of the principle in each case we reviewed makes clear that the real issue is the foreseeability of the use or misuse.	See responses to comment immediately above.

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	3M Company, by Thomas A. Packer of Gordon & Reese, San Francisco	The proposed amendments to CACI No. 1245 confuse comparative fault with a misuse/modification defense and should not be adopted. The proposed modifications are not supported by *Perez* or by other principles of California law, and will create a conflict between CACI No. 1245 (Misuse/Modification as a Defense) and CACI Nos. 1207A and 1207B (Comparative Fault of Plaintiff or a Third Party)	The committee does not believe that comparative fault has been confused with a misuse/modification defense or that there is any conflict. No changes have been made to the comparative fault instructions 1207A and 1207B. And the Directions for Use to all instructions still cross refer to these instructions. Nothing forecloses a defendant from requesting a comparative fault instruction and CACI No. 1245 for a complete defense in the alternative.
		If any revision is necessary, it may be to clarify the Directions for Use to CACI No. 1245 to more precisely use the term "superseding cause." As the Directions for Use say, if misuse is not the "sole cause" of plaintiff's harm, then comparative fault may apply − as set forth in CACI Nos. 1207A and 1207B. It is not necessary that the misuse also be a "superseding" cause. Based on the context of the Directions for Use, on the language of CACI Nos. 1207A and 1207B, and on settled principles of California law, the use of the term "superseding" in the Directions for Use is a synonym for "sole;" the Directions for Use do not invite a completely different comparative fault standard for misuse or modification defenses. If anything, the Directions for Use could be revised to strike the term "superseding." However, it is inappropriate and contrary to California law to make the proposed revisions to the text of CACI No. 1245, requiring that the defendant prove that misuse of the product	Nothing suggests that a defendant must prove superseding cause to assert a comparative-fault defense. However, the committee has revised the Directions for Use to delete the word "superseding" as currently used and instead, to provide an explanation of how the term "superseding cause" has been used in some cases.

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		was a superseding cause to establish comparative fault.	
		Even if the additions to CACI No. 1245 are adopted, the proposed three-prong analysis is unclear, confusing, and contrary to California law. The term "highly unusual" as a standard for a reasonable person's determination of the misuse is undefined and unsupported by the law cited in the Sources and Authority section.	While the committee is not proceeding with an attempt to define "superseding cause" in the instruction, it has included the phrase "highly extraordinary" as a qualification on forseeability in element 2. The language is supported by *Torres, supra.* (49 Cal.App.4th at p. 18.)
		The measure of the misuse is not from the point of view of a "reasonable person," but is from the perspective of the manufacturer of the product. See *Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825 (The law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse.") (emphasis added) (citation omitted).	The issue is moot because the definition of "superseding cause" has been deleted from the instruction.
		The requirement that defendant prove that "the kind of harm resulting from [the misuse] was different from the kind of harm that could have been reasonably expected" is vague, ambiguous, and unsupported by California law. In many circumstances, the harm that may result from a defective product is the same as the harm resulting from misuse of a nondefective product. To require a defendant to prove that the "kind of harm" from the misuse is different than "reasonably expected" may foreclose a misuse defense in many products liability actions where the harm from	See responses to comment above.

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		misuse of a nondefective product is the same as the harm from a defective product. Certainly, *Perez* does not support such a change.	
2570, Age Discrimination-Disparate Treatment-Essential Factual Elements	California Judges Association	SUPPORT: This proposed new instruction is for age discrimination cases. It mirrors the already existing instruction 2500, which deals with disparate treatment, generally. It seems the original approach to instructions on age discrimination was to tailor the general instruction to this specific kind of case. But CACI 2500 can be too simple for age discrimination issues. This new instruction is useful in that it provides a comprehensive discussion of the complicated burden-shifting aspect of this area of law. That discussion is particularly helpful. Found in the Directions for Use, it details a multiple burden-shifting that attends to age discrimination, followed by a thorough Sources and Authority section. What may at first blush seem "unnecessary duplication" to CACI 2500 seems to be well overcome by a thoughtful, well written instruction and insightful, concise discussion and references to help trial judges.	No response necessary.
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Disagree. The committee believes that there is no need for a separate instruction on age discrimination. CACI No. 2500 can be used for age discrimination just as it can be used for discrimination on any other protected status. The plaintiff's membership in a protected group ordinarily is not disputed, but if it is disputed an element can be added to CACI No. 2500 without the need for a	The committee agrees with the comment of the California Judges Association above.

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Instruction	Commentator	Summary of Comment	Committee Response
		separate instruction.	
2924. Status as Defendants' Employee—Subservant Company	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees that elements 2 and 3 should be added and that the list of factors (a) through (f) should be deleted. (But fix formatting to reflect that instruction can be used for both injury and death.)	The format problem has been fixed.
		Schmidt v. Burlington Northern & Santa Fe Ry. (9th Cir. 2010) 605 F.3d 686, 689-690, states that the plaintiff must prove that the defendant "controlled or had the right to control his physical conduct on the job." Yet the second element in the instruction refers more generally to the right to control the primary employer's "employees." We believe that the second element should be specific to the plaintiff or decedent: "2. That [*name of defendant*] controlled or had the right to control [*name of plaintiff/decedent*]'s physical conduct of [*name of primary employer*]'s employees in the course of the work during which [*name of plaintiff/decedent*] was [injured/killed]; and"	The committee believes that the right to control the primary employer's employees equates to the right to control the injured or deceased worker if the worker was an employee of the primary employer.
		The committee also suggests stating in the Directions for Use that the court should instruct on the appropriate factors to determine the existence of the right to control, and citing section 220 of the Restatement Second of Agency.	Although section 220 was not carried forward in the Restatement Third of Agency, it is still included in the Sources and Authority for CACI No. 2923, *Borrowed Servant/Dual Employee.* The committee has added Directions for Use to No. 2924 to cross refer to No. 2923 and section 220. Section 220 has also been added to the Sources and Authority, along with two additional case excerpts that mention section 220.

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Instruction	Commentator	Summary of Comment	Committee Response
3011, Violation of Prisoner's Federal Civil Rights-Eighth Amendment-General Conditions of Confinement Claim	California Judges Association	SUPPORT: The proposed revision to this existing instruction seeks to clarify the 'deliberate indifference' standard and include the previously absent "no reasonable justification" element. This revision inserts a necessary element and clarifies, based on updated case law, the existing element related to deliberate indifference. The rationale for the changes appears to be supported by current law. Even though this may not be a "frequent flier" for trial judges in terms of trial work, clarity and currency with the law are well thought out and well explained in the Directions for Use, so if a trial judge wants to insert "deliberate indifference" into the instruction, the law and background are there for authority and reference.	No response necessary.
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Disagree. Use of the word "deprivation" suggests that the instruction applies only to those cases where the prisoner was deprived of some necessity. But a deprivation of rights, privileges, or immunities under section 1983 may involve affirmative conduct (such as excessive force) that most jurors would not describe as a deprivation.	The committee agrees with the comment and has revised the instruction to remove the word "deprivation."
		The committee believes that the existing instruction more accurately describes the essential elements.	The current instruction does not adequately express the deliberate-indifference element.
		We believe that the fact that a substantial risk of harm was obvious may be circumstantial evidence of the defendant's knowledge, but does not merit specific mention in this instruction. The defendant's knowledge of	The inmate must show that the prison officials were aware of a substantial risk of serious harm to an inmate's health or safety. Awareness may be satisfied if the inmate shows that the risk posed by the deprivation

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Instruction	Commentator	Summary of Comment	Committee Response
		the risk of harm must be actual and subjective. (*Farmer v. Brennan* (1970) 511 U.S. 825, 847.) Instructing on the obviousness of the risk may weaken this requirement.	is obvious." (*Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150.) The committee believes that the jury should be instructed on this point.
		The authorities cited in the Sources and Authority do not indicate whether absence of reasonable justification is an essential element for the plaintiff to prove or reasonable justification is an affirmative defense for the defendant to prove.	The inmate must show that the prison officials had no reasonable' justification for the deprivation, in spite of that risk. (*Thomas v. Ponder, supra.*, included in the Sources and Authority.)
3301 Below Cost Sales-Essential Factual Elements	California Judges Association	OPPOSE UNLESS REVISED: The proposed new last paragraph of the instruction is an oversimplification of the law in the context of a very complex area and renders the instruction incomplete, inaccurate, and misleading. The jury should be told that the defendant is entitled to rebut the initial presumption. We therefore propose the following revised language, as indicated by underline: "If [*name of plaintiff*] proves that [*name of defendant*] [[offered to sell/sold] [product/service] at a price that was below cost/ [or] gave away [product/services]], you may assume that [*name of defendant*]'s purpose was to injure competitors or destroy competition. This presumption may be rebutted (overcome) by evidence presented by the defendant."	While the committee does not believe that the instruction as proposed is incomplete, inaccurate, and misleading, the last paragraph has been revised slightly to include language similar to that proposed by the commentator.
	Orange County Bar Association, by John C	As currently proposed, the instruction will be confusing to jurors. The jurors will be asked:	The committee shares the commentator's concern about juror confusion, but feels

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Instruction	Commentator	Summary of Comment	Committee Response
	Hueston, President	1. To prove if defendant's intent was predatory; 2. Then to "assume" it was predatory; 3. Then to go back and reconsider defendant's arguments to once again determine defendant's purpose. The newly-added language should be either asterisked * to Point 1 injury instructions or placed directly within Point 1 to ensure that jurors' thought process is led down a progressive, logical path.	constrained by the court's statement in *Bay Guardian Co. v. New Times Media, LLC* (2010) 187 Cal.App.4th 438 that the plaintiff is entitled to instructions on the presumption of Business and Professions Code sections 17071 and 17071.5. Neither of the commentator's suggestions will work within CACI format. Explanatory text is never inserted between elements, and asterisks are not used.
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee believes that an instruction on the presumption is appropriate, but believes that a separate instruction would be clearer.	The committee generally tries to avoid separate instructions on related points unless combining them would result in unduly complex elements. That is not the case here.
		Bay Guardian Co. v. New Times Media, LLC (2010) 187 Cal.App.4th 438 holds that the presumption under Business and Professions Code section 17071 is a presumption affecting the burden of proof, but offers no clear guidance on how to instruct the jury on such a presumption. We believe that other authorities better explain the operation of such a presumption (*Haycock v. Hughes Aircraft* Co. (1994) 22 Cal.App.4th 1473, 1492-1495; Assembly Com. on Judiciary com. on Evid. Code § 606, 29B West's Ann. Evid. Code (1995 ed.) foll. § 606, pp. 64-65; Jefferson's California Evidence Benchbook (Cont.Ed.Bar 4th ed. 2010) §§ 48.29-48.33) and should be cited in lieu of relying on *Bay Guardian.*	*Haycock* is not a below-cost-sales case, but the committee does agree that it contains a better explanation of the operation of a presumption affecting the burden of proof. The committee has added a "but see" citation to *Haycock* as possibly in conflict with *Bay Guardian's* statement that the burden shifts back to the plaintiff after the defendant offers rebuttal evidence to the presumption. Under Evidence Code section 606 as explained in *Haycock,* the burden of proof is on the party against whom the presumption operates, which in this case is the defendant. Nevertheless, the committee believes that *Bay Guardian* compels retaining element 2

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Instruction	Commentator	Summary of Comment	Committee Response
			on intent to injure as part of the plaintiff's burden of proof.
		The proposed new language provides for a rebuttable presumption on the plaintiff's proof of only one factor: sales below cost or giving away product or services. But section 17071 also requires "proof of the injurious effects of such acts" to establish the presumption. This second factor should be included in the instruction.	The committee agrees and has added language indicating that the presumption requires proof of both the act and the harm,
3712 – Vicarious Responsibility: Joint Ventures	Orange County Bar Association, by John C Hueston, President	The proposed instruction is too restrictive and does not take into account the wide variety of joint ventures found by the specific facts as identified at Witkin, Summary of California Law (10th ed 2005) Ch. 12, "Partnerships," §§ 9-14. We recommend adding or substituting the following language: At line 2, substitute "in furtherance of the joint enterprise" in lieu of "within the scope of his or her authority." (Witkin, *supra* at § 14.)	The committee agrees with the comment and has made this change.
		At line 4, add "by a preponderance of the evidence:" (*Weiner v. Fleschman* (1991) 54 Cal3d 476.)	CACI instructions do not mention the degree of proof required unless it's more than a preponderance.
		At element 1, add "or series of business transactions for their mutual benefit;" (Witkin, *supra,* at § 9).	While Witkin does include the "series of transactions" language, the cases that it cites for the proposition do not. A number of them say "single transaction," as does *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482, which is currently included in the Sources and Authority. The committee has expanded this case excerpt to include that "a joint venture usually involves a single

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Instruction	Commentator	Summary of Comment	Committee Response
			business transaction."
		At the end of the instruction, add "Little formality is required as long as the parties have an intent to carry out a business enterprise jointly." (*Boyd vs. Bevilacqua* (1966) 247 Cal.App.2d 272, 285.)	The committee has added reference to intent to element 1 and added an excerpt from *Boyd* to the Sources and Authority. The committee does not believe that the "little formality" language is needed as the instruction already states that the agreement may be oral or implied.
3921 and 3922 (Wrongful death)	Orange County Bar Association, by John C Hueston, President	Delete added word "future". For clarity add phrase "past and future" after phrase "for noneconomic damages"	See response below to State Bar Committee on Administration of Justice.
	State Bar Committee on Administration of Justice	CAJ recommends, as to instruction 3921 and 3922: • Deleting "future" under noneconomic damages. • Deleting the Directions for Use sentence that states: "Include the last sentence only if both future economic and noneconomic damages are sought." The proposed revision includes the addition of the word "future" to noneconomic damages in both instruction 3921 and 3922. This addition, taken in conjunction with the Directions for Use and other parts of the instructions, do not add clarity and may lead to confusion for practitioners and jurors. Measurement of the loss of comfort, society, companionship, care assistance, protection, affection, society, moral support, loss of enjoyment of sexual relations and loss of	The committee agrees with the removal of "future." Noneconomic damages are not reduced to present cash value under any circumstances, past or future. And as the commentator notes, noneconomic damages in wrongful death are measured over a future period. The committee does not agree that the sentence in the Directions for Use should be deleted. It was added because of concerns about juror confusion if future economic damages were sought and present-value tables and worksheets were provided. The jury needs to understand that the worksheets and tables are not to be used to make a present-value reduction to noneconomic damages. Additional language has been added to the Directions for Use to explain this concern.

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Instruction	Commentator	Summary of Comment	Committee Response
		training and guidance resulting from a death must necessarily be measured over a future period. CACI 3921 and 3922 correctly list these damages as noneconomic damages. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646-647; *Krouse v. Graham*, (1977) 19 Cal.3d 59, 67-69; Civ. Code § 1431.2.) Thus, whether the damage is sought in a wrongful death or other case, if it is noneconomic, it is not subject to reduction to present cash value. It does not matter that they are damages calculated over a future period of time. Adding the word "future" makes it appear as though there are two different types of noneconomic damage and that only "future noneconomic damage" should not be reduced to present cash value when in fact no noneconomic damage should be reduced to present cash value.	
4302–4309 (All unlawful detainer instructions)	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	In *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876, the court held that the residential tenant's admission that he actually received the written notice waived any defect in the manner of service. The committee believes that the Directions for Use should be modified to clarify that a waiver occurs only on actual receipt of the written notice: "If service of notice may have been defective, but there is evidence that the defendant d it, include the bracketed language at the end of element 4. Defective service may be waived if defendant	The committee does not believe that this revision is necessary. The antecedent of "it" cannot be anything else other than "notice," and while "written" could be added, it seems implausible that an oral notice would ever get to the jury.

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Instruction	Commentator	Summary of Comment	Committee Response
		admits receipt of the written notice."	
4303, 4305, 4307, 4309 (All unlawful detainer instructions on manner of notice)	Orange County Bar Association, by John C Hueston, President	In the paragraph containing the second listed method of service of notice, in each instance where the phrase "commercial property" occurs, change that phrase to read as follows: "commercial rental property."	The committee has conformed all references to say "commercial rental property."
	California Judges Association	Code of Civil Procedure section 1162 requires that the notice be affixed in a "conspicuous place," not in a "place where it would easily be noticed." By changing the language of the statute, the jury instruction is misleading and an incorrect statement of the law. The language should be the same as that found in section 1162.	The committee believes that "easily noticed" is an accurate plain-language expression of "conspicuous[BG6]."[SRM7]
5000, Duties of the Judge and Jury	Hon. Elizabeth Baron, former justice of the Second District Court of Appeal	An I-Pad is generically referred to as a tablet device, and it should be on the list of prohibited electronic communications devices.	The committee has added "tablet device" as an additional prohibited item.
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee suggests the following revisions to the third paragraph of the instruction to make it more understandable: "These prohibitions on communications and research extend to all forms of electronic communications. Do not use any electronic devices or media to send or receive any information to or from anyone about this case or your experience as a juror until after I tell you that you are discharged from your jury duty. This means that you cannot use any cell phone, smart phone, PDA, computer, the Internet,	The committee does not believe that the proposed revised language is an improvement.

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Instruction	Commentator	Summary of Comment	Committee Response
		any Internet service, any text or instant-messaging service, any Internet chat room, blog, or Web site, including social networking websites or online diaries, or any other electronic device to send or receive anything dealing with your experience as a juror or any subject matter of this case."	
5009, Predeliberation Instructions	California Judges Association	SUPPORT: It appears that the proposed revision to CACI 5009 is intended to clarify that the procedure to arrive at a quotient verdict (agreeing in advance to add up the sums each juror thinks should be awarded, and dividing that sum by the number of jurors) is prohibited if there is no further deliberation after the quotient is reached, but is permissible if the average is to be used as a basis for further discussion and deliberation. A long string of California authority supports the use of quotients by jurors as a basis for further discussion, although the more recent cases all condemn the advance agreement to make the quotient the verdict without further discussion. The instruction as modified does not appear to encourage use of a quotient as a discussion device, but Directions for Use make it clear that such a use is permissible. It can be quite difficult for a jury to arrive at a number for general damages. While the quotient approach is potentially subject to misuse, in an appropriate case it might assist	No response required.

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Instruction	Commentator	Summary of Comment	Committee Response
		the jury in reaching a decision. For this reason, and because we believe the distinction drawn is supported by appellate authority, we support the revision.	
Multiple: removing sentence in the Directions for Use regarding deleting uncontested elements	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees with the proposed revisions. Omitting uncontested elements from the instructions shortens the instructions, which is beneficial, but may mislead or confuse the jury by creating the impression that the plaintiff's burden is too light. We believe that if a particular instruction includes several elements, however, it would useful to state in the Directions for Use that the court may instruct the jury that particular elements are uncontested.	The committee will add a section to the User Guide in the next release suggesting several approaches to uncontested elements.
	Orange County Bar Association, by John C Hueston, President	Agree with all new and revised instructions except as indicated above	No response necessary.
	State Bar Litigation Section Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree with all new and revised instructions except as indicated above	No response necessary.

CIVIL JURY INSTRUCTIONS (CACI 11–01)
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108. Duty to Abide by Translation Provided in Court

Some testimony will be given in [*insert language other than English***]. An interpreter will provide a translation for you at the time that the testimony is given. You must rely solely on the translation provided by the interpreter, even if you understand the language spoken by the witness. Do not retranslate any testimony for other jurors. If you believe the court interpreter translated testimony incorrectly, let me know immediately by writing a note and giving it to the [clerk/bailiff/court attendant].**

New September 2003; Revised April 2004, June 2011

Sources and Authority

- It is misconduct for a juror to retranslate for other jurors testimony that has been translated by the court-appointed interpreter. (*People v. Cabrera* (1991) 230 Cal.App.3d 300, 303 [281 Cal.Rptr. 238].)

- "It is well-settled a juror may not conduct an independent investigation into the facts of the case or gather evidence from outside sources and bring it into the jury room. It is also misconduct for a juror to inject his or her own expertise into the jury's deliberation." (*People v. Cabrera, supra,* 230 Cal.App.3d at p. 303.)

- "If [the juror] believed the court interpreter was translating incorrectly, the proper action would have been to call the matter to the trial court's attention, not take it upon herself to provide her fellow jurors with the 'correct' translation." (*People v. Cabrera, supra,* 230 Cal.App.3d at p. 304.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial § 281

1 California Trial Guide, Unit 3, *Other Non-Evidentiary Motions*, § 3.32 (Matthew Bender)

1A California Trial Guide, Unit 20, *Procedural Rules for Presentation of Evidence*, § 20.13 (Matthew Bender)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, §§ 91.10, 91.12 (Matthew Bender)

112. Questions From Jurors

If, during the trial, you have a question that you believe should be asked of a witness, you may write out the question and send it to me through my courtroom staff. I will share your question with the attorneys and decide whether it may be asked.

Do not feel disappointed if your question is not asked. Your question may not be asked for a variety of reasons. For example, the question may call for an answer that is not allowed for legal reasons. Also, you should not try to guess the reason why a question is not asked or speculate about what the answer might have been. Because the decision whether to allow the question is mine alone, do not hold it against any of the attorneys or their clients if your question is not asked.

Remember that you are not an advocate for one side or the other. Each of you is an impartial judge of the facts. Your questions should be posed in as neutral a fashion as possible. Do not discuss any question asked by any juror with any other juror until after deliberations begin.

New February 2005; Revised April 2007, April 2009, June 2011

Directions for Use

This is an optional instruction for use if the jurors will be allowed to ask questions of the witnesses. For an instruction to be given at the end of the trial, see CACI No. 5019, *Questions From Jurors*. This instruction may ~~need to~~ be modified to account for an individual judge's practice.

Sources and Authority

- Rule 2.1033 of the California Rules of Court provides: "A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury."

- "In a proper case there may be a real benefit from allowing jurors to submit questions under proper control by the court. However, in order to permit the court to exercise its discretion and maintain control of the trial, the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness." (*People v. McAlister* (1985) 167 Cal.App.3d 633, 644 [213 Cal.Rptr. 271].)

- "[T]he judge has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305 [18 Cal.Rptr.2d 796, 850 P.2d 1].)

- "The appellant urges that when jurymen ask improper questions the defendant is placed in the delicate dilemma of either allowing such question to go in without objection or of offending the jurors by making the objection and the appellant insists that the court of its own motion should check the putting of such improper questions by the jurymen, and thus relieve the party injuriously affected

thereby from the odium which might result from making that objection thereto. There is no force in this contention. Objections to questions, whether asked by a juror or by opposing counsel, are presented to the court, and its ruling thereon could not reasonably affect the rights or standing of the party making the objection before the jury in the one case more than in the other." (*Maris v. H. Crummey, Inc.* (1921) 55 Cal.App. 573, 578–579 [204 P. 259].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 85

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 7-E, *Juror Questioning Of Witnesses*, ¶ 7:45.11b (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, §§ 91.01–91.03 (Matthew Bender)

115. "Class Action" Defined (Plaintiff Class)

A class action is a lawsuit that has been brought by one or more plaintiffs on behalf of a larger group of people who have similar legal claims. All of these people together are called a "class." [*Name of plaintiff***] brings this action as the class representative.**

In a class action, the claims of many individuals can be resolved at the same time instead of requiring each member to sue separately. Because of the large number of claims that are at issue in this case, not everyone in the class will testify. You may assume that the evidence at this [stage of the] trial applies to all class members [except as I specifically tell you otherwise]. All members of the class will be bound by the result of this trial.

In this case, the class(es) consist(s) of the following:

[*Describe each class, e.g.,*

> *Original Homebuyers: All current homeowners in the Happy Valley subdivision in Pleasantville, California, who purchased homes that were constructed and marketed by [*name of defendant*]. ("Class of Original Purchasers")*
>
> *Subsequent Homebuyers: All current homeowners in the Happy Valley subdivisions in Pleasantville, California, who purchased homes that were constructed and marketed by [*name of defendant*] from another homeowner. ("Class of Later Purchasers")***].**

New June 2011

Directions for Use

The first paragraph may be modified for use with a defendant class. If in the course of the trial the court decertifies the class or one of the classes as to some or all issues, a concluding instruction explaining the effect of the decertification should be given.

In the second paragraph, if class evidence and individual evidence will be received in separate stages of the trial, include the first bracketed language. If both class evidence and individual evidence will be received together, include the second bracketed language and specify the class evidence in a separate instruction.

Sources and Authority

- Code of Civil Procedure section 382 provides, in part: "[W]hen the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."

- "Courts long have acknowledged the importance of class actions as a means to prevent a failure of

justice in our judicial system. ‘ “By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress . . . .” ’ Generally, a class suit is appropriate ‘when numerous parties suffer injury of insufficient size to warrant individual action and when denial of class relief would result in unjust advantage to the wrongdoer.’ ‘But because group action also has the potential to create injustice, trial courts are required to ‘ “carefully weigh respective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts.” ’ ” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 434–435 [97 Cal.Rptr.2d 179, 2 P.3d 27], internal citations omitted.)

- “The cases uniformly hold that a plaintiff seeking to maintain a class action must be a member of the class he claims to represent.” (*La Sala v. American Sav. & Loan Assn.* (1971) 5 Cal.3d 864, 875 [97 Cal.Rptr 849, 489 P.2d 1113].)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Pleading, § 267 et seq.

Cabraser, California Class Actions and Coordinated Proceedings (2d ed.), Ch. 3, *California’s Class Action Statute*, § 3.03 (Matthew Bender)

Deskbook on the Management of Complex Civil Litigation, Ch. 3, *Specialized Areas*, § 3.70 et seq. (Matthew Bender)

12 California Forms of Pleading and Practice, Ch. 120, *Class Actions*, §§ 120.11, 120.14 (Matthew Bender)

4 California Points and Authorities, Ch. 41, *Class and Representative Actions*, § 41.30 et seq. (Matthew Bender)

3 Matthew Bender Practice Guide: California Pretrial Civil Procedure: Ch. 33, *Class Actions*, § 33.04

116. Why Electronic Communications and Research Are Prohibited

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I know that many of us are used to communicating and perhaps even learning by electronic communications and research. However, there are good reasons why you must not electronically communicate or do any research on anything having to do with this trial or the parties.

In court, jurors must make important decisions that have consequences for the parties. Those decisions must be based only on the evidence that you hear in this courtroom.

The evidence that is presented in court can be tested; it can be shown to be right or wrong by either side; it can be questioned; and it can be contradicted by other evidence. What you might read or hear on your own could easily be wrong, out of date, or inapplicable to this case.

The parties can receive a fair trial only if the facts and information on which you base your decisions are presented to you as a group, with each juror having the same opportunity to see, hear, and evaluate the evidence.

Also, a trial is a public process that depends on disclosure in the courtroom of facts and evidence. Using information gathered in secret by one or more jurors undermines the public process and violates the rights of the parties.

New June 2011

Directions for Use

Give this instruction after CACI No. 100, *Preliminary Admonitions,* in order to provide more information to the jury as to the reasons why independent electronic research using the internet and electronic communications is prohibited.

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, § 330 et seq.

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 7-F, *Juror Misconduct During Trial*, ¶¶ 7:110, 7:113.1 (The Rutter Group)

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-F, *Juror Misconduct During Deliberations*, ¶¶ 15:206-15:210 (The Rutter Group)

4 Johnson, California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.10 et seq. (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 322, *Juries and Jury Selection*, § 322.50 et seq. (Matthew Bender)

1 Matthew Bender Trial Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.21

302. Contract Formation—Essential Factual Elements

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

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

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

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

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

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

New September 2003; Revised October 2004, June 2011

Directions for Use

This instruction should only be given if the existence of a contract is contested. If both parties agree that they had a contract, then the instructions relating to whether or not a contract was actually formed would not need to be given. At other times, the parties may be contesting only a limited number of contract formation issues. Also, some of these issues may be decided by the judge as a matter of law. ~~Users should omit elements in this instruction that are not contested so that the jury can focus on the contested issues.~~ Read the bracketed paragraph only if element 3 is read.

The elements regarding legal capacity and legal purpose are omitted from this instruction because these issues are not likely to be before the jury. If legal capacity or legal purpose is factually disputed then this instruction should be amended to add that issue as an element. Regarding legal capacity, the element could be stated as follows: "That the parties were legally capable of entering into a contract." Regarding legal purpose, the element could be stated as follows: "That the contract had a legal purpose."

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

Sources and Authority

- Civil Code section 1550 provides:
  It is essential to the existence of a contract that there should be:

1. Parties capable of contracting;
2. Their consent;
3. A lawful object; and
4. A sufficient cause or consideration.

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

- The issue of whether a contract is illegal or contrary to public policy is a question of law. (*Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 350 [258 Cal.Rptr. 454].)

- "In order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.' [Citation.]" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811 [71 Cal.Rptr.2d 265].)

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

- Courts have stated that the issue of whether a contract is sufficiently definite is a question of law for the court. (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770, fn. 2 [23 Cal.Rptr.2d 810]; *Ersa Grae Corp. v. Fluor Corp.* (1991) 1 Cal.App.4th 613, 623 [2 Cal.Rptr.2d 288].)

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

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

- In *Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 884 [268 Cal.Rptr. 505],

the court concluded that the presumption of consideration in section 1614 goes to the burden of producing evidence, not the burden of proof.

- Lack of consideration is an affirmative defense and must be alleged in answer to the complaint. (*National Farm Workers Service Center, Inc. v. M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 808 [194 Cal.Rptr. 617].)

- "Consideration consists not only of benefit received by the promisor, but of detriment to the promisee. ... 'It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.' " (*Flojo Internat., Inc. v. Lassleben* (1992) 4 Cal.App.4th 713, 719 [6 Cal.Rptr.2d 99], internal citation omitted.)

- "Consideration may be an act, forbearance, change in legal relations, or a promise." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 202.)

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

- California courts use the objective standard to determine mutual consent: "[A plaintiff's] uncommunicated subjective intent is not relevant. The existence of mutual assent is determined by objective criteria. The test is whether a reasonable person would, from the conduct of the parties, conclude that there was mutual agreement." (*Hilleary v. Garvin* (1987) 193 Cal.App.3d 322, 327 [238 Cal.Rptr. 247], internal citations omitted; see also *Roth v. Malson* (1998) 67 Cal.App.4th 552, 557 [79 Cal.Rptr.2d 226].)

- Actions as well as words are relevant: "The manifestation of assent to a contractual provision may be 'wholly or partly by written or spoken words or by other acts or by failure to act.' " (*Merced County Sheriff's Employees' Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 670 [233 Cal.Rptr. 519] (quoting Rest. 2d Contracts, § 19).)

- The surrounding circumstances can also be relevant in determining whether a binding contract has been formed. (*California Food Service Corp., Inc. v. Great American Insurance Co.* (1982) 130 Cal.App.3d 892, 897 [182 Cal.Rptr. 67].) "If words are spoken under circumstances where it is obvious that neither party would be entitled to believe that the other intended a contract to result, there is no contract." (*Fowler v. Security-First National Bank* (1956) 146 Cal.App.2d 37, 47 [303 P.2d 565].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 26, 50, 58, 116–255, 419, 420

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.10, 140.20–140.25 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts,* § 50.350 et seq. (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions,* §§ 75.10, 75.11 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element,* 13.03–13.17

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, June 2011

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 needed if conditions for performance are at issue. 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*.

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.)

- "When a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract. Normally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact. Whether a partial breach of a contract is material depends on 'the importance or seriousness thereof and the probability of the injured party getting substantial performance.' 'A material breach of one aspect of a contract generally constitutes a material breach of the whole contract.' " (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–278 [-- Cal.Rptr.3d --], internal citations omitted.)

- "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) Contracts, § 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.*)

- ~~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

325. Breach of Covenant of Good Faith and Fair Dealing—Essential Factual Elements

In every contract or agreement there is an implied promise of good faith and fair dealing. This means that each party will not do anything to unfairly interfere with the right of any other party to receive the benefits of the contract; however, the implied promise of good faith and fair dealing cannot create obligations that are inconsistent with the terms of the contract. [*Name of plaintiff***] claims that [***name of defendant***] violated the duty to act fairly and in good faith. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

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

4. **That [***name of defendant***] unfairly interfered with [***name of plaintiff***]'s right to receive the benefits of the contract; and**

5. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s conduct.**

New April 2004; Revised June 2011

Directions for Use

This instruction should be given only when the plaintiff has brought a separate cause of action for breach of the covenant of good faith and fair dealing. ~~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.~~

Sources and Authority

- Section 205 of the Restatement Second of Contracts provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

- "There is an implied covenant of good faith and fair dealing in every contract that neither party will do anything which will injure the right of the other to receive the benefits of the agreement." (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658 [328 P.2d 198], internal citation omitted.)

- " ' "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." ' " [] The covenant of good faith finds particular application in situations where one party is invested with a discretionary power affecting the rights of another. Such power must be

exercised in good faith." (*Carma Developers (Cal.), Inc. v. Marathon Development California, Inc.* (1992) 2 Cal.4th 342, 371-372 [6 Cal.Rptr.2d 467, 826 P.2d 710], internal citations omitted.)

- "The covenant of good faith and fair dealing, implied by law in every contract, exists merely to prevent one contracting party from unfairly frustrating the other party's right to receive the *benefits of the agreement actually made*. The covenant thus cannot ' " 'be endowed with an existence independent of its contractual underpinnings.' " ' It cannot impose substantive duties or limits on the contracting parties beyond those incorporated in the specific terms of their agreement." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 349-350 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted, original italics.)

- "The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. 'The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose.' ... 'In essence, the 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], internal citations omitted.)

- "There is no obligation to deal fairly or in good faith absent an existing contract. If there exists a contractual relationship between the parties ... the implied covenant is limited to assuring compliance with the express terms of the contract, and cannot be extended to create obligations not contemplated in the contract." (*Racine & Laramie, Ltd., supra,* 11 Cal.App.4th at p. 1032, internal citations omitted.)

- "The issue of whether the implied covenant of good faith and fair dealing has been breached is ordinarily 'a question of fact unless only one inference [can] be drawn from the evidence.' " (*Hicks v. E.T. Legg & Associates* (2001) 89 Cal.App.4th 496, 509 [108 Cal.Rptr.2d 10], internal citation omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 798, 800–802

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.12, 140.50 et seq. (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 23, *Suing or Defending Action for Breach of Duty of Good Faith and Fair Dealing*, 23.05

333. Affirmative Defense—Economic Duress

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

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

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

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

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

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

New September 2003; Revised December 2005, June 2011

Directions for Use

Different elements may apply if economic duress is alleged to avoid an agreement to settle a debt. (See *Perez v. Uline, Inc.* (2007) 157 Cal.App.4th 953, 959–960 [68 Cal.Rptr.3d 872].)

Sources and Authority

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

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

- ~~Economic duress is evaluated under an objective standard:~~ "The doctrine of 'economic duress' can

apply when one party has done a wrongful act which is sufficiently coercive to cause a reasonably prudent person, faced with no reasonable alternative, to agree to an unfavorable contract. The party subjected to the coercive act, and having no reasonable alternative, can then plead 'economic duress' to avoid the contract." (*CrossTalk Productions, Inc. v. Jacobson* (1998) 65 Cal.App.4th 631, 644 [76 Cal.Rptr.2d 615], internal citation omitted.)

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

- " 'At the outset it is helpful to acknowledge the various policy considerations which are involved in cases involving economic duress. Typically, those claiming such coercion are attempting to avoid the consequences of a modification of an original contract or of a settlement and release agreement. On the one hand, courts are reluctant to set aside agreements because of the notion of freedom of contract and because of the desirability of having private dispute resolutions be final. On the other hand, there is an increasing recognition of the law's role in correcting inequitable or unequal exchanges between parties of disproportionate bargaining power and a greater willingness to not enforce agreements which were entered into under coercive circumstances.' " (*Rich & Whillock, Inc. v. Ashton Development, Inc.* (1984) 157 Cal.App.3d 1154, 1158 [204 Cal.Rptr. 86].)

- " 'As it has evolved to the present day, the economic duress doctrine is not limited by early statutory and judicial expressions requiring an unlawful act in the nature of a tort or a crime. … Instead, the doctrine now may come into play upon the doing of a wrongful act which is sufficiently coercive to cause a reasonably prudent person faced with no reasonable alternative to succumb to the perpetrator's pressure. … The assertion of a claim known to be false or a bad faith threat to breach a contract or to withhold a payment may constitute a wrongful act for purposes of the economic duress doctrine. … Further, a reasonably prudent person subject to such an act may have no reasonable alternative but to succumb when the only other alternative is bankruptcy or financial ruin. …' " (*Chan v. Lund* (2010) 188 Cal.App.4th 1159, 1173–1174 [116 Cal.Rptr.3d 122].)

- "Economic duress has been recognized as a basis for rescinding a settlement. However, the courts, in desiring to protect the freedom of contracts and to accord finality to a privately negotiated dispute resolution, are reluctant to set aside settlements and will apply 'economic duress' only in limited circumstances and as a 'last resort.' " (*San Diego Hospice v. County of San Diego* (1995) 31 Cal.App.4th 1048, 1058 [37 Cal.Rptr.2d 501].)

- "Required criteria that must be proven to invalidate a settlement agreement are: '(1) the debtor knew there was no legitimate dispute and that it was liable for the full amount; (2) the debtor nevertheless refused in bad faith to pay and thereby created the economic duress of imminent bankruptcy; (3) the debtor, knowing the vulnerability its own bad faith had created, used the situation to escape an acknowledged debt; and (4) the creditor was forced to accept an inequitably low amount. …' " (*Perez, supra,* 157 Cal.App.4th at pp. 959–960.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 313–315

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

9 California Points and Authorities, Ch. 92, *Duress, Menace, Fraud, Undue Influence, and Mistake*, § 92.24 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions,* 8.07

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 17, *Attacking or Defending Existence of Contract—Fraud, Duress, Menace, and Undue Influence,* 17.03–17.06, 17.20–17.24[2]

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

[or] ~~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 [either option for] question ~~3~~ 2 is yes, then answer question ~~4~~3. If you answered no [to both options], stop here, answer no further questions, and have the presiding juror sign and date this form.

~~4~~3. Did all the conditions ~~occur~~ that were required for [*name of defendant*]'s performance occur or were they excused?
____ Yes ____ No

If your answer to question ~~4~~ 3 is yes, then answer question ~~5~~4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~5~~4. Did [*name of defendant*] fail to do something that the contract required [him/her/it] to do?
____ Yes ____ No

[or]

Did [*name of defendant*] do something that the contract prohibited [him/her/it] from doing?

If your answer to [either option for] question ~~5~~ 4 is yes, then answer question ~~6~~5. If you answered no [to both options], stop here, answer no further questions, and have

the presiding juror sign and date this form.

~~6~~5. Was [*name of plaintiff*] harmed by that failure?
____ Yes ____ No

If your answer to question ~~6~~ 5 is yes, then answer question ~~7~~6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~7~~6. 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 [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 April 2004; Revised December 2010, June 2011

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~~6.

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~~6. 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*.

417. Special Doctrines: Res ipsa loquitur

~~In this case,~~ [~~name~~ *Name of plaintiff*] may prove that [*name of defendant*]'s negligence caused [his/her] harm if [he/she] proves all of the following:

1. **That [*name of plaintiff*]'s harm ordinarily would not have happened unless someone was negligent;**

2. **That the harm was caused by something that only [*name of defendant*] controlled; and**

3. **That [*name of plaintiff*]'s voluntary actions did not cause or contribute to the event[s] that harmed [him/her].**

If you decide that [*name of plaintiff*] did not prove one or more of these three things, ~~[your verdict must be for [*name of defendant*].]~~

~~*[or]*~~

~~[~~you must decide whether [*name of defendant*] was negligent in light of the other instructions I have read.~~]~~

If you decide that [*name of plaintiff*] proved all of these three things, you may, but are not required to, find that [*name of defendant*] was negligent or that [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm, or both.

~~You must carefully consider the evidence presented by both [*name of plaintiff*] and [*name of defendant*] before you make your decision. You should not decide in favor of [*name of plaintiff*] unless you believe, after weighing all of the evidence, that it is more probable than not that [*name of defendant*] was negligent and that [his/her] negligence was a substantial factor in causing [*name of plaintiff*]'s harm.]~~
[[*Name of defendant*] presented evidence that would support a finding that [he/she/it] was not negligent or that [his/her/its] negligence, if any, did not cause [*name of plaintiff*] harm. If after weighing all of the evidence, you believe that it is more probable than not that [*name of defendant*] was negligent and that [his/her] negligence was a substantial factor in causing [*name of plaintiff*]'s harm, you must decide in favor of [*name of plaintiff*]. Otherwise, you must decide in favor of [*name of defendant*].]

New September 2003; Revised June 2011

Directions for Use

~~If the plaintiff establishes res ipsa loquitur but the defendant presented rebuttal evidence, the presumption drops out, and the plaintiff must then prove the elements of negligence without the benefit of the presumption of res ipsa loquitur.~~ The first paragraph of this instruction sets forth the three elements of res

ipsa loquitur. The second paragraph explains that ~~I~~if the plaintiff fails to establish res ipsa loquitur as a presumption, the jury may still find for the plaintiff if it finds the plaintiff's evidence presented in support of res ipsa loquitur more persuasive than the defendant's evidence. (See *Howe v. Seven Forty Two Co., Inc.* (2010) 189 Cal.App.4th 1155, 1163–1164 [117 Cal.Rptr.3d 126].)

If the plaintiff has established the three conditions that give rise to the doctrine, the jury is required to find that the accident resulted from the defendant's negligence unless the defendant comes forward with evidence that would support a contrary finding. (See Cal. Law Revision Com. Comment to Evid. Code, § 646.) Give the last paragraph if the defendant presented evidence that would support a finding that the defendant was not negligent or that any negligence on the defendant's part was not a proximate cause of the accident. In this case, the presumption drops out, and the plaintiff must then prove the elements of negligence without the benefit of the presumption of res ipsa loquitur. (See *Howe, supra,* 189 Cal.App.4th at pp. 1163–1164; see also Evid. Code, § 646(c).) ~~In the second paragraph, the first bracketed option is to be used when plaintiff is relying solely on a res ipsa loquitur theory and has introduced no other evidence of defendant's negligence. The second option is to be used when plaintiff has introduced other evidence of defendant's negligence.~~

~~"It follows that where part of the facts basic to the application of the doctrine of res ipsa loquitur is established as a matter of law but that others are not, the court should instruct that application of the doctrine by the jury depends only upon the existence of the basic facts not conclusively established." (*Rimmele v. Northridge Hospital Foundation* (1975) 46 Cal.App.3d 123, 130 [120 Cal.Rptr. 39].)~~

Sources and Authority

- Evidence Code section 646(c) provides:

  > If the evidence, or facts otherwise established, would support a res ipsa loquitur presumption and the defendant has introduced evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence, the court may, and upon request shall, instruct the jury to the effect that:
  >
  > (1) If the facts which would give rise to a res ipsa loquitur presumption are found or otherwise established, the jury may draw the inference from such facts that a proximate cause of the occurrence was some negligent conduct on the part of the defendant; and
  >
  > (2) The jury shall not find that a proximate cause of the occurrence was some negligent conduct on the part of the defendant unless the jury believes, after weighing all the evidence in the case and drawing such inferences therefrom as the jury believes are warranted, that it is more probable than not that the occurrence was caused by some negligent conduct on the part of the defendant.

Evidence Code section 604 provides: "The effect of a presumption affecting the burden of producing evidence is to require the trier of fact to assume the existence of the presumed fact unless and until evidence is introduced which would support a finding of its nonexistence, in which case the trier of fact shall determine the existence or nonexistence of the presumed fact from the evidence and without

regard to the presumption. Nothing in this section shall be construed to prevent the drawing of any inference that may be appropriate."

- "In California, the doctrine of res ipsa loquitur is defined by statute as 'a presumption affecting the burden of producing evidence.' The presumption arises when the evidence satisfies three conditions: '(1) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant; (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff.' A presumption affecting the burden of producing evidence 'require[s] the trier of fact to assume the existence of the presumed fact' unless the defendant introduces evidence to the contrary. The presumed fact, in this context, is that 'a proximate cause of the occurrence was some negligent conduct on the part of the defendant ... .' If the defendant introduces 'evidence which would support a finding that he was not negligent or that any negligence on his part was not a proximate cause of the occurrence,' the trier of fact determines whether defendant was negligent without regard to the presumption, simply by weighing the evidence." (*Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 825–826 [15 Cal.Rptr.2d 679, 843 P.2d 624], internal citations omitted.)

- " 'The doctrine of res ipsa loquitur is applicable where the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the one responsible.' " (*Howe*, *supra*, 189 Cal.App.4th at p. 1161.)~~Stated less mechanically, a plaintiff suing in a personal injury action is entitled to the benefit of res ipsa loquitur when: 'the accident is of such a nature that it can be said, in the light of past experience, that it probably was the result of negligence by someone and that the defendant is probably the person who is responsible.' " (*Rimmele*, *supra*, 46 Cal.App.3d at p. 129, internal citations omitted.)~~

- "Res ipsa loquitur is an evidentiary rule for 'determining whether circumstantial evidence of negligence is sufficient.' " (*Howe*, *supra*, 189 Cal.App.4th at p. 1161, internal citation omitted.)

- ~~Under Evidence Code section 604, a presumption affecting the burden of producing evidence "require[s] the trier of fact to assume the existence of the presumed fact" unless the defendant introduces evidence to the contrary. Here, the presumed fact is that "a proximate cause of the occurrence was some negligent conduct on the part of the defendant." (Evid. Code, § 646(c)(1); *Brown*, *supra*, 4 Cal.4th at p. 826.)~~

- ~~"The doctrine of res ipsa loquitur is fundamentally a doctrine predicated upon inference deducible from circumstantial evidence." (*Hale v. Venuto* (1982) 137 Cal.App.3d 910, 918 [187 Cal.Rptr. 357].)~~

- The doctrine "is based on a theory of 'probability' where there is no direct evidence of defendant's conduct, permitting a common sense inference of negligence from the happening of the accident." (*Gicking v. Kimberlin* (1985) 170 Cal.App.3d 73, 75 [215 Cal.Rptr. 834].)

- "All of the cases hold, in effect, that it must appear, either as a matter of common experience or from evidence in the case, *that the accide*nt is of a type which probably would not happen unless someone was negligent." (*Zentz v. Coca Cola Bottling Co. of Fresno* (1952) 39 Cal.2d 436, 442–443 [247 P.2d 344].)

- The purpose of the second "control" requirement is to "link the defendant with the probability, already established, that the accident was negligently caused." (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 362 [124 Cal.Rptr. 193, 540 P.2d 33].) ~~The control requirement is not absolute. (*Zentz, supra*, 39 Cal.2d at p. 443.)~~

- "The purpose of [the third] requirement, like that of control by the defendant is to establish that the defendant is the one probably responsible for the accident. The plaintiff need not show that he was entirely inactive at the time of the accident in order to satisfy this requirement, so long as the evidence is such as to eliminate his conduct as a factor contributing to the occurrence." (*Newing, supra,* 15 Cal.3d at p. 363, internal citations omitted.)

- The third condition "should not be confused with the problem of contributory negligence, as to which defendant has the burden of proof. ... [I]ts purpose, like that of control by the defendant, is merely to assist the court in determining whether it is more probable than not that the defendant was responsible for the accident." (*Zentz, supra,* 39 Cal.2d at p. 444.)

- "[Evidence Code section 646] … classified the doctrine as a presumption affecting the burden of producing evidence. Under that classification, when the predicate facts are established to give rise to the presumption, the burden of producing evidence to rebut it shifts to the defendant to prove lack of negligence or lack of proximate cause that the injury claimed was the result of that negligence. As a presumption affecting the burden of producing evidence (as distinguished from a presumption affecting the burden of proof), if evidence is presented to rebut the presumed fact, the presumption is out of the case—it 'disappears.' But if no such evidence is submitted, the trier of fact must find the presumed fact to be established." (*Howe*, *supra*, 189 Cal.App.4th at p. 1162.)

- " 'If evidence is produced that would support a finding that the defendant was not negligent or that any negligence on his part was not a proximate cause of the accident, the presumptive effect of the doctrine vanishes.' '[T]he mere introduction of evidence sufficient to sustain a finding of the nonexistence of the presumed fact causes the presumption, as a matter of law, to disappear.' When the presumptive effect vanishes, it is the plaintiff's burden to introduce actual evidence that would show that the defendant is negligent and that such negligence was the proximate cause of the accident." (*Howe*, *supra*, 189 Cal.App.4th at p. 1163, internal citations omitted.)

- "As the [Law Revision Commission] Comment [to Evidence Code section 646] explains, even though the presumptive effect of the doctrine vanishes, 'the jury may still be able to draw an inference that the accident was caused by the defendant's lack of due care from the facts that gave rise to the presumption. … [¶] … [¶] … An inference of negligence may well be warranted from all of the evidence in the case even though the plaintiff fails to establish all the elements of res ipsa loquitur. In appropriate cases, therefore, the jury may be instructed that, even though it does not find that the facts giving rise to the presumption have been proved by a preponderance of the evidence, it may nevertheless find the defendant negligent if it concludes from a consideration of all the evidence that it is more probable than not that the defendant was negligent.' " (*Howe*, *supra*, 189 Cal.App.4th at p. 1163, internal citation omitted.)

- "It follows that where part of the facts basic to the application of the doctrine of res ipsa loquitur is established as a matter of law but that others are not, the court should instruct that application of the

doctrine by the jury depends only upon the existence of the basic facts not conclusively established." (*Rimmele v. Northridge Hospital Foundation* (1975) 46 Cal.App.3d 123, 130 [120 Cal.Rptr. 39].)

Secondary Sources

1 Witkin, California Evidence (4th ed. 2000) Burden of Proof and Presumptions, §§ 114 – 118~~, pp. 250–256~~

7 Witkin, California Procedure (5th ed.) Trial § 300

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-G, *Inability To Prove Negligence Or Causation-Res Ipsa Loquitur, "Alternative Liability" And "Market Share Liability"*, ¶¶ 2:1751-2:1753 (The Rutter Group)

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.20 et seq. (Matthew Bender)

1A California Trial Guide, Unit 11, *Opening Statement*, § 11.42, Unit 90, *Closing Argument*, § 90.90 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence,* § 380.11 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.340 et seq. (Matthew Bender)

VF-704. Negligent Entrustment of Motor Vehicle

We answer the questions submitted to us as follows:

1. **Was [***name of driver***] negligent in operating the vehicle?**
____ Yes ____ No

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

2. **~~Was~~ Did [***name of defendant***] ~~an owner of~~own the vehicle operated by [***name of driver***] or did [***name of defendant***] have possession of the vehicle operated by [***name of driver***] with the owner's permission?**
____ Yes ____ No

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

3. **Did [***name of defendant***] know, or should [he/she] have known, that [***name of driver***] was incompetent or unfit to drive?**
____ Yes ____ No

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

4. **Did [***name of defendant***] permit [***name of driver***] to ~~use~~ drive the vehicle?**
____ Yes ____ No

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

5. **Was [***name of driver***]'s incompetence or unfitness to drive a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

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

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

[a. Past economic loss

[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.

New September 2003; Revised April 2007, December 2010, June 2011

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. 724, *Negligent Entrustment of Motor Vehicle*. Modify to include elements of negligence instruction against the driver if plaintiff is suing both driver and owner.

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

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*.

1201. Strict Liability—Manufacturing Defect—Essential Factual Elements

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[*Name of plaintiff***] claims that the [***product***] contained a manufacturing defect. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That the [***product***] contained a manufacturing defect when it left [***name of defendant***]'s possession;**

3. **That [***name of plaintiff***] was harmed ~~while using the [*product*] in a reasonably foreseeable way~~; and**

4. **That the [***product***]'s defect was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised April 2009, December 2009, June 2011

Directions for Use

To make a prima facie case, the plaintiff has the initial burden of producing evidence that he or she was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590] [risk-benefit design defect case]; *Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 125–126 [104 Cal.Rptr. 433, 501 P.2d 1153 [product misuse asserted as a defense to manufacturing defect]; see also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.) Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's ~~reason that the product caused~~ injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) ~~See CACI No. 1245, *Affirmative Defense—Product Misuse or Modification.*~~ Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

- "A manufacturing defect occurs when an item is manufactured in a substandard condition." (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 792 [64 Cal.Rptr.3d 908].)

- "[I]n reviewing this record for substantial evidence in support of a manufacturing or production defect theory, we must keep in mind the two formulations of the test: A defective product is one that 'differs from the manufacturer's intended result or from other ostensibly identical units of the same

product line.' " (*In re Coordinated Latex Glove Litigation* (2002) 99 Cal.App.4th 594, 611 [121 Cal.Rptr.2d 301].)

- " 'Regardless of the theory which liability is predicated upon ... it is obvious that to hold a producer, manufacturer, or seller liable for injury caused by a particular product, there must first be proof that the defendant produced, manufactured, sold, or was in some way responsible for the product ... .' " (*Garcia v. Joseph Vince Co.* (1978) 84 Cal.App.3d 868, 874 [148 Cal.Rptr. 843], internal citation omitted.)

- "[W]here a plaintiff alleges a product is defective, proof that the product has malfunctioned is essential to establish liability for an injury *caused by the defect*." (*Khan v. Shiley Inc.* (1990) 217 Cal.App.3d 848, 855 [266 Cal.Rptr. 106], original italics.)

- "We think that a requirement that a plaintiff also prove that the defect made the product 'unreasonably dangerous' places upon him a significantly increased burden and represents a step backward in the area pioneered by this court.~~In California, there is no requirement that the plaintiff prove that the defect made the product "unreasonably dangerous.~~" (*Cronin*, *supra*, ~~*v. J.B.E. Olson Corp.* (1972)~~ 8 Cal.3d at pp. ~~121,~~ 134-135 ~~[104 Cal.Rptr. 433, 501 P.2d 1153]~~.)

- ~~"~~"[T]he policy underlying the doctrine of strict liability compels the conclusion that recovery should not be limited to cases involving latent defects."~~ Also, the plaintiff does not have to prove that he or she was unaware of the defect.~~ (*Luque v. McLean* (1972) 8 Cal.3d 136, ~~146~~ 145 [104 Cal.Rptr. 443, 501 P.2d 1163].)

- "A manufacturer is liable only when a defect in its product was a legal cause of injury. A tort is a legal cause of injury only when it is a substantial factor in producing the injury." (*Soule v. General Motors Corp.* (1972) 8 Cal.4th 548, *572 [34 Cal.R*ptr.2d 607, 882 P.2d 298], internal citations omitted.)

- "[S]trict liability should not be imposed upon a manufacturer when injury results from a use of its product that is not reasonably foreseeable." (*Cronin*, *supra*, 8 Cal.3d at p. 126.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1428–1437

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1215, 2:1216 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.06 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.30 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.140 (Matthew Bender)

1203. Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements

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

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

2. **That the [***product***] did not perform as safely as an ordinary consumer would have expected it to perform when used or misused in an intended or reasonably foreseeable way;**

3. **That [***name of plaintiff***] was harmed ~~while using the [*product*] in a reasonably foreseeable way~~; and**

4. **That the [***product***]'s failure to perform safely was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2005, April 2009, December 2009, June 2011

Directions for Use

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

The court must make an initial determination as to whether the consumer expectation test applies to the product. In some cases, the court may determine that the product is one to which the test may, but not necessarily does, apply, leaving the determination to the jury. (See *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233–1234 [115 Cal.Rptr.3d 151].) In such a case, modify the instruction to advise the jury that it must first determine whether the product is one about which an ordinary consumer can form reasonable minimum safety expectations.

To make a prima facie case, the plaintiff has the initial burden of producing evidence that he or she was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590] [risk-benefit case]; see also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.)
Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole ~~reason~~ cause of the plaintiff's ~~that the product caused~~ injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) ~~See CACI No. 1245, *Affirmative Defense—Product Misuse or Modification.*~~ Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the

plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

- "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- "[A] product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors … , the benefits of the challenged design do not outweigh the risk of danger inherent in such design." (*Barker v. Lull Engineering Co.* (1978) 20 Cal.3d 413, 418 [143 Cal.Rptr. 225, 573 P.2d 443]~~In *Barker v. Lull Engineering* (1978) 20 Cal.3d 413 [143 Cal.Rptr. 225, 573 P.2d 443], the court established two alternative tests for determining whether a product is defectively designed. Under the first test, a product may be found defective in design if the plaintiff demonstrates that the product "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Id.* at p. 429.) Under the second test, a product is defective if the risk of danger inherent in the design outweighs the benefits of such design. (*Id.* at p. 430~~.)

- "The rationale of the consumer expectations test is that '[t]he purposes, behaviors, and dangers of certain products are commonly understood by those who ordinarily use them.' Therefore, in some cases, ordinary knowledge of the product's characteristics may permit an inference that the product did not perform as safely as it should. '*If* the facts permit such a conclusion, and *if* the failure resulted from the product's design, a finding of defect is warranted without any further proof,' and the manufacturer may not defend by presenting expert evidence of a risk/benefit analysis. … Nonetheless, the inherent complexity of the product itself is not controlling on the issue of whether the consumer expectations test applies; a complex product 'may perform so unsafely that the defect is apparent to the common reason, experience, and understanding of its ordinary consumers.' " (*Saller*, *supra*, 187 Cal.App.4th at p. 1232, original italics, internal citations omitted.)

- "The critical question, in assessing the applicability of the consumer expectation test, is not whether the product, when considered in isolation, is beyond the ordinary knowledge of the consumer, but whether the product, *in the context of the facts and circumstances of its failure*, is one about which the ordinary consumers can form minimum safety expectations." (*Pannu v. Land Rover North America, Inc.* (2011) 191 Cal.App.4th 1298, 1311–1312 [-- Cal.Rptr.3d --].)

- "Whether the jury should be instructed on either the consumer expectations test or the risk/benefit test depends upon the particular facts of the case. In a jury case, the trial court must initially determine as a question of foundation, within the context of the facts and circumstances of the particular case, whether the product is one about which the ordinary consumer can form reasonable minimum safety expectations. 'If the court concludes it is not, no consumer expectation instruction should be given. … If, on the other hand, the trial court finds there is sufficient evidence to support a finding that the ordinary consumer can form reasonable minimum safety expectations, the court should instruct the jury, consistent with Evidence Code section 403, subdivision (c), to determine whether the consumer

expectation test applies to the product at issue in the circumstances of the case [or] to disregard the evidence about consumer expectations unless the jury finds that the test is applicable. If it finds the test applicable, the jury then must decide whether the product failed to perform as safely as an ordinary consumer would expect when the product is used in an intended or reasonably foreseeable manner.' " (*Saller, supra*, 187 Cal.App.4th at pp. 1233–1234, internal citations omitted.)

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

- The consumer expectation test "acknowledges the relationship between strict tort liability for a defective product and the common law doctrine of warranty, which holds that a product's presence on the market includes an implied representation 'that it [will] safely do the jobs for which it was built.' " (*Soule, supra*, 8 Cal.4th at p. 562, internal citations omitted.)

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

- "[T]he consumer expectation test is reserved for cases in which the *everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*." (*Soule, supra,* 8 Cal.4th at p. 567, original italics.)

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

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

- "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

- " '[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse. … [T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact.' " (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1235 [63 Cal.Rptr.2d 422].)

- "[T]he plaintiff bears an initial burden of making 'a prima facie showing that the injury was proximately caused by the product's design.' This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Perez, supra*, 188 Cal.App.4th at p. 678, original italics, internal citations omitted.)

- "The use of asbestos insulation is a product that is within the understanding of ordinary lay consumers." (*Saller, supra*, 187 Cal.App.4th at p. 1236.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1449–1467

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1220-2:1222 (The Rutter Group)

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

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

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.116 (Matthew Bender)

1204. Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof

[*Name of plaintiff***] claims that the [***product***]'s design caused harm to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of plaintiff***] was harmed ~~while using the [*product*] in a reasonably foreseeable way~~; and**

3. **That the [***product***]'s design was a substantial factor in causing harm to [***name of plaintiff***].**

If [*name of plaintiff***] has proved these three facts, then your decision on this claim must be for [***name of plaintiff***] unless [***name of defendant***] proves that the benefits of the [*product*]'s design outweigh the risks of the design. In deciding whether the benefits outweigh the risks, you should consider the following:**

(a) The gravity of the potential harm resulting from the use of the [*product***];**

(b) The likelihood that this harm would occur;

(c) The feasibility of an alternative safer design at the time of manufacture;

(d) The cost of an alternative design; [and]

(e) The disadvantages of an alternative design; [and]

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

New September 2003; Revised February 2007, April 2009, December 2009, December 2010, June 2011

Directions for Use

If the plaintiff asserts both tests for design defect (the consumer expectation test and the risk-benefit test), the instructions must make it clear that the two tests are alternatives. (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431].) Risk-benefit weighing is not a formal part of, nor may it serve as a defense to, the consumer expectations test. (*Bresnahan v. Chrysler Corp.* (1995) 32 Cal.App.4th 1559, 1569 [38 Cal.Rptr.2d 446].)

To make a prima facie case, the plaintiff has the initial burden of producing evidence that he or she was injured while the product was being used in an intended or reasonably foreseeable

manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590]; see also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.) Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's ~~reason that the product caused~~ injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) ~~See CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*.~~ Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Aesthetics might be an additional factor to be considered in an appropriate case in which there is evidence that appearance is important in the marketability of the product. (See *Bell v. Bayerische Motoren Werke Aktiengesellschaft* (2010) 181 Cal.App.4th 1108, 1131 [105 Cal.Rptr.3d 485].)

Sources and Authority

- "A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way." (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 560 [34 Cal.Rptr.2d 607, 882 P.2d 298].)

- " '[O]nce the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.' Appellants are therefore correct in asserting that it was not their burden to show that the risks involved in the loader's design—the lack of mechanical safety devices, or of a warning—outweighed the benefits of these aspects of its designs. The trial court's instruction to the jury, which quite likely would have been understood to place this burden on appellants, was therefore an error." (*Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 497–498 [200 Cal.Rptr. 387], internal citations omitted.)~~.~~

- "[U]nder the risk/benefit test, the plaintiff may establish the product is defective by showing that its design proximately caused his injury and the defendant then fails to establish that on balance the benefits of the challenged design outweigh the risk of danger inherent in such design. In such case, the jury must evaluate the product's design by considering the gravity of the danger posed by the design, the likelihood such danger would occur, the feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the consumer resulting from an alternative design. 'In such cases, the jury must consider the manufacturer's evidence of competing design considerations …, and the issue of design defect cannot fairly be resolved by standardless reference to the "expectations" of an "ordinary consumer." '" (*Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233 [115 Cal.Rptr.3d 151], internal citations omitted.)

- "[T]he defendant's burden is one 'affecting the burden of proof, rather than simply the burden of producing evidence.' " (*Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487].)

- "Under *Barker*, in short, the plaintiff bears an initial burden of making 'a prima facie showing that the injury was proximately caused by the product's design.' This showing requires evidence that the plaintiff was injured *while using the product in an intended or reasonably foreseeable manner* and that the plaintiff's ability to avoid injury was frustrated by the absence of a safety device, or by the nature of the product's design. If this prima facie burden is met, the burden of proof shifts to the defendant to prove, in light of the relevant factors, that the product is not defective. Importantly, the plaintiff's prima facie burden of producing evidence that injury occurred while the product was being used in an intended or reasonably foreseeable manner must be distinguished from the ultimate burden of proof that rests with the defendant to establish that its product was not defective because the plaintiff's injury resulted from a misuse of the product." (*Perez, supra, v. VAS S.p.A.* (2010) 188 Cal.App.4th at p. 658,]678 [___ Cal.Rptr.3d ___], , original italics, internal citations omitted.)

- " '[I]n evaluating the adequacy of a product's design pursuant to [the risk-benefit] standard, a jury may consider, among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design.' '[O]nce the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.' " (*Gonzalez v. Autoliv ASP, Inc.* (2007) 154 Cal.App.4th 780, 786–787 [64 Cal.Rptr.3d 908], internal citations omitted.)

- "Plaintiffs contend aesthetics is not a proper consideration in the risk-benefit analysis, and the trial court's ruling to the contrary was an '[e]rror in law.' We disagree. In our view, much of the perceived benefit of a car lies in its appearance. A car is not a strictly utilitarian product. We believe that a jury properly may consider aesthetics in balancing the benefits of a challenged design against the risk of danger inherent in the design. Although consideration of the disadvantages of an alternative design (CACI No. 1204, factor (e)) would encompass any impact on aesthetics, we conclude that there was no error in the trial court's approval of the modification listing aesthetics as a relevant factor." (*Bell, supra,* 181 Cal.App.4th at p. 1131, internal citations omitted.)

- "Taken together, section 2, subdivision (b), and section 5 of the Restatement indicate that a component part manufacturer may be held liable for a defect in the component. When viewed in its entirety, the Restatement does not support [defendant]'s argument that '[o]nly if the component part analysis establishes sufficient control over the design of the alleged defect should the component manufacturer be held to the standard of the risk-benefit test.' Instead, the test considering foreseeable risks of harm and alternative designs is applied to the component part manufacturer when the alleged defect is in the component." (*Gonzalez,*

supra, 154 Cal.App.4th at pp. 789–790.)

- "Where liability depends on the proof of a design defect, no practical difference exists between negligence and strict liability; the claims merge." (*Lambert v. General Motors* (1998) 67 Cal.App.4th 1179, 1185 [76 Cal.Rptr.2d 657].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1449–1467

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1223-2:1224 (The Rutter Group)

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

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

19 California Points and Authorities, Ch. 190, *Products Liability*, §§ 190.110, 190.118–190.122 (Matthew Bender)

1205. Strict Liability—Failure to Warn—Essential Factual Elements

[*Name of plaintiff***] claims that the [***product***] lacked sufficient [instructions] [or] [warning of potential [risks/side effects/allergic reactions]]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That the [***product***] had potential [risks/side effects/allergic reactions] that were [known] [or] [knowable by the use of scientific knowledge available] at the time of [manufacture/distribution/sale];**

3. **That the potential [risks/side effects/allergic reactions] presented a substantial danger ~~to users of~~ when the [***product***] is used or misused in an intended or reasonably foreseeable way;**

4. **That ordinary consumers would not have recognized the potential [risks/side effects/allergic reactions];**

5. **That [***name of defendant***] failed to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions];**

6. **That [***name of plaintiff***] was harmed ~~while using the [***product***] in a reasonably foreseeable way~~; and**

7. **That the lack of sufficient [instructions] [or] [warnings] was a substantial factor in causing [***name of plaintiff***]'s harm.**

[The warning must be given to the prescribing physician and must include the potential risks, side effects, or allergic reactions that may follow the foreseeable use of the product. [*Name of defendant***] had a continuing duty to warn physicians as long as the product was in use.]**

New September 2003; Revised April 2009, December 2009, June 2011

Directions for Use

A fuller definition of "scientific knowledge" may be appropriate in certain cases. Such a definition would advise that the defendant did not adequately warn of a potential risk, side effect, or allergic reaction that was "knowable in light of the generally recognized and prevailing best scientific and medical knowledge available." (*Carlin v. Superior Court* (1996) 13 Cal.4th 1104, 1112 [56 Cal.Rptr.2d 162, 920 P.2d 1347].)

The last bracketed paragraph should be read only in prescription product cases: "In the case of prescription drugs and implants, the physician stands in the shoes of the 'ordinary user' because it is through the physician that a patient learns of the properties and proper use of the drug or implant. Thus,

the duty to warn in these cases runs to the physician, not the patient." (*Valentine v. Baxter Healthcare Corp.* (1999) 68 Cal.App.4th 1467, 1483 [81 Cal.Rptr.2d 252].)

To make a prima facie case, the plaintiff has the initial burden of producing evidence that he or she was injured while the productwas being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590] [risk-benefit design defect case].) See also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's ~~reason that the product caused~~ injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) ~~See CACI No. 1245, *Affirmative Defense—Product Misuse or Modification.*~~ Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

- "Our law recognizes that even ' "a product flawlessly designed and produced may nevertheless possess such risks to the user without a suitable warning that it becomes 'defective' simply by the absence of a warning." …' Thus, manufacturers have a duty to warn consumers about the hazards inherent in their products. The purpose of requiring adequate warnings is to inform consumers about a product's hazards and faults of which they are unaware, so that the consumer may then either refrain from using the product altogether or avoid the danger by careful use." (*Taylor v. Elliott Turbomachinery Co., Inc.* (2009) 171 Cal.App.4th 564, 577 [90 Cal.Rptr.3d 414], internal citations and footnote omitted.)

- "Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury." (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299].)

- "[F]ailure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. ... [¶] [T]he manufacturer is liable if it failed to give warning of dangers that were known to the scientific community at the time it manufactured or distributed the product. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002–1003 [281 Cal.Rptr. 528, 810 P.2d 549].)

- "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. … [¶] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418].)

- "The actual knowledge of the individual manufacturer, even if reasonably prudent, is not the issue. We view the standard to require that the manufacturer is held to the knowledge and skill of an expert in the field; it is obliged to keep abreast of any scientific discoveries and is presumed to know the results of all such advances." (*Carlin, supra,* 13 Cal.4th at p. 1113, fn. 3.)

- "[A] defendant in a strict products liability action based upon an alleged failure to warn of a risk of harm may present evidence of the state of the art, i.e., evidence that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacture and/or distribution." (*Anderson, supra,* 53 Cal.3d at p. 1004.)

- "[T]here can be no liability for failure to warn where the instructions or warnings sufficiently alert the user to the possibility of danger." (*Aguayo v. Crompton & Knowles Corp.* (1986) 183 Cal.App.3d 1032, 1042 [228 Cal.Rptr. 768], internal citation omitted.)

- "A duty to warn or disclose danger arises when an article is or should be known to be dangerous for its intended use, either inherently or because of defects." (*DeLeon v. Commercial Manufacturing and Supply Co.* (1983) 148 Cal.App.3d 336, 343 [195 Cal.Rptr. 867], internal citation omitted.)

- "... California is well settled into the majority view that knowledge, actual or constructive, is a requisite for strict liability for failure to warn ... ." (*Anderson, supra,* 53 Cal.3d at p. 1000.)

- "[T]he duty to warn is not conditioned upon [actual or constructive] knowledge [of a danger] where the defectiveness of a product depends on the adequacy of instructions furnished by the supplier which are essential to the assembly and use of its product." (*Midgley v. S. S. Kresge Co.* (1976) 55 Cal.App.3d 67, 74 [127 Cal.Rptr. 217].)

- Under *Cronin,* plaintiffs in cases involving manufacturing and design defects do not have to prove that a defect made a product unreasonably dangerous; however, that case "did not preclude weighing the degree of dangerousness in the failure to warn cases." (*Cavers v. Cushman Motor Sales, Inc.* (1979) 95 Cal.App.3d 338, 343 [157 Cal.Rptr. 142].)

- "[T]he warning requirement is not limited to unreasonably or unavoidably dangerous products. Rather, directions or warnings are in order where reasonably required *to prevent the use of a product from becoming unreasonably dangerous*. It is the lack of such a warning which renders a product unreasonably dangerous and therefore defective." (*Gonzales v. Carmenita Ford Truck Sales, Inc.* (1987) 192 Cal.App.3d 1143, 1151 [238 Cal.Rptr. 18], original italics.)

- "In most cases, ... the adequacy of a warning is a question of fact for the jury." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1320 [273 Cal.Rptr. 214].)

- "[A] pharmaceutical manufacturer may not be required to provide warning of a risk known to the medical community." (*Carlin, supra,* 13 Cal.4th at p. 1116.)

- "To be liable in California, even under a strict liability theory, the plaintiff must prove that the defendant's failure to warn was a substantial factor in causing his or her injury. (CACI No. 1205.) The natural corollary to this requirement is that a defendant is not liable to a plaintiff if the injury would have occurred even if the defendant had issued adequate warnings." (*Huitt v. Southern California Gas Co.* (2010) 188 Cal.App.4th 1586, 1604 [116 Cal.Rptr.3d 453].)

- "[A] manufacturer's liability to the ultimate consumer may be extinguished by 'intervening cause' where the manufacturer either provides adequate warnings to a middleman or the middleman alters the product before passing it to the final consumer." (*Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 661 [74 Cal.Rptr.3d 359].)

- " 'A manufacturer's duty to warn is a continuous duty which lasts as long as the product is in use.' ... [T]he manufacturer must continue to provide physicians with warnings, at least so long as it is manufacturing and distributing the product." (*Valentine, supra,* 68 Cal.App.4th at p. 1482.)

- " '[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse. … [T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact. … [A] manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product.' " (*Wright v. Stang Manufacturing Co.* (1997) 54 Cal.App.4th 1218, 1235 [63 Cal.Rptr.2d 422].)

- "California case law has not imposed on manufacturers a duty to warn about the dangerous propensities of other manufacturers' products. California courts will not impose a duty to warn on a manufacturer where the manufacturer's product 'did not cause or create the risk of harm.' As one commentary explains, '[t]he product must, in some sense of the word, "create" the risk. If it does not, then the manufacturer should not be required to supply warnings, even if the risks are not obvious to users and consumers.' As California law now stands, unless the manufacturer's product in some way causes or creates the risk of harm, 'the risks of the manufacturer's own product … are the only risks [the manufacturer] is required to know.' " (*Taylor, supra,* 171 Cal.App.4th at p. 583, internal citations omitted; cf. *O'Neil v. Crane Co.* (2009) 177 Cal. App. 4th 1019, 1030–1031 [99 Cal. Rptr. 3d 533], review granted December 23, 2009 (S177401) [disagreeing with *Taylor*].)

- ~~"[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse." (*Self v. General Motors Corp.* (1974) 42 Cal.App.3d 1, 7 [116 Cal.Rptr. 575], disapproved and overruled on another issue in *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607, 882 P.2d 298].)~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467–1479

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1275-2:1276 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.11, Ch. 7, *Proof*, § 7.05 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, §§ 460.11, 460.164 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.194 (Matthew Bender)

1222. Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] was negligent by not using reasonable care to warn [or instruct] about the [*product*]'s dangerous condition or about facts that ~~make~~ made the [*product*] likely to be dangerous. To establish this claim, [*name of plaintiff*] must prove all of the following:

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

2. **That [*name of defendant*] knew or reasonably should have known that the [*product*] was dangerous or was likely to be dangerous when used or misused in a reasonably foreseeable manner;**

3. **That [*name of defendant*] knew or reasonably should have known that users would not realize the danger;**

4. **That [*name of defendant*] failed to adequately warn of the danger [or instruct on the safe use of the [*product*]];**

5. **That a reasonable [manufacturer/distributor/seller] under the same or similar circumstances would have warned of the danger [or instructed on the safe use of the [*product*]];**

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

7. **That [*name of defendant*]'s failure to warn [or instruct] was a substantial factor in causing [*name of plaintiff*]'s harm.**

[The warning must be given to the prescribing physician and must include the potential risks or side effects that may follow the foreseeable use of the product. [*Name of defendant*] had a continuing duty to warn physicians as long as the product was in use.]

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Directions for Use

To make a prima facie case, the plaintiff has the initial burden of producing evidence that he or she was injured while the product was being used in an intended or reasonably foreseeable manner. If this prima facie burden is met, the burden of proof shifts to the defendant to prove that the plaintiff's injury resulted from a misuse of the product. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 678 [115 Cal.Rptr.3d 590] [strict liability design defect risk-benefit case].) See also CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole cause of the plaintiff's injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51,

56 [148 Cal.Rptr. 596, 583 P.2d 121]; see CACI No. 1245.) Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

The last bracketed paragraph is to be used in prescription drug cases only.

Sources and Authority

- ~~A manufacturer~~ "[T]he manufacturer has a duty to use reasonable care to give warning of the dangerous condition of the product or of facts which make it likely to be dangerous to those whom he should expect to use the product or be endangered by its probable use, if the manufacturer has reason to believe that they will not realize its dangerous condition." (*Putensen v. Clay Adams, Inc.* (1970) 12 Cal.App.3d 1062, 1076–1077 [91 Cal.Rptr. 319].)

- "Negligence and strict products liability are separate and distinct bases for liability that do not automatically collapse into each other because the plaintiff might allege both when a product warning contributes to her injury." (*Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89, 101 [85 Cal.Rptr.3d 299].)

- "[F]ailure to warn in strict liability differs markedly from failure to warn in the negligence context. Negligence law in a failure-to-warn case requires a plaintiff to prove that a manufacturer or distributor did not warn of a particular risk for reasons which fell below the acceptable standard of care, i.e., what a reasonably prudent manufacturer would have known and warned about. Strict liability is not concerned with the standard of due care or the reasonableness of a manufacturer's conduct. The rules of strict liability require a plaintiff to prove only that the defendant did not adequately warn of a particular risk that was known or knowable in light of the generally recognized and prevailing best scientific and medical knowledge available at the time of manufacture and distribution. Thus, in strict liability, as opposed to negligence, the reasonableness of the defendant's failure to warn is immaterial." (*Anderson v. Owens-Corning Fiberglas Corp.* (1991) 53 Cal.3d 987, 1002 [281 Cal.Rptr. 528, 810 P.2d 549].)

- "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. … [¶] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418].)

- ~~Restatement Second of Torts section 388 provides:~~

  ~~One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other~~

~~or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier~~

~~(a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and~~

~~(b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and~~

~~(c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.~~

- ~~Restatement Second of Torts section 394 provides: "The manufacturer of a chattel which he knows or has reason to know to be, or to be likely to be, dangerous for use is subject to the liability of a supplier of chattels with such knowledge."~~

- ~~These sections have been cited with approval by California courts. (See *Putensen, supra*, 12 Cal.App.3d at p. 1077 and cases cited therein.)~~

- There is no duty to warn of obvious defects. (*Krawitz v. Rusch* (1989) 209 Cal.App.3d 957, 966 [257 Cal.Rptr. 610]; *Holmes v. J.C. Penney Co.* (1982) 133 Cal.App.3d 216, 220 [183 Cal.Rptr. 777]; *Morris v. Toy Box* (1962) 204 Cal.App.2d 468, 471 [22 Cal.Rptr. 572].)

- "When a manufacturer or distributor has no effective way to convey a product warning to the ultimate consumer, the manufacturer should be permitted to rely on downstream suppliers to provide the warning. 'Modern life would be intolerable unless one were permitted to rely to a certain extent on others doing what they normally do, particularly if it is their duty to do so.' " (*Persons v. Salomon N. Am.* (1990) 217 Cal.App.3d 168, 178 [265 Cal.Rptr. 773], internal citation omitted.)

- The duty of a manufacturer to warn about the potential hazards of its product, even when that product is only a component of an item manufactured or assembled by a third party, has been recognized, but is limited. (See *Garza v. Asbestos Corp., Ltd.* (2008) 161 Cal.App.4th 651, 661 [74 Cal.Rptr.3d 359]; *Artiglio v. General Electric Co.* (1998) 61 Cal.App.4th 830, 837 [71 Cal.Rptr.2d 817].)

- Restatement Third of Torts, Products Liability, section 2, provides in part:

  A product is defective when, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings. A product:

  …

  (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.

  Comment m provides: "Reasonably foreseeable uses and risks in design and warning claims. Subsections (b) and (c) impose liability only when the product is put to uses that it is reasonable to

expect a seller or distributor to foresee. Product sellers and distributors are not required to foresee and take precautions against every conceivable mode of use and abuse to which their products might be put. Increasing the costs of designing and marketing products in order to avoid the consequences of unreasonable modes of use is not required."

Secondary Sources

6 Witkin, Summary of California Law (10th ed.) Torts, §§ 1171-1174A

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1271, 2:1295 (The Rutter Group)

California Products Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.21, Ch. 7, *Proof*, § 7.05 (Matthew Bender)

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

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.165 et seq. (Matthew Bender)

1245. Affirmative Defense—Product Misuse or Modification

[*Name of defendant***] claims that [he/she/it] is not responsible for [***name of plaintiff***]'s claimed harm because the [***product***] was [misused/ [or] modified] after it left [***name of defendant***]'s possession. To succeed on this defense, [***name of defendant***] must prove that:**

1. **The [***product***] was [misused/ [or] modified] after it left [***name of defendant***]'s possession; and**

2. **That the [misuse/ [or] modification] was so highly extraordinary that it was not reasonably foreseeable to [***name of defendant***], and therefore should be considered as the sole cause of [***name of plaintiff***]'s harm.**

~~2. That the [misuse/ [or] modification] was not reasonably foreseeable to [*name of defendant*]; and~~

~~3. That the [misuse/ [or] modification] was the sole cause of [*name of plaintiff*]'s harm.~~

New April 2009; Revised December 2009, June 2011

Directions for Use

Give this instruction if the defendant claims a complete defense to strict product liability because the product was misused or modified after it left the defendant's possession and control in an unforeseeable way, and the evidence permits defendant to argue that the subsequent misuse or modification was ~~so unforeseeable that it should be deemed~~ the sole ~~or superseding~~ cause of the plaintiff's injury. (See *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) If misuse or modification was a substantial factor contributing to, but not the sole ~~or superseding~~ cause of, plaintiff's harm, there is no complete defense, but the conduct of the plaintiff or of third parties may be considered under principles of comparative negligence or fault. (See *Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 15–21 [56 Cal.Rptr.2d 455].) See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff*, and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Third party negligence that is the immediate cause of an injury may be viewed as a superseding cause if it is so highly extraordinary as to be unforeseeable. Product misuse or modification may be deemed to be a superseding cause, which provides a complete defense to liability. (See *Torres*, *supra*, 49 Cal.App. 4th at pp. 18–19.) Element 2 incorporates this aspect of superseding cause as an explanation of what is meant by "sole cause." If misuse or modification truly were the *sole* cause, the product would not be defective.

It would appear that at least one court views superseding cause as a different standard from sole cause. (See *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 685 [115 Cal.Rptr.3d 590] [product misuse may serve as a complete defense when the misuse was so unforeseeable that it should be deemed the sole *or* superseding cause], original italics.) For an instruction on superseding cause that may perhaps be adapted for product misuse or modification, see CACI No. 432, *Causation: Third-Party Conduct as Superseding Cause*.

Sources and Authority

- " '[T]he law now requires a manufacturer to foresee some degree of misuse and abuse of his product, either by the user or by third parties, and to take reasonable precautions to minimize the harm that may result from misuse and abuse. … [T]he extent to which designers and manufacturers of dangerous machinery are required to anticipate safety neglect presents an issue of fact. … [A] manufacturer owes a foreseeable user of its product a duty to warn of risks of using the product.' " (*Wright v. Stang Mfg. Co.* (1997) 54 Cal.App.4th 1218, 1235 [63 Cal.Rptr.2d 422].)

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

- "[S]trict liability should not be imposed upon a manufacturer when injury results from a use of its product that is not reasonably foreseeable." (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 126 [104 Cal.Rptr. 433, 501 P.2d 1153].)

- "[Defendant] contends … that it cannot be held liable for any design defect because the accident was attributable to the misuse of the rewinder by [employer] and [plaintiff]. In order to avoid liability for product defect, [defendant] was required to prove, as an affirmative defense, that [employer]'s and [plaintiff]'s misuse of the machine … was an unforeseeable, superseding cause of the injury to [plaintiff]." *Perez, supra, ~~v. VAS S.p.A.~~ (~~2010~~)* 188 Cal.App.4th at pp.~~658,~~ 679–680 ~~[___ Cal.Rptr.3d ___]~~.)

- "[P]roduct misuse may serve as a complete defense when the misuse 'was so unforeseeable that it should be deemed the sole *or* superseding cause.' … '[T]he defense of "superseding cause …" … absolves a tortfeasor, *even though his [or her] conduct was a substantial contributing factor*, when an independent event intervenes in the chain of causation, producing harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible. [Citations.]' Here, the trial court reasonably concluded, in substance, that [plaintiff]'s misuse of the rewinder was so extreme as to be the sole cause of his injury. That conclusion dispensed with the need to apply principles of comparative fault." (*Perez, supra,* 188 Cal.App.4th at p. 685, original italics.)

- "Third party negligence which is the immediate cause of an injury may be viewed as a superseding cause when it is so highly extraordinary as to be unforeseeable. 'The foreseeability required is of the risk of harm, not of the particular intervening act. In other words, the defendant may be liable if his conduct was 'a substantial factor' in bringing about the harm, though he neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred.' It must appear that the intervening act has produced 'harm of a kind and degree so far beyond the risk the original tortfeasor should have foreseen that the law deems it unfair to hold him responsible.' " (*Torres, supra,* 49 Cal.App.4th at pp. 18–19, internal citations omitted.)

- " 'Misuse' is a defense only when that misuse is the actual cause of the plaintiff's injury, not when some other defect produces the harm. This causation is one of the elements of the 'misuse'

affirmative defense and thus the burden falls on the defendant to prove it." (*Huynh v. Ingersoll-Rand* (1993) 16 Cal.App.4th 825, 831 [20 Cal.Rptr.2d 296], internal citation omitted.)

- "[Defendant] further contends that [plaintiff]'s injuries arose not from a defective product, but rather, from his parents' modification of the product or their negligent supervision of its use. These arguments cannot be advanced by demurrer. Creation of an unreasonable risk of harm through product modification or negligent supervision is not clearly established on the face of [plaintiff]'s complaint. Instead, these theories must be pled as affirmative defenses." (*Williams v. Beechnut Nutrition Corp.* (1986) 185 Cal.App.3d 135, 141 [229 Cal.Rptr. 605].)

- "[T]here are cases in which the modification of a product has been determined to be so substantial and unforeseeable as to constitute a superseding cause of an injury as a matter of law. However, foreseeability is a question for the jury unless undisputed facts leave no room for a reasonable difference of opinion. Thus, the issue of superseding cause is generally one of fact. Superseding cause has been viewed as an issue of fact even in cases where 'safety neglect' by an employer has increased the risk of injury, or modification of the product has made it more dangerous." (*Torres, supra,* 49 Cal.App.4th at p. 19, internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Torts, § 1530, 1531

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶¶ 2:1329 et seq. (The Rutter Group)

California Product Liability Actions, Ch. 2, *Liability for Defective Products*, § 2.13[4] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.183 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.201 (Matthew Bender)

VF-1200. Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [manufacture/distribute/sell] the [***product***]?**
____ Yes ____ No

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

2. Did the [*product***] contain a manufacturing defect when it left [***name of defendant***]'s possession?**
____ Yes ____ No

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

~~**3. Was the [*product*] used in a way that was reasonably foreseeable to [*name of defendant*]?**~~
~~**____ Yes ____ No**~~

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

4~~3~~. Was the manufacturing defect a substantial factor in causing harm to [*name of plaintiff***]?**
____ Yes ____ No

If your answer to question 4~~3~~ is yes, then answer question 5~~4~~. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

5~~4~~. What are [*name of plaintiff***]'s damages? Do not reduce the damages based on the fault, if any, of [***name of plaintiff***] or [***name/description of other person***].**

[a. Past economic loss

[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 $ _____

If [*name of plaintiff*] has proved any damages, answer question ~~6~~5. If [*name of plaintiff*] has not proved any damages, then stop here, answer no further questions, and have the presiding juror sign and date this form.

~~6~~5. Was [*name of plaintiff*] negligent?
____ Yes ____ No

If your answer to question ~~6~~ 5 is yes, then answer question ~~7~~6. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question ~~10~~ 9 and answer question ~~8~~7.

~~7~~6. Was [*name of plaintiff*]'s negligence a substantial factor in causing [his/her] harm?
____ Yes ____ No

If your answer to question ~~7~~ 6 is yes, then answer question~~s~~ ~~8~~7 and 9. If you answered no, insert the number zero next to [*name of plaintiff*]'s name in question ~~10~~ 9 and answer question ~~8~~7.

~~8~~7. Was [*name/description of other person*] negligent?
____ Yes ____ No

If your answer to question ~~8~~ 7 is yes, then answer question ~~9~~8. If you answered no, insert the number zero next to [*name/description of other person*]'s name in question ~~10~~ 9.~~and answer question 10.~~

~~9~~8. Was [*name/description of other person*]'s negligence a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question ~~9~~ 8 is yes, then answer question ~~10~~9. If you answered no, insert the number zero next to [*name/description of other person*]'s name in question ~~10~~9 ~~and answer question 10~~.

~~10~~9. What percentage of responsibility for [*name of plaintiff*]'s harm do you assign to:

[*Name of defendant*]:	**____%**
[*Name of plaintiff*]:	**____%**
[*Name/description of other person*]:	**____%**
TOTAL	**100%**

Signed: _____
Presiding Juror

Dated: _____

After [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 September 2003; Revised April 2007, April 2009, December 2009, December 2010, June 2011

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. 1201, *Strict Liability—Manufacturing Defect—Essential Factual Elements,* CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person.* If product misuse or modification is alleged as a complete defense (see CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*), questions 2 and 3 of CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification,* may be included after question 1.

If the negligence or fault of more than one third person is alleged to have contributed to the plaintiff's injury, repeat questions ~~8~~ 7 and ~~9~~8.

If specificity is not required, users do not have to itemize all the damages listed in question ~~5~~4. 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*.

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

VF-1201. Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?
____ Yes ____ No

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

2. Was the [*product*] [misused/ [or] modified] after it left [*name of defendant*]'s possession in a way that was not reasonably foreseeable to [him/her/it]?
____ Yes ____ No

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

3. Was the [misuse/ [or] modification] the sole cause of [*name of plaintiff*]'s harm?
____ Yes ____ No

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

4. Did the [*product*] fail to perform as safely as an ordinary consumer would have expected when used or misused in an intended or reasonably foreseeable way?
____ Yes ____ No

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

~~**5. Was the [*product*] used in a way that was reasonably foreseeable to [*name of defendant*]?**~~
~~**____ Yes ____ No**~~

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

~~6~~5. Was the [*product*]'s design a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question ~~6~~ 5 is yes, then answer question ~~7~~6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~7~~6. What are [*name of plaintiff*]'s damages?

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [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 September 2003; Revised October 2004~~,~~; April 2007, April 2009, December 2010, June 2011

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. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements*, and CACI No. 1245, *Affirmative Defense—Product Misuse or Modification.* If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions ~~6~~ 5 through ~~10~~ 9 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue*, may be added at the end.

If misuse or modification is alleged to be a superseding cause of plaintiff's injury, modify question 3 with the elements to establish superseding cause from CACI No. 1245.

If specificity is not required, users do not have to itemize all the damages listed in question ~~7~~6. 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. However, do not combine this verdict form with CACI No. VF-1202, *Strict Products Liability—Design Defect—Risk-Benefit Test*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431]) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer-expectation test. 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 prior to judgment.

VF-1202. Strict Products Liability—Design Defect—Risk-Benefit Test

We answer the questions submitted to us as follows:

1. Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?
____ Yes ____ No

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

~~**2. Was the [*product*] used in a way that was reasonably foreseeable 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~~2. Was the [*product*]'s design a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question ~~3~~ 2 is yes, then answer question ~~4~~3. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~4~~3. Did the risks of the [*product*]'s design outweigh the benefits of the design?
____ Yes ____ No

If your answer to question ~~4~~ 3 is yes, then answer question ~~5~~4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~5~~4. 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.

New September 2003; Revised April 2007, April 2009, December 2010, June 2011

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. 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof.* If product misuse or modification is alleged as a complete defense (see CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*), questions 2 and 3 of CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification,* may be included after question 1. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions ~~6~~ 7 through ~~10~~ 9 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue,* may be added at the end.

If specificity is not required, users do not have to itemize all the damages listed in question ~~5~~4. 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.

However, do not combine this verdict form with CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431]) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer-expectation test. 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 prior to judgment.

VF-1203. Strict Products Liability—Failure to Warn

We answer the questions submitted to us as follows:

1. **Did [*name of defendant*] [manufacture/distribute/sell] the [*product*]?**
   ____ Yes ____ No

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

2. **Did the [*product*] have potential [risks/side effects/allergic reactions] that were [known] [or] [knowable through the use of scientific knowledge available] at the time of [manufacture/distribution/sale]?**
   ____ Yes ____ No

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

3. **Did the potential [risks/side effects/allergic reactions] present a substantial danger to ~~users of~~persons using or misusing the [*product*] in an intended or reasonably foreseeable way?**
   ____ Yes ____ No

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

4. **Would ordinary consumers have recognized the potential [risks/side effects/allergic reactions]?**
   ____ Yes ____ No

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

5. **Did [*name of defendant*] fail to adequately warn [or instruct] of the potential [risks/side effects/allergic reactions]?**
   ____ Yes ____ No

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

~~6. **Was the [*product*] used in a way that was reasonably foreseeable to [*name of defendant*]?**~~

~~____ Yes ____ No~~

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

~~7~~6. **Was the lack of sufficient [instructions] [or] [warnings] a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

If your answer to question ~~7~~ 6 is yes, then answer question ~~8~~7. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~8~~7. **What are [***name of plaintiff***]'s damages?**

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

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

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

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

TOTAL $ _____

Signed: _____

Presiding Juror

Dated: _____

After [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 September 2003; Revised April 2007, April 2009, December 2010, June 2011

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. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements.* If product misuse or modification is alleged as a complete defense (see CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*), questions 2 and 3 of CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification,* may be included after question 1. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions ~~6~~ 7 through ~~10~~ 9 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue,* may be added at the end.

If specificity is not required, users do not have to itemize all the damages listed in question ~~8~~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*.

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

VF-1205. Products Liability—Negligent Failure to Warn

We answer the questions submitted to us as follows:

1. Did [*name of defendant***] [manufacture/distribute/sell] the [***product***]?**
____ Yes ____ No

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

2. Did [*name of defendant***] know or should [he/she/it] reasonably have known that the [***product***] was dangerous or was likely to be dangerous when used or misused in a reasonably foreseeable manner?**
____ Yes ____ No

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

3. Did [*name of defendant***] know or should [he/she/it] reasonably have known that users would not realize the danger?**
____ Yes ____ No

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

4. Did [*name of defendant***] fail to adequately warn of the danger [or instruct on the safe use of] the [***product***]?**
____ Yes ____ No

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

5. Would a reasonable [manufacturer/distributor/seller] under the same or similar circumstances have warned of the danger [or instructed on the safe use of] the [*product***]?**
____ Yes ____ No

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

6. Was [*name of defendant***]'s failure to warn a substantial factor in causing harm to [***name of plaintiff***]?**

____ Yes ____ No

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

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

[a. Past economic loss

[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.

New September 2003; Revised April 2007, December 2010, June 2011

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. 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements.*

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

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 prior to judgment.

VF-1206. Products Liability—Express Warranty—Affirmative Defense—Not "Basis of Bargain"

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] represent to [***name of plaintiff***] by a [statement ~~of fact~~/ ~~promise/~~description/sample/model/*other*] that the [***product***] [***insert description of alleged express warranty***]?**
   ____ Yes ____ No

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

2. **Was the resulting bargain between the parties in which [***name of plaintiff***] ~~Did [***name of plaintiff***] rely on [***name of defendant***]'s [statement of fact/promise/description/sample/model] in deciding~~decided to [purchase/use] the [***product***] based in any way on [***name of defendant***]'s [statement/description/sample/model/*other*]?**
   ____ Yes ____ No

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

3. **Did the [***product***] fail to [perform] [or] [have the same quality] as represented?**
   ____ Yes ____ No

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

4. **Was the failure of the [***product***] to [perform] [or] [meet the quality] as represented a substantial factor in causing harm to [***name of plaintiff***]?**
   ____ Yes ____ No

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

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

   [a. Past economic loss

[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.

New September 2003; Revised February 2005, April 2007, December 2010, June 2011

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. 1230, *Express Warranty—Essential Factual Elements*, and CACI No. 1240, *Affirmative Defense to Express Warranty—Not "Basis of Bargain."*

Under various circumstances, the plaintiff must also prove that he or she made a reasonable attempt to notify the defendant of the defect. Thus, ~~where~~ if appropriate, the following question should be added ~~prior to~~before the question regarding the plaintiff's harm: "Did [*name of plaintiff*] take reasonable steps to

notify [*name of defendant*] within a reasonable time that the [*product*] [was not/did not perform] as requested?"

~~This verdict form is based on CACI No. 1230, *Express Warranty—Essential Factual Elements*, and CACI No. 1240, *Affirmative Defense to Express Warranty—Not "Basis of Bargain."*~~

If specificity is not required, users do not have to itemize all the damages listed in question 5. The breakdown is optional depending on the circumstances.

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 prior to judgment.

Do not include question 2 if the affirmative defense is not at issue.

VF-2100. Conversion

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] [own/possess/have a right to possess] a [***insert description of personal property***]?**
   ____ Yes ____ No

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

2. **Did [***name of defendant***] intentionally and substantially interfere with [***name of plaintiff***]'s property by [[~~take~~ taking possession of/preventing [***name of plaintiff***] from having access to] the [***insert description of personal property***]~~ for a significant period of time~~]/[destroying the [***insert description of personal property***]/~~refuse~~ refusing to return [***name of plaintiff***]'s [***insert description of personal property***] after [***name of plaintiff***] demanded its return]?**
   ____ Yes ____ No

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

3. **Did [***name of plaintiff***] consent?**
   ____ Yes ____ No

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

4. **Was [***name of plaintiff***] harmed?**
   ____ Yes ____ No

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

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

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

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

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 2005; Revised December 2009, December 2010, June 2011

Directions for Use

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

This verdict form is based on CACI No. 2100, *Conversion—Essential Factual Elements.*

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

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

2500. Disparate Treatment—Essential Factual Elements (Gov. Code, § 12940(a))

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

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

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

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

4. **That [***name of plaintiff***]'s [***protected status-for example, race, gender, or age***] was a motivating reason for the [discharge/refusal to hire/[***other adverse employment action***]];**

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

6. **That the [**discharge/refusal to hire/[*other adverse employment action*]**] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised April 2009, June 2011

Directions for Use

This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status. In contrast, disparate impact (the other general theory of discrimination) occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group. For disparate impact claims, see CACI No. 2502, *Disparate Impact—Essential Factual Elements*.

~~Elements that are uncontested should be deleted from this instruction.~~

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

Note that there are two causation elements. There must be a causal link between the discriminatory animus and the adverse action (see element 4), and there must be a causal link between the adverse action and the damage (see element 6). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

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

- Government Code section 12926(m) provides: " 'Race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation' includes a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics."

- "[C]onceptually the theory of 'disparate treatment' ... is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)

- "California has adopted the three-stage burden-shifting test for discrimination claims set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S. Ct. 1817, 36 L. Ed. 2d 668]. 'This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.' " (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307 [115 Cal.Rptr.3d 453], internal citations omitted.)

- "At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff's prima facie burden is 'not onerous', he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' …." …' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though 'rebuttable,' is 'legally mandatory.' Thus, in a trial, '[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.' [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],'

that its action was taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." *(Guz, supra*, 24 Cal.4th at pp. 355–356, internal citations omitted.)

- "[W]hether or not a plaintiff has met his or her prima facie burden [under *McDonnell Douglas Corp.*, *supra,* ~~*v. Green* (1973)~~ 411 U.S. 792 ~~[93 S.Ct. 1817, 36 L.Ed.2d 668]~~], and whether or not the defendant has rebutted the plaintiff's prima facie showing, are questions of law for the trial court, not questions of fact for the jury." (*Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].)

- ~~"[If] the case is submitted to the trier of fact, the intermediate burdens set forth in *McDonnell Douglas* will fall away, and the fact finder will have only to decide the ultimate issue of whether the employer's discriminatory intent was a motivating factor in the adverse employment decision." (*Caldwell*, *supra*, 41 Cal.App.4th at p. 205.)~~

- ~~"The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 356 [100 Cal.Rptr.2d 352, 8 P.3d 1089].)~~

- "To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action." (*Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)

- "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon, supra,* 192 Cal.App.3d at p. 1319.)

- "In cases involving a comparison of the plaintiff's qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer's decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable

juror would in every case defer to the employer's assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture." (*Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)

- "While not all cases hold that 'the disparity in candidates' qualifications "must be so apparent as to jump off the page and slap us in the face to support a finding of pretext" ' the precedents do consistently require that the disparity be substantial to support an inference of discrimination." (*Reeves, supra,* 186 Cal.App.4th at p. 675, internal citation omitted.)

- "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz, supra,* 24 Cal.4th at p. 354.)

- "We have held 'that, in a civil action under the FEHA, all relief generally available in noncontractual actions ... may be obtained.' This includes injunctive relief." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)

- "The FEHA does not itself authorize punitive damages. It is, however, settled that California's punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA ... ." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, §§ 915, 916, 918

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 4:25, 5:153, 7:194, 7:200–7:201, 7:356, 7:391–7:392

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, §§ 2.44–2.82

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[2] (Matthew Bender)

California Civil Practice: Employment Litigation, ~~(Thomson West)~~ §§ 2:2, 2:20 (Thomson Reuters West)

2502. Disparate Impact—Essential Factual Elements (Gov. Code, § 12940(a))

[*Name of plaintiff***] claims that [***name of defendant***] had [an employment practice/a selection policy] that wrongfully discriminated against [him/her]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of defendant***] had [an employment practice of [***describe practice***]/a selection policy of [***describe policy***]] that had a disproportionate adverse effect on [***describe protected group-for example, persons over the age of 40***];**

4. **That [***name of plaintiff***] is [***protected status***];**

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

6. **That [***name of defendant***]'s [employment practice/selection policy] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised June 2011

Directions for Use

This instruction is intended for disparate impact employment discrimination claims. Disparate impact occurs when an employer has an employment practice that appears neutral but has an adverse impact on members of a protected group and cannot be justified by business necessity.

~~Uncontested elements should be deleted from this instruction.~~

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

The court should consider instructing the jury on the meaning of "adverse impact," tailored to the facts of the case and the applicable law.

Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, or sexual orientation of any person, to refuse

to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment."

- Government Code section 12941.1 expresses the Legislature's rejection of the opinion in *Marks v. Loral Corp.* (1997) 57 Cal.App.4th 30 [68 Cal.Rptr.2d 1] and states, in part: "The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination."

- The California Fair Employment and Housing Commission's regulations state: "Where an employer or other covered entity has a facially neutral practice which has an adverse impact (i.e., is discriminatory in effect), the employer or other covered entity must prove that there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and that the challenged practice effectively fulfills the business purpose it is supposed to serve. The practice may still be impermissible where it is shown that there exists an alternative practice which would accomplish the business purpose equally well with a lesser discriminatory impact." (Cal. Code Regs., tit. 2, § 7286.7(b).)

- The California Fair Employment and Housing Commission's regulations state: "Any policy or practice of an employer or other covered entity which has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related. ... A testing device or other means of selection which is facially neutral, but which has an adverse impact (as described in the Uniform Guidelines on Employee Selection Procedures (29 CFR 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is sufficiently related to an essential function of the job in question to warrant its use." (Cal. Code Regs., tit. 2, § 7287.4(a), (e).)

- "Prohibited discrimination may ... be found on a theory of disparate impact, i.e., that regardless of motive, a *facially neutral* employer practice or policy, bearing no manifest relationship to job requirements, *in fact* had a disproportionate adverse effect on members of the protected class." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354, fn. 20 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "A 'disparate impact' plaintiff ... may prevail without proving intentional discrimination ... [However,] a disparate impact plaintiff 'must not merely prove circumstances raising an inference of discriminatory impact; he must prove the discriminatory impact at issue.' " (*Ibarbia v. Regents of the University of California* (1987) 191 Cal.App.3d 1318, 1329–1330 [237 Cal.Rptr. 92], quoting *Lowe v. City of Monrovia* (9th Cir. 1985) 775 F.2d 998, 1004.)

- " 'To establish a prima facie case of discrimination, a plaintiff must show that the facially neutral employment practice had a significantly discriminatory impact. If that showing is made, the employer must then demonstrate that "any given requirement [has] a manifest relationship to the employment in question," in order to avoid a finding of discrimination ... Even in such a case, however, the plaintiff

may prevail, if he shows that the employer was using the practice as a mere pretext for discrimination.' " (*City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716], quoting *Connecticut v. Teal* (1982) 457 U.S. 440, 446-447 [102 S.Ct. 2525, 73 L.Ed.2d 130], internal citation omitted.)

- Under federal title VII, a plaintiff may establish an unlawful employment practice based on disparate impact in one of two ways: (1) the plaintiff demonstrates that a defendant uses a particular employment practice that causes a disparate impact on the basis of a protected status, and the defendant "fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity"; or (2) the plaintiff demonstrates that there is an alternative employment practice with less adverse impact, and the defendant "refuses to adopt such alternative employment practice." (42 U.S.C. § 2000e-2(k)(1)(A).)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 4.25, 5:153, 7:530–7:531, 7:535

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Discrimination Claims, § 2.65

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.21 (Matthew Bender)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.01[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.23[4] (Matthew Bender)

California Civil Practice: Employment Litigation (Thomson West) § 2:23

2570. Age Discrimination—Disparate Treatment—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] because of [his/her] age. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

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

4. **That [***name of plaintiff***] was age 40 or older at the time of the [discharge/[***other adverse employment action***]];**

5. **That [***name of plaintiff***]'s age was a motivating reason for the [discharge/refusal to hire/[***other adverse employment action***]];**

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

7. **That the [**discharge/refusal to hire/[***other adverse employment action***]] was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2011

Directions for Use

Give also CACI No. 2507, *"Motivating Reason" Explained.* See also the Sources and Authority to CACI No, 2500, *Disparate Treatment—Essential Factual Elements.*

Note that there are two causation elements. There must be a causal link between the discriminatory animus based on age and the adverse action (see element 5), and there must be a causal link between the adverse action and the damage (see element 7). (See *Mamou v. Trendwest Resorts, Inc.* (2008) 165 Cal.App.4th 686, 713 [81 Cal.Rptr.3d 406].)

Under the *McDonnell Douglas* (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed.2d 668]) process for allocating burdens of proof and producing evidence, which is used in California for disparate-treatment cases under FEHA, the employee must first present a prima facie case of discrimination. The burden then shifts to the employer to produce evidence of a nondiscriminatory reason for the adverse action. At that point, the burden shifts back to the employee to show that the employer's stated reason was in fact a pretext for a discriminatory act.

Whether or not the employee has met his or her prima facie burden, and whether or not the employer has

rebutted the employee's prima facie showing, are questions of law for the trial court, not questions of fact for the jury. (See *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 [48 Cal.Rptr.2d 448].) In other words, by the time that the case is submitted to the jury, the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision. The *McDonnell Douglas* shifting burden drops from the case. The jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent or that of the employer's age-neutral reasons for the employment decision. (See *Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1118, fn. 5 [94 Cal.Rptr.2d 579]).

Under FEHA, age-discrimination cases require the employee to show that his or her job performance was satisfactory at the time of the adverse employment action as a part of his or her prima facie case (see *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 321 [115 Cal.Rptr.3d 453]), even though it is the employer's burden to produce evidence of a nondiscriminatory reason for the action. Poor job performance is the most common nondiscriminatory reason that an employer advances for the action. Even though satisfactory job performance may be an element of the employee's prima facie case, it is not an element that the employee must prove to the trier of fact. Under element 5 and CACI No. 2507, the burden remains with the employee to ultimately prove that age discrimination was a motivating reason for the action. (See *Muzquiz, supra,* 79 Cal.App.4th at p. 1119.)

Sources and Authority

- Government Code section 12940(a) provides that it is an unlawful employment practice "[f]or an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, *age,* or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (emphasis added)

- Government Code section 12926(b) provides: " 'Age' refers to the chronological age of any individual who has reached his or her 40th birthday."

- Government Code section 12941 provides: "The Legislature hereby declares its rejection of the court of appeal opinion in *Marks v Loral Corp.* (1997) 57 Cal. App.4th 30, and states that the opinion does not affect existing law in any way, including, but not limited to, the law pertaining to disparate treatment. The Legislature declares its intent that the use of salary as the basis for differentiating between employees when terminating employment may be found to constitute age discrimination if use of that criterion adversely impacts older workers as a group, and further declares its intent that the disparate impact theory of proof may be used in claims of age discrimination. The Legislature further reaffirms and declares its intent that the courts interpret the state's statutes prohibiting age discrimination in employment broadly and vigorously, in a manner comparable to prohibitions against sex and race discrimination, and with the goal of not only protecting older workers as individuals, but also of protecting older workers as a group, since they face unique obstacles in the later phases of their careers. Nothing in this section shall limit the affirmative defenses traditionally available in employment discrimination cases including, but

not limited to, those set forth in Section 7286.7 of Title 2 of the California Code of Regulations."

- "In order to make out a prima facie case of age discrimination under FEHA, a plaintiff must present evidence that the plaintiff (1) is over the age of 40; (2) suffered an adverse employment action; (3) was performing satisfactorily at the time of the adverse action; and (4) suffered the adverse action under circumstances that give rise to an inference of unlawful discrimination, i.e., evidence that the plaintiff was replaced by someone significantly younger than the plaintiff." (*Sandell, supra,* 188 Cal.App.4th at p. 321.)

- "In other words, '[b]y the time that the case is submitted to the jury, . . . the plaintiff has already established his or her prima facie case, and the employer has already proffered a legitimate, nondiscriminatory reason for the adverse employment decision, leaving only the issue of the employer's discriminatory intent for resolution by the trier of fact. Otherwise, the case would have been disposed of as a matter of law for the trial court. That is to say, if the plaintiff cannot make out a prima facie case, the employer wins as a matter of law. If the employer cannot articulate a nondiscriminatory reason for the adverse employment decision, the plaintiff wins as a matter of law. In those instances, no fact-finding is required, and the case will never reach a jury. [¶] In short, if and when the case is submitted to the jury, the construct of the shifting burden "drops from the case," and the jury is left to decide which evidence it finds more convincing, that of the employer's discriminatory intent, or that of the employer's race or age-neutral reasons for the employment decision.' " (*Muzquiz, supra,* 79 Cal.App.4th at p. 1118, fn. 5.)

- "Because the only issue properly before the trier of fact was whether the [defendant]'s adverse employment decision was motivated by discrimination on the basis of age, the shifting burdens of proof regarding appellant's prima facie case and the issue of legitimate nondiscriminatory grounds were actually irrelevant." (*Muzquiz, supra,* 79 Cal.App.4th at p. 1119.)

- "An employee alleging age discrimination must ultimately prove that the adverse employment action taken was based on his or her age. Since direct evidence of such motivation is seldom available, the courts use a system of shifting burdens as an aid to the presentation and resolution of age discrimination cases. That system necessarily establishes the basic framework for reviewing motions for summary judgment in such cases." (*Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1002 [67 Cal.Rptr.2d 483], internal citations omitted.)

- "While we agree that a plaintiff must demonstrate some basic level of competence at his or her job in order to meet the requirements of a prima facie showing, the burden-shifting framework established in *McDonnell Douglas* compels the conclusion that any measurement of such competency should, to the extent possible, be based on objective, rather than subjective, criteria. A plaintiff's burden in making a prima facie case of discrimination is not intended to be 'onerous.' Rather, the prima facie burden exists in order to weed out patently unmeritorious claims." (*Sandell, supra,* 188 Cal.App.4th at p. 322, internal citations omitted.)

- "A discharge is not 'on the ground of age' within the meaning of this prohibition unless age is a 'motivating factor' in the decision. Thus, ' "an employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision." ' '[A]n employee claiming discrimination must offer substantial evidence

that the employer's stated nondiscriminatory reason for the adverse action was untrue or pretextual, or evidence the employer acted with a discriminatory animus, or a combination of the two, such that a reasonable trier of fact could conclude the employer engaged in intentional discrimination.' " (*West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 978 [117 Cal.Rptr.2d 647].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law, § 932–935

Chin et al., California Practice Guide: Employment Litigation, Ch. 8-B, *California Fair Employment and Housing Act*, ¶¶ 8:740, 8:800 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 43.31 (Matthew Bender)

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

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.43 (Matthew Bender)

2601. Eligibility

To show that [he/she] was eligible for [family care/medical] leave, [*name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was an employee of [***name of defendant***];**

2. **That [***name of defendant***] employed 50 or more employees within 75 miles of [***name of plaintiff***]'s workplace;**

3. **That at the time [***name of plaintiff***] [requested/began] leave, [he/she] had more than 12 months of service with [***name of defendant***] and had worked at least 1,250 hours for [***name of defendant***] during the previous 12 months; and**

4. **That at the time [***name of plaintiff***] [requested/began] leave [***name of plaintiff***] had taken no more than 12 weeks of family care or medical leave in the 12-month period [***define period***].**

New September 2003; Revised June 2011

~~Directions for Use~~

~~Uncontested elements may be deleted from this instruction.~~

Sources and Authority

- Government Code section 12945.2(a) provides, in part, that "it shall be an unlawful employment practice for any employer ... to refuse to grant a request by any employee with more than 12 months of service with the employer, and who has at least 1,250 hours of service with the employer during the previous 12-month period, to take up to a total of 12 workweeks in any 12-month period for family care and medical leave. Family care and medical leave ... shall not be deemed to have been granted unless the employer provides the employee, upon granting the leave request, a guarantee of employment in the same or a comparable position upon the termination of the leave."

- Government Code section 12945.2(c)(2) provides, in part:

  "Employer" means either of the following:

  (A) Any person who directly employs 50 or more persons to perform services for a wage or salary.

  (B) The state, and any political or civil subdivision of the state and cities.

- Government Code section 12945.2(b) provides: "It shall not be an unlawful employment practice for

an employer to refuse to grant a request for family care and medical leave by an employee if the employer employs less than 50 employees within 75 miles of the worksite where that employee is employed."

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 12:32, 12:87, 12:125, 12:390, 12:421, 12:1201, 12:1300

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.32[6][c] (Matthew Bender)

2900. Essential Factual Elements

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

1. **That [***name of plaintiff/decedent***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] was a common carrier by railroad;**

3. **That [***name of defendant***] was engaged in interstate commerce;**

4. **That [***name of plaintiff/decedent***]'s job duties furthered, or in any way substantially affected, interstate commerce;**

5. **That [***name of plaintiff/decedent***] was acting within the scope of [his/her] employment at the time of the incident;**

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

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

8. **That [***name of defendant***]'s negligence was a cause of [***name of plaintiff/decedent***]'s [harm/death].**

["Interstate commerce" is commercial activity that crosses more than one country or state, such as the movement of goods from one state to another.]

New September 2003; Revised June 2011

Directions for Use

~~In many case, some of the elements itemized above may not be contested or may be decided by the judge as a matter of law in advance of trial. Such elements may be deleted from this instruction.~~

If the plaintiff is bringing a negligence claim under the Federal Employers' Liability Act (FELA) and a claim under the Federal Safety Appliance Act (SAA) or the Boiler Inspection Act (BIA), the court may wish to add an introductory instruction that would alert the jury to the difference between the two claims.

Sources and Authority

- 45 U.S.C. section 51 provides, in part:

  Every common carrier by railroad while engaging in commerce between any of the several States

> or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this [chapter], be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this [chapter].

- The FELA is "liberally construed" to further Congress's remedial goal of protecting railroad workers. (*Consolidated Rail Corp. v. Gottshall* (1994) 512 U.S. 532, 543 [114 S.Ct. 2396, 129 L.Ed.2d 427].)

- "The elements of a FELA case are: (1) the injury occurred while the plaintiff was working within the scope of his or her employment with the railroad; (2) the employment was in furtherance of the railroad's interstate transportation business; (3) the employer railroad was negligent; and (4) the employer's negligence played some part in causing the injury for which compensation is sought under the Act." (*Monarch v. Southern Pacific Transportation Co.* (1999) 70 Cal.App.4th 1197, 1210, fn. 10 [83 Cal.Rptr.2d 247], internal citations omitted.)

- "That FELA is to be liberally construed ... does not mean that it is a workers' compensation statute. We have insisted that FELA 'does not make the employer the insurer of the safety of his employees while they are on duty. The basis of his liability is his negligence, not the fact that injuries occur.' " (*Consolidated Rail Corp., supra*, 512 U.S. at p. 543, internal citations omitted.)

- "We note that under the Federal Employers' Liability Act of 1908 an injured railroad employee may bring a cause of action without proof of negligence based on failure of the SAA-mandated safety appliances to function. When such strict liability does not apply, i.e., the injury does not result from defective equipment covered by the SAA, the employee must establish common law negligence." (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1170, fn. 4 [86 Cal.Rptr.2d 832, 980 P.2d 386], internal citations omitted.)

- "Under the FELA, liability is established if the employer's negligence played any part in causing the employee's injury." (*McDonald v. Southern Pacific Transportation Co.* (1999) 71 Cal.App.4th 256, 260, fn. 4 [83 Cal.Rptr.2d 734], internal citation omitted.)

- "The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation." (*Reed v. Pennsylvania Railroad Co.* (1956) 351 U.S. 502, 505 [76 S.Ct. 958, 100

L.Ed. 1366].)

- "Where more than one inference can be drawn from the evidence, the question whether an employee was, at the time of receiving the injury sued for, engaged in interstate commerce, is for the jury." (*Sullivan v. Matt* (1955) 130 Cal.App.2d 134, 139 [278 P.2d 499], internal citations omitted.)

Secondary Sources

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 15:485–15:488, 15:495

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.35 (Matthew Bender)

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 3, *Removing a State Court Case to Federal Court*, 3.14

2920. Federal Safety Appliance Act or Boiler Inspection Act—Essential Factual Elements—~~Federal Safety Appliance Act or Boiler Inspection Act~~

[*Name of plaintiff***] [also] claims that while [he/she/[***name of decedent***]] was employed by [***name of defendant***], [[he/she] was harmed by/[his/her] death was caused by] [***name of defendant***]'s [***describe violation of Federal Safety Appliance Act/Boiler Inspection Act***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff/decedent***] was employed by [***name of defendant***];**

2. **That [***name of defendant***] was a common carrier by railroad;**

3. **That [***name of plaintiff/decedent***] was acting within the scope of [his/her] employment at the time of the incident;**

4. **That [***name of defendant***] was engaged in interstate commerce;**

5. **That [***name of plaintiff/decedent***]'s job duties furthered, or in any way substantially affected, interstate commerce;**

6. **That [***name of defendant***] [***describe violation of Federal Safety Appliance Act/Boiler Inspection Act***];**

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

8. **That [***name of defendant***]'s conduct was a cause of [[***name of plaintiff***]'s harm/[***name of decedent***]'s death].**

[Interstate commerce is commercial activity that crosses more than one country or state, such as the movement of goods from one state to another.]

[*Name of defendant***] is responsible for harm caused by [***describe conduct that violated the FSA/BIA***] even if it was not negligent. If you find that [***name of defendant***] is responsible for [***name of plaintiff/decedent***]'s [harm/death], [***name of plaintiff***]'s recovery, if any, must not be reduced because of [***name of plaintiff/decedent***]'s own conduct.**

New September 2003; Revised December 2009, June 2011

Directions for Use

The statutory violation should be paraphrased in this instruction where indicated. Separate instructions may need to be drafted detailing the statutory requirements of the specific violation as alleged and any applicable defenses. (See 49 U.S.C. §§ 20301 et seq., 20501 et seq., and 20701.)

~~In many case, some of the elements itemized above may not be contested or may be decided by the judge as a matter of law in advance of trial. These elements may be deleted from this instruction.~~

If the plaintiff is bringing a negligence claim under the Federal Employers' Liability Act (FELA) and a claim under the Federal Safety Appliance Act (SAA) or the Boiler Inspection Act (BIA), the court may wish to add an introductory instruction that would alert the jury to the difference between the two claims.

Do not give a comparative fault instruction if the case is brought under this theory.

Sources and Authority

- Title 45 United States Code section 51 provides, in part: "Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this [chapter]."

- Title 45 United States Code section 53 provides, in part: "[T]he fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: Provided, that no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

- Title 45 United States Code section 54 provides: "In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

- Title 45 United States Code section 54a provides: "A regulation, standard, or requirement in force, or prescribed by the Secretary of Transportation under chapter 201 of title 49, United States Code [49 USCS §§ 20101 et seq.], or by a State agency that is participating in investigative and surveillance activities under section 20105 of title 49, is deemed to be a statute under sections 3 and 4 of this Act [45 USCS §§ 53, 54]."

- Title 49 United States Code section 20302(a) provides:

> (a) General. Except as provided in subsection (c) of this section and section 20303 of this title, a railroad carrier may use or allow to be used on any of its railroad lines-
>
> (1) a vehicle only if it is equipped with-
>
> (A) couplers coupling automatically by impact, and capable of being

uncoupled, without the necessity of individuals going between the ends of the vehicles;

(B) secure sill steps and efficient hand brakes; and

(C) secure ladders and running boards when required by the Secretary of Transportation, and, if ladders are required, secure handholds or grab irons on its roof at the top of each ladder;

(2) except as otherwise ordered by the Secretary, a vehicle only if it is equipped with secure grab irons or handholds on its ends and sides for greater security to individuals in coupling and uncoupling vehicles;

(3) a vehicle only if it complies with the standard height of drawbars required by regulations prescribed by the Secretary;

(4) a locomotive only if it is equipped with a power-driving wheel brake and appliances for operating the train-brake system; and

(5) a train only if-

(A) enough of the vehicles in the train are equipped with power or train brakes so that the engineer on the locomotive hauling the train can control the train's speed without the necessity of brake operators using the common hand brakes for that purpose; and

(B) at least 50 percent of the vehicles in the train are equipped with power or train brakes and the engineer is using the power or train brakes on those vehicles and on all other vehicles equipped with them that are associated with those vehicles in the train.

- Title 49 United States Code section 20502(b) provides:

(b) Use. A railroad carrier may allow a signal system to be used on its railroad line only when the system, including its controlling and operating appurtenances-

(1) may be operated safely without unnecessary risk of personal injury; and

(2) has been inspected and can meet any test prescribed under this chapter [49 USCS §§ 20501 et seq.].

- Title 49 United States Code section 20701 provides:

A railroad carrier may use or allow to be used a locomotive or tender on its railroad line only when the locomotive or tender and its parts and appurtenances-

(1) are in proper condition and safe to operate without unnecessary danger of personal injury;

(2) have been inspected as required under this chapter and regulations prescribed by the Secretary of Transportation under this chapter; and

(3) can withstand every test prescribed by the Secretary under this chapter.

- "We note that under the Federal Employers' Liability Act of 1908 an injured railroad employee may bring a cause of action without proof of negligence based on failure of the SAA-mandated safety appliances to function. When such strict liability does not apply, i.e., the injury does not result from defective equipment covered by the SAA, the employee must establish common law negligence. The Supreme Court has also recognized that the SAA imposes a duty on railroads extending to nonemployee travelers at railway/highway crossings, who must bring a common law tort action in state court (absent diversity) and must prove negligence." (*Carrillo v. ACF Industries, Inc.* (1999) 20 Cal.4th 1158, 1170, fn. 4 [86 Cal.Rptr.2d 832, 980 P.2d 386], internal citations omitted.)

- "[An] FSAA violation is *per se* negligence in a FELA suit. In other words, the injured employee has to show only that the railroad violated the FSAA, and the railroad is strictly liable for any injury resulting from the violation." (*Phillips v. CSX Transportation Co.* (4th Cir. 1999) 190 F.3d 285, 288, original italics.)

- " 'The BIA and the SAA are regarded as amendments to the FELA. The BIA supplements the FELA to provide additional public protection and facilitate employee recovery. ... [T]he BIA imposes on the carrier an absolute duty to maintain the locomotive, and all its parts and appurtenances, in proper condition, and safe to operate without unnecessary peril to life or limb.' " (*Fontaine v. National Railroad Passenger Corp.* (1997) 54 Cal.App.4th 1519, 1525 [63 Cal.Rptr.2d 644], internal citation omitted.)

- "[N]either contributory negligence nor assumption of the risk is a defense to a BIA violation which has contributed to the cause of an injury." (*Fontaine, supra,* 54 Cal.App.4th at p. 1525.)

- "Where an inefficient brake causes an injury the carrier in interstate commerce under the Safety Appliance Act cannot escape liability, and proof of negligence on the part of the railroad is unnecessary." (*Leet v. Union Pacific Railroad Co.* (1943) 60 Cal.App.2d 814, 817 [142 P.2d 37].)

- "Proof of a BIA violation is enough to establish negligence as a matter of law, and neither contributory negligence nor assumption of risk can be raised as a defense." (*Law v. General Motors Corp.* (9th Cir. 1997) 114 F.3d 908, 912, internal citations omitted.)

- "The purpose in enacting the BIA was to protect train service employees and the traveling public from defective locomotive boilers and equipment. '[I]t has been held consistently that the [BIA] supplements the [FELA] by imposing on interstate railroads "an absolute and continuing duty" to provide safe equipment.' In addition to the civil penalty, a person harmed by violation of the BIA is given recourse to sue under FELA, which applies only to railroad employees injured while engaged in interstate commerce. FELA provides the exclusive remedy for recovery of damages against a railroad

by its employees. FELA liability is expressly limited to common carriers." (*Viad Corp. v. Superior Court* (1997) 55 Cal.App.4th 330, 335 [64 Cal.Rptr.2d 136], internal citations omitted, disapproved on other grounds in *Scheiding v. General Motors Corp.* (2000) 22 Cal.4th 471, 484, fn. 6 [93 Cal.Rptr.2d 342, 993 P.2d 996].)

- "The test for coverage under the amendment is not whether the employee is engaged in transportation, but rather whether what he does in any way furthers or substantially affects transportation." (*Reed v. Pennsylvania Railroad Co.* (1956) 351 U.S. 502, 505 [76 S.Ct. 958, 100 L.Ed. 1366].)

- "Where more than one inference can be drawn from the evidence, the question whether an employee was, at the time of receiving the injury sued for, engaged in interstate commerce, is for the jury." (*Sullivan v. Matt* (1955) 130 Cal.App.2d 134, 139 [278 P.2d 499], internal citations omitted.)

Secondary Sources

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.45 (Matthew Bender)

2924. Status as Defendant's Employee—Subservant Company

[*Name of plaintiff***] claims [he/she/[***name of decedent***]] was [***name of defendant***]'s employee because [he/she] was employed by [***name of primary employer***], a company that was controlled by [***name of defendant***]. To succeed on this claim, [***name of plaintiff***] must prove all of the following:**

1. ~~that~~ That [*name of defendant*] controlled or had the right to control the daily operations of [*name of primary employer*];

2. That [*name of defendant*] controlled or had the right to control the physical conduct of [*name of primary employer*]'s employees in the course of the work during which [*name of plaintiff/decedent*] was [injured/killed]; and

3. That [*name of plaintiff/decedent*] was performing services for the benefit of [*name of defendant*] at the time of [injury/death].

~~. Sharing information or coordinating efforts between two companies, by itself, is not enough to establish the right to control.~~

~~In deciding whether [*name of defendant*] controlled [*name of primary employer*], you should consider the following:~~

~~(a) Did the two companies share directors or management-level officers?~~

~~(b) Did the two companies share strategies, policies, sales, administrative, and operating staffs?~~

~~(c) Did the two companies share payroll and personnel records?~~

~~(d) Did [*name of defendant*] have a right to participate in [*name of primary employer*]'s day-to-day operations?~~

~~(e) Did [*name of defendant*] establish [*name of primary employer*]'s work procedures?~~

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

~~A "yes" answer to one or more of these questions suggests that the right to control exists. "No" answers suggest that the right to control does not exist. You should consider the relative importance of each factor and not simply count the number of "yes" and "no" answers. Remember that the ultimate test is the right to control.~~

New September 2003; Revised June 2011

Directions for Use

For factors that may apply to determine whether the employer has a right to control, see CACI No. 2923,

Borrowed Servant/Dual Employee. These factors are taken from section 220 of the Restatement Second of Agency. The factors were not included in the Restatement Third of Agency.

Sources and Authority

- "In the *Kelley* case, the Supreme Court recognized that if a second company could be shown to be a conventional common-law servant, the 'control or right to control' test would be met." (*Bradsher v. Missouri Pacific Railroad* (8th Cir. 1982) 679 F.2d 1253, 1257-1258, internal citation omitted.)

- "To prove WFE was [defendant]'s servant, [plaintiff] must establish [defendant] controlled or had the right to control the physical conduct of WFE's employees in the course of the work during which the injury allegedly occurred. The subservant theory presupposes the existence of two separate entities in a master-servant relationship. A plaintiff can proceed under this theory by showing his employer was the common-law servant of the defendant railroad such that the railroad controlled or had the right to control the employer's daily operations. A plaintiff must also show he was 'employed to perform services in the affairs of [the defendant railroad] and . . . with respect to the physical conduct in the performance of the services [was] subject to [that railroad's] control or right to control.' For [plaintiff] to succeed under the subservant theory, he must show [defendant] controlled or had the right to control his physical conduct on the job. It is not enough for him to merely show WFE was the railroad's agent, or that he was acting to fulfill the railroad's obligations; [defendant]'s generalized oversight of [plaintiff], without physical control or the right to exercise physical control of his daily work is insufficient." (*Schmidt v. Burlington Northern & Santa Fe Ry.* (9th Cir. 2010) 605 F.3d 686, 689–690, internal citations omitted.)

- "Where the evidence of control is in dispute, the case should go to the jury." (*Vanskike v. ACF Industries, Inc.* (8th Cir. 1981) 665 F.2d 188, 198, internal citations omitted.)

- "In this case ... the evidence of contacts between Southern Pacific employees and PMT employees may indicate, not direction or control, but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation. The informal contacts between the two groups must assume a supervisory character before the PMT employees can be deemed pro hac vice employees of the railroad." (*Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 330 [95 S.Ct. 472, 42 L.Ed.2d 498].)

- Restatement Second of Agency, section 220(1), defines a servant as "a person employed to perform services in the affairs of another and who with respect to the physical conduct in the performance of the services is subject to the other's control or right to control." Section 220(2) lists various factors that are helpful in applying this definition:

  (a) the extent of control which, by the agreement, the master may exercise over the details of the work;

  (b) whether or not the one employed is engaged in a distinct occupation or business;

  (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without

supervision;

(d) the skill required in the particular occupation;

(e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;

(f) the length of time for which the person is employed;

(g) the method of payment, whether by the time or by the job;

(h) whether or not the work is a part of the regular business of the employer;

(i) whether or not the parties believe they are creating the relation of master and servant; and

(j) whether the principal is or is not in business.

- "While [section 220] is directed primarily at determining whether a particular bilateral arrangement is properly characterized as a master-servant or independent contractor relationship, it can also be instructive in analyzing the three-party relationship between two employers and a worker." (*Kelley v. Southern Pacific Co.* (1974) 419 U.S. 318, 324 [95 S.Ct. 472, 42 L.Ed.2d 498].)

- "In 2006 the Restatement (Second) of Agency was superseded by the Restatement (Third) of Agency, which uses 'employer' and 'employee' rather than 'master' and 'servant,' Restatement (Third) of Agency, § 2.04, comment a, and defines an employee simply as a type of agent subject to a principal's control. Id., § 7.07(3)(a)." (*Schmidt*, *supra*, 605 F.3d at p. 690, fn. 3.)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Workers' Compensation, § 118

42 California Forms of Pleading and Practice, Ch. 485, *Railroads*, § 485.33 (Matthew Bender)

3011. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—General Conditions of Confinement Claim (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to prison conditions that violated [his/her] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was imprisoned under conditions that ~~deprived [him/her] of~~ [*describe violation~~deprivation~~, e.g., deprived [him/her] of out-of-cell exercise*]~~exposed [him/her] to a substantial risk of serious harm~~;**

2. **That [***name of defendant***]'s conduct~~the deprivation~~ created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

3. **That [***name of defendant***] knew or it was obvious that ~~the deprivation~~[his/her/its] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety~~knew the conditions created a substantial risk of serious harm and disregarded that risk by failing to take reasonable measures to correct it~~;**

4. **That there was no reasonable justification for the ~~deprivation~~conduct;**

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

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

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

New September 2003; Revised December 2010, June 2011

Directions for Use

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811].) "Deliberate indifference" involves a two part inquiry. First, the inmate must show that the prison officials were aware of a 'substantial risk of serious harm' to the inmate's health or safety. Second, the inmate must show that the prison officials had no 'reasonable' justification for the deprivation, in spite of that risk. (*Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150.) Elements 3 and 4 express the deliberate-indifference components.

The "official duties" referred to in element ~~3~~ 5 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~~5.

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].)

- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra, ~~v. Brennan (1994)~~* 511 U.S. at p. ~~825,~~ 834 ~~[114 S.Ct. 1970, 128 L.Ed.2d 811]~~, internal citations omitted.)

- "The second step, showing 'deliberate indifference,' involves a two part inquiry. First, the inmate must show that the prison officials were aware of a 'substantial risk of serious harm' to an inmate's health or safety. This part of our inquiry may be satisfied if the inmate shows that the risk posed by the deprivation is obvious. Second, the inmate must show that the prison officials had no 'reasonable' justification for the deprivation, in spite of that risk." (*Thomas, supra, ~~v. Ponder (9th Cir. 2010)~~* 611 F.3d at p. ~~1144,~~ 1150, footnotes and internal citations omitted.)

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- "[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- "Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." (*Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 731, internal citations omitted.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and 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.) Constitutional Law § 826

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶¶ 11.02–11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.28 (Matthew Bender)

VF-3005. ~~Municipal~~ Public Entity Liability (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Did the [***name of local governmental entity***] have an official [policy/custom] [***specify policy or custom***][~~[***name of officer, employee, etc.***]~~ [intentionally/[***insert other applicable state of mind***]] [***insert conduct allegedly violating plaintiff's civil rights***]?**

____ Yes ____ No

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

2. **Did [***name of local governmental entity***] know, or should it have been obvious to it, that this official [policy/custom] was likely to result in a deprivation of the right [***specify right violated***][~~[***insert conduct allegedly violating plaintiff's civil rights***]~~ occur as a result of the official [policy/custom] of the [***name of municipality***]]?**

____ Yes ____ No

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

3. **Was [***name of officer or employee***] an [officer/employee/[***other***]] of [***name of local governmental entity***][~~[***name of officer, employee, etc.***]~~'s conduct a substantial factor in causing harm to [***name of plaintiff***]]?**

____ Yes ____ No

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

4. **Did [***name of officer or employee***] [intentionally/[***insert other applicable state of mind***]] [***insert conduct allegedly violating plaintiff's civil rights***]?**

____ Yes ____ No

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

5. **Did [***name of officer or employee***]'s conduct violate [***name of plaintiff***]'s right [***specify right***]?**

____ Yes ____ No

If your answer to question 5 is yes, then answer question 6. If you answered no, stop

here, answer no further questions, and have the presiding juror sign and date this form.

6. Did [*name of officer or employee*] act because of this official [policy/custom]?
____ 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.

47. 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.

New September 2003; Revised April 2007, December 2010, June 2011

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. 3007, *Local Government Liability—Policy or Custom—Essential Factual Elements.* It should be given with CACI No. VF-3000, *Violation of Federal Civil Rights—In General*, to impose liability on the governmental entity for the acts of its officer or employee.

If specificity is not required, users do not have to itemize all the damages listed in question ~~4~~ 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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*.

VF-3006. Public Entity Liability—Failure to Train (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Was [***name of ~~public~~ local governmental entity***]'s training program inadequate to train its [officers/employees] to properly handle usual and recurring situations?**
   ____ Yes ____ No

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

2. **Did [***name of local governmental entity***] know, or should it have been obvious to it, that the inadequate training program was likely to result in a deprivation of the right [***specify right violated***]~~Was [***name of public entity***] deliberately indifferent to the need to train its [officers/employees] adequately~~?**
   ____ Yes ____ No

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

3. **Did [***name of officer or employee***] violate [***name of plaintiff***]'s right [***specify right***]?**
   ____ 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.

~~3~~4. **Was the failure to provide ~~proper~~ adequate training the cause of the deprivation of [***name of plaintiff***]'s right [~~*insert*~~ *specify right*~~, e.g., "of privacy"~~]?**
   ____ Yes ____ No

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

~~4. Was [*name of public entity*]'s failure to adequately train its [officers/employees] a substantial factor in causing harm to [*name of plaintiff*]?~~
   ~~____ Yes ____ No~~

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

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

[a. Past economic loss

[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.

New September 2003; Revised April 2007, December 2010, June 2011

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. 3009, *Local Government Liability—Failure to Train—Essential Factual Elements.* It should be given with CACI No. VF-3000, *Violation of Federal Civil Rights—In General*, to impose liability on the governmental entity for the acts of its officer or employee.

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

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

VF-3008. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—General Conditions of Confinement Claim (42 U.S.C. § 1983)

We answer the questions submitted to us as follows:

1. **Was [***name of plaintiff***] imprisoned under conditions that ~~deprived [him/her] of~~ [***describe violation~~deprivation~~, e.g., deprived [him/her] of out-of-cell exercise***]~~exposed [him/her] to a substantial risk of serious harm~~?**
   ____ Yes ____ No

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

2. **Did ~~the deprivation~~[***name of defendant***]'s conduct create a substantial risk of serious harm to [***name of plaintiff***]'s health or safety?**
   ____ Yes ____ No

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

~~2~~3. **Did [***name of defendant***] know, or was it obvious that, the ~~conditions deprivation~~[his/her/its] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety ~~and disregard that risk by failing to take reasonable measures to correct it~~?**
   ____ Yes ____ No

   If your answer to question ~~2~~ 3 is yes, then answer question ~~3~~4. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

4. **Was there a reasonable justification for the ~~deprivation~~conduct?**
   ____ Yes ____ No

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

~~3~~5. **Was [***name of defendant***] acting or purporting to act in the performance of [his/her] official duties?**
   ____ Yes ____ No

   If your answer to question ~~3~~ 5 is yes, then answer question ~~4~~6. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

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

____ Yes ____ No

If your answer to question 46 is yes, then answer question 57. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

57. 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.

New September 2003; Revised April 2007, December 2010, June 2011

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. 3011, *Violation of Prisoner's Federal Civil Rights—Eighth Amendment-General Conditions of Confinement Claim.*

If specificity is not required, users do not have to itemize all the damages listed in question ~~5~~ 7 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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.*

3230. Breach of Disclosure Obligations—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] violated California's motor vehicle warranty laws. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. That [*name of plaintiff***] [bought/leased] a [***motor vehicle***] from [***name of defendant***];**

2. [That the vehicle was returned by a previous [buyer/lessee] to [*name of manufacturer***] under [California/[***name of state***]]'s motor vehicle warranty laws; and]**

[That [*name of defendant***] knew or should have known that the vehicle had been returned to the manufacturer under [California/[***name of state***]]'s motor vehicle warranty laws; and]**

[3. That before the [sale/leasing], [*name of defendant***] failed to tell [***name of plaintiff***], in clear and simple language, about the nature of the defect experienced by the original [buyer/lessee] of the vehicle; [or]]**

[4. That before the [sale/leasing] to [*name of plaintiff***], the defect experienced by the vehicle's original [buyer/lessee] was not fixed; [or]]**

[5. That [*name of defendant***] did not provide a written warranty to [***name of plaintiff***] that the vehicle would be free for one year of the defect experienced by the vehicle's original [buyer/lessee].]**

New September 2003; Revised June 2011

Directions for Use

Use the first bracketed option in element 2 if the defendant is the manufacturer. Otherwise, use the second option.

This instruction is based on the disclosure and warranty obligations set forth in Civil Code section 1793.22(f). ~~Uncontested elements should be deleted.~~ The instruction may be modified for use with claims involving the additional disclosure obligations set forth in California's Automotive Consumer Notification Act. (Civ. Code, §§ 1793.23, 1793.24.)

Sources and Authority

- Civil Code section 1793.22(f)(1) provides, in part: "[N]o person shall sell, either at wholesale or retail, lease, or transfer a motor vehicle transferred by a buyer or lessee to a manufacturer pursuant to paragraph (2) of subdivision (d) of Section 1793.2 or a similar statute of any other state [i.e., a "lemon law" buyback], unless the nature of the nonconformity experienced by the original buyer or lessee is clearly and conspicuously disclosed to the prospective buyer, lessee, or transferee, the nonconformity

is corrected, and the manufacturer warrants to the new buyer, lessee, or transferee in writing for a period of one year that the motor vehicle is free of that nonconformity."

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

- Civil Code section 1793.23 provides, in part:

> (b) This section and Section 1793.24 shall be known, and may be cited as, the Automotive Consumer Notification Act.
>
> (c) Any manufacturer who reacquires or assists a dealer or lienholder to reacquire a motor vehicle registered in this state, any other state, or a federally administered district shall, prior to any sale, lease, or transfer of the vehicle in this state, or prior to exporting the vehicle to another state for sale, lease, or transfer if the vehicle was registered in this state and reacquired pursuant to paragraph (2) of subdivision (d) of Section 1793.2, cause the vehicle to be retitled in the name of the manufacturer, request the Department of Motor Vehicles to inscribe the ownership certificate with the notation "Lemon Law Buyback," and affix a decal to the vehicle in accordance with Section 11713.12 of the Vehicle Code if the manufacturer knew or should have known that the vehicle is required by law to be replaced, accepted for restitution due to the failure of the manufacturer to conform the vehicle to applicable warranties pursuant to paragraph (2) of subdivision (d) of Section 1793.2, or accepted for restitution by the manufacturer due to the failure of the manufacturer to conform the vehicle to warranties required by any other applicable law of the state, any other state, or federal law.
>
> (d) Any manufacturer who reacquires or assists a dealer or lienholder to reacquire a motor vehicle in response to a request by the buyer or lessee that the vehicle be either replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease, or other transfer of the vehicle, execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by Section 1793.24.
>
> (e) Any person, including any dealer, who acquires a motor vehicle for resale and knows or should have known that the vehicle was reacquired by the vehicle's manufacturer in response to a request by the last retail owner or lessee of the vehicle that it be replaced or accepted for restitution because the vehicle did not conform to express warranties shall, prior to the sale, lease, or other transfer, execute and deliver to the subsequent transferee a notice and obtain the transferee's written acknowledgment of a notice, as prescribed by Section 1793.24.
>
> (f) Any person, including any manufacturer or dealer, who sells, leases, or transfers ownership of a motor vehicle when the vehicle's ownership certificate is inscribed with the notation "Lemon Law Buyback" shall, prior to the sale, lease, or

ownership transfer of the vehicle, provide the transferee with a disclosure statement signed by the transferee that states:

"THIS VEHICLE WAS REPURCHASED BY ITS MANUFACTURER DUE TO A DEFECT IN THE VEHICLE PURSUANT TO CONSUMER WARRANTY LAWS. THE TITLE TO THIS VEHICLE HAS BEEN PERMANENTLY BRANDED WITH THE NOTATION 'LEMON LAW BUYBACK'."

(g) The disclosure requirements in subdivisions (d), (e), and (f) are cumulative with all other consumer notice requirements and do not relieve any person, including any dealer or manufacturer, from complying with any other applicable law, including any requirement of subdivision (f) of Section 1793.22.

Secondary Sources

20 California Points and Authorities, Ch. 206, *Sales*, § 206.08 et seq. (Matthew Bender)

5 California Civil Practice: Business Litigation (Thomson West) § 53:29

3301. Below Cost Sales—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] engaged in unlawful sales below cost. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **[That [*name of defendant*] [offered to sell/sold] [*product/service*] at a price that ~~is~~ was below cost;]**

   [or]

   [That [*name of defendant*] gave away [*product/service*];]

2. **That [*name of defendant*]'s purpose was to injure competitors or destroy competition;**

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

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

If [*name of plaintiff*] proves that [*name of defendant*] [[offered to sell/sold] [*product/service*] at a price that was below cost/ [or] gave away [*product/service*]] and that [*name of defendant*]'s acts harmed [*name of plaintiff*], you may assume that [*name of defendant*]'s purpose was to injure competitors or destroy competition. To overcome this presumption, [*name of defendant*] must present evidence of a different purpose. [*Name of defendant*] has presented evidence that [his/her/its purpose was [~~of a different purpose/~~[*specify other purpose*~~]~~]. Considering all of the evidence presented, you must decide whether [*name of plaintiff*] proved that [*name of defendant*]'s purpose was to injure competitors or destroy competition.

New September 2003; Revised June 2011

Directions for Use

The word "price" as used here should be read sufficiently broadly to include "special rebates, collateral contracts, or any device of any nature whereby such sale below cost is in substance or fact effected." (Bus. & Prof. Code, § 17049.) To the extent the circumstances of the case warrant it, the word "price" in the instruction may be supplemented or supplanted by other such price-related terms.

For instructions on "cost," see CACI No. 3303, *Definition of "Cost,"* ~~;~~ CACI No. 3304, *Presumptions Concerning Costs—Manufacturer*~~;~~, CACI No. 3305, *Presumptions Concerning Costs—Distributor*~~;~~, and CACI No. 3306, *Methods of Allocating Costs to an Individual Product.*

Business and Professions Code sections 17071 and 17071.5 create a rebuttable presumption~~s~~ of the purpose or intent to injure competitors or destroy competition. The presumption ~~The Supreme Court has observed "[t]he obvious and only effect of this provision is to~~ require~~s~~ the defendants to go forward with

evidence that would establish an affirmative defense or otherwise rebut the presumption ~~such proof as would bring them within one of the exceptions or which would negative the prima facie showing~~ of wrongful intent." (See *People v. Pay Less Drug Store* (1944) 25 Cal.2d 108, 114 [153 P.2d 9].) The plaintiff is entitled to an instruction on the presumption. (See *Bay Guardian Co. v. New Times Media LLC* (2010) 187 Cal.App.4th 438, 465 [114 Cal.Rptr.3d 392.) For possible affirmative defenses, see CACI No. 3331, *Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Closed-out, Discontinued, Damaged, or Perishable Items;* CACI No. 3332, *Affirmative Defense to Locality Discrimination, Below Cost Sales, Loss Leader Sales, and Secret Rebates—Functional Classifications;* and CACI No. 3333, *Affirmative Defense to Locality Discrimination, Below Cost Sales, and Loss Leader Sales Claims—Meeting Competition.*

Sources and Authority

- Business and Professions Code section 17043 provides: "It is unlawful for any person engaged in business within this State to sell any article or product at less than the cost thereof to such vendor, or to give away any article or product, for the purpose of injuring competitors or destroying competition."

- Business and Professions Code section 17024 provides~~,~~ in part: " 'Article or product' includes any article, product, commodity, thing of value, service or output of a service trade."

- Business and Professions Code section 17071 provides: "In all actions brought under this chapter proof of one or more acts of selling or giving away any article or product below cost or at discriminatory prices, together with proof of the injurious effect of such acts, is presumptive evidence of the purpose or intent to injure competitors or destroy competition."

- Business and Professions Code section 17082 provides in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter."

- "The purpose of the Unfair Practices Act (UPA) is 'to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented.' It forbids most locality discriminations, the use of loss leaders, gifts, secret rebates, boycotts, and 'deceptive, untrue or misleading advertising.' It also prohibits the sale of goods and services below cost." (*Pan Asia Venture Capital Corp. v. Hearst Corp.* (1999) 74 Cal.App.4th 424, 431–432 [88 Cal.Rptr.2d 118], internal citations omitted.)

- "Section 17043 uses the word 'purpose,' not 'intent,' not 'knowledge.' We therefore conclude that to violate section 17043, a company must act with the purpose, i.e., the desire, of injuring competitors or destroying competition." (*Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 174–175 [83 Cal.Rptr.2d 548, 973 P.2d 527].)

- "Proof that a defendant sold or distributed articles or products below cost will be 'presumptive evidence of the purpose or intent to injure competitors or destroy competition.' " (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432, internal citation omitted.)

- "[W]e conclude that the section 17071 presumption is properly categorized as one that affects the burden of proof rather than merely the burden of persuasion. 'A presumption affecting the burden of proof shifts the burden of persuasion on an ultimate fact to the party against whom the presumption operates upon a finding of the predicate facts.' 'A presumption meant to establish or implement some public policy other than facilitation of the particular action in which it applies is a presumption affecting the burden of proof.' As we view section 17071, the presumption is indicative of an effort by the Legislature to implement the public policy of facilitating proof of unlawful purpose of below-cost sales which injure a competitor by shifting the burden of proof to the party more in possession of relevant evidence demonstrating the true intent associated with the pricing scheme." (*Bay Guardian Co., supra,* 187 Cal.App.4th at p. 464, internal citations omitted.)

- " '[T]he allocation of evidentiary burdens [under section 17071 is] as follows: "Assuming proof of injury to a competitor has been made, California law allows plaintiffs to establish a prima facie case with proof of prices below average total cost. The defendant then has the burden of negating the inference of illegal intent or establishing an affirmative defense." … [Citation.]' The presumption 'may be rebutted by establishing one of the statute's affirmative defenses, such as meeting competition, see Cal.Bus. & Prof.Code § 17050, or by showing that the sales "were made in good faith and not for the purpose of injuring competitors or destroying competition." [Citation.]' 'After proof of the sales below cost and injury resulting therefrom, there is no undue hardship cast upon the defendants to require them to come forward with evidence of their true intent as against the prima facie showing, or with evidence which will bring them within a specified exception in the act.' Once the presumption is rebutted, 'the burden shifts back to the moving party to offer actual proof of injurious intent.' " (*Bay Guardian Co., supra*, 187 Cal.App.4th at pp. 464–465, internal citations omitted; but see *Haycock v. Hughes Aircraft Co.* (1994) 22 Cal.App.4th 1473, 1492 [28 Cal.Rptr.2d 248] [Evid. Code § 606 indicates that a presumption affecting the burden of proof imposes upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact].)

- "The section 17071 presumption, being one that in both nature and consequence alters the burden of proof, did ' "*not* disappear in the face of evidence as to the *nonexistence* of the presumed fact. …" [Citations.]' Therefore, the fact that defendants denied any purpose to harm competition, and produced some evidence of good faith efforts to compete in the marketplace, did not negate plaintiff's right to an instruction on a presumption affecting the burden of proof of unlawful purpose. Defendants may have offered rebuttal evidence, but they did not negate the presumption by conclusive proof that negated unlawful purpose as a matter of law or compelled a finding on the issue in their favor based on this record." (*Bay Guardian Co., supra*, 187 Cal.App.4th at p. 465, original italics.)

- "Determination of the defendant's cost has always been treated as an issue of fact." (*Pan Asia Venture Capital Corp., supra,* 74 Cal.App.4th at p. 432.)

- ~~Business and Professions Code section 17082 provides, in part: "In any action under this chapter, it is not necessary to allege or prove actual damages or the threat thereof, or actual injury or the threat~~

~~thereof, to the plaintiff. But, in addition to injunctive relief, any plaintiff in any such action shall be entitled to recover three times the amount of the actual damages, if any, sustained by the plaintiff, as well as three times the actual damages, if any, sustained by any person who has assigned to the plaintiff his claim for damages resulting from a violation of this chapter.~~"

- "While, similar to other cases, damages cannot be awarded in antitrust cases upon sheer guesswork or speculation, the plaintiff seeking damages for loss of profits is required to establish only with reasonable probability the existence of some causal connection between defendant's wrongful act and some loss of the anticipated revenue. Once that has been accomplished, the jury will be permitted to act upon probable and inferential proof and to 'make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly.' " (*Suburban Mobile Homes, Inc. v. AMFAC Communities, Inc.* (1980) 101 Cal.App.3d 532, 545 [161 Cal.Rptr. 811], internal citations omitted.)

- "Even the objectives of the [federal and state] laws, though certainly similar, are not identical. The Sherman Act and Robinson-Patman Act (15 U.S.C. § 13(a)) seek to prevent anticompetitive acts that impair competition or harm competitors, whereas the UPA reflects a broader '[l]egislative concern not only with the maintenance of competition, but with the maintenance of "*fair and honest* competition." [Citations.]' We disagree with defendants' characterization of the UPA as legislation that was merely 'intended to protect the public, not individual competitors.' The UPA has been described by our high court 'as a legislative attempt "to regulate business as a whole by prohibiting practices which the legislature has determined constitute unfair trade practices." ' " (*Bay Guardian Co., supra*, 187 Cal.App.4th at p. 457, original italics, internal citations omitted.)~~The federal law most comparable to the Unfair Practices Act is the Robinson-Patman Act (15 U.S.C. § 13 et seq.); that act differs substantially from the Unfair Practices Act, however. For a discussion of this subject, see *Turnbull & Turnbull v. ARA Transportation* (1990) 219 Cal.App.3d 811 [268 Cal.Rptr. 856]. One notable difference is that the Robinson-Patman Act requires at least two actual sales. Thus, mere offers to sell cannot violate that act.~~

- "In light of the distinctions we discern, some glaring, some subtle, between section 17043 and the federal or other state predatory pricing laws, and particularly in light of the conspicuous focus of section 17043 upon the mental state of defendants' purpose rather than ultimate impact of below-cost pricing, we decline to imply a recoupment element in the statute where none has been expressed." (*Bay Guardian Co., supra*, 187 Cal.App.4th at p. 459, internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 609–615

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.153 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.52 (Matthew Bender)

23 California Points and Authorities, Ch. 235, *Unfair Competition*, § 235.22 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 5, *Antitrust,* 5.46[3], 5.47[2]

3712. Joint Ventures

~~A joint venture and e~~Each of ~~its~~ the members of a joint venture, and the joint venture itself, are responsible for the wrongful conduct of a member acting ~~within the scope of his or her authority~~in furtherance of the venture.

You must decide whether a joint venture ~~existed~~ was created in this case. A joint venture exists ~~when~~if all of the following have been proved:

1. **~~t~~Two or more persons or business entities combine their property, skill, or knowledge with the intent to carry out a single business undertaking;**

2. **Each has an ownership interest in the business;**

3. **They have joint control over the business, even if they agree to delegate control; and**

4. **They ~~and~~ agree to share the ~~control,~~ profits~~,~~ and losses of the business.**

A joint venture can be formed by a written or oral agreement or by an agreement implied by the parties' conduct.

New September 2003; Revised June 2011

Directions for Use

This instruction can be modified for cases involving unincorporated associations by substituting the term "unincorporated association" for "joint venture."

Sources and Authority

- "A joint venture is 'an undertaking by two or more persons jointly to carry out a single business enterprise for profit.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482 [286 Cal.Rptr. 40, 816 P.2d 892], internal citations omitted.)

- "A joint venture has been defined in various ways, but most frequently perhaps as an association of two or more persons who combine their property, skill or knowledge to carry out a single business enterprise for profit." (*Holtz v. United Plumbing and Heating Co.* (1957) 49 Cal.2d 501, 506 [319 P.2d 617].)

- " 'There are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an ownership interest in the enterprise. … .' 'Whether a joint venture actually exists depends on the intention of the parties. … [¶] … [¶] [W]here evidence is in dispute the existence or nonexistence of a joint venture is a question of fact to be determined by the jury.

[Citation.]' " (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 370 [76 Cal.Rptr.3d 146], internal citations omitted.)

- "The law requires little formality in the creation of a joint venture and the agreement is not invalid because it may be indefinite with respect to its details." (*Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272, 285 [55 Cal.Rptr. 610].)

- ~~Joint ventures are similar to partnerships, but the term "joint venture" commonly applies to temporary business arrangements involving a single transaction:~~ "The distinction between joint ventures and partnerships is not sharply drawn. A joint venture usually involves a single business transaction, whereas a partnership may involve 'a continuing business for an indefinite or fixed period of time.' Yet a joint venture may be of longer duration and greater complexity than a partnership. From a legal standpoint, both relationships are virtually the same. Accordingly, the courts freely apply partnership law to joint ventures when appropriate." (*Weiner, supra,* 54 Cal.3d at p. 482, internal citations omitted.)

- "The incidents of a joint venture are in all important respects the same as those of a partnership. One such incident of partnership is that all partners are jointly and severally liable for partnership obligations, irrespective of their individual partnership interests. Because joint and several liability arises from the partnership or joint venture, Civil Code section 1431.2 [Proposition 51] is not applicable." (*Myrick v. Mastagni* (2010) 185 Cal.App.4th 1082, 1091 [111 Cal.Rptr.3d 165], internal citations omitted.)

- "Normally, … a partnership or joint venture is liable to an injured third party for the torts of a partner or venturer acting in furtherance of the enterprise." (*Orosco v. Sun-Diamond Corp.* (1997) 51 Cal.App.4th 1659, 1670 [60 Cal.Rptr.2d 179, 186].)

- "It has generally been recognized that in order to create a joint venture there must be an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control." (*Holtz, supra,* 49 Cal.2d at pp. 506–507.)

- "The joint enterprise theory, while rarely invoked outside the automobile accident context, is well established and recognized in this state as an exception to the general rule that imputed liability for the negligence of another will not be recognized." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 893 [2 Cal.Rptr.2d 79, 820 P.2d 181], internal citation omitted.)

- "The term 'joint enterprise' may cause some confusion because it is 'sometimes used to define a noncommercial undertaking entered into by associates with equal voice in directing the conduct of the enterprise … .' However, when it is 'used to describe a business or commercial undertaking[,] it has been used interchangeably with the term "joint venture" and courts have not drawn any significant legal distinction between the two.' " (*Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 872 [32 Cal.Rptr.3d 351], internal citation omitted.)

- " 'There are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the

~~members must each have an ownership interest in the enterprise. [Citation].' 'Whether a joint venture actually exists depends on the intention of the parties. [Citations.] [¶] … [¶] [W]here evidence is in dispute the existence or nonexistence of a joint venture is a question of fact to be determined by the jury. [Citation.]' " (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 370 [76 Cal.Rptr.3d 146], internal citations omitted.)~~

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1235

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.07 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.132 (Matthew Bender)

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

10 California Points and Authorities, Ch. 100A, *Employer and Employee: Respondeat Superior* (Matthew Bender)

17 California Points and Authorities, Ch. 170, *Partnerships*, § 170.222 (Matthew Bender)

1 California Civil Practice: Torts (Thomson Reuters West) §§ 3:38–3:39

3921. Wrongful Death (Death of an Adult)

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

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

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

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

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

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

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

4. **The reasonable value of household services that [***name of decedent***] would have provided.**

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

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

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

[2. The loss of the enjoyment of sexual relations[; [and]/.]]

[~~2~~3. The loss of [*name of decedent***]'s training and guidance.]**

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

[For ~~future~~these noneconomic damages, determine the amount in current dollars paid at

the time of judgment that will compensate [*name of plaintiff***] for those damages. [~~]This amount of noneconomic damages should not be further reduced to present cash value because that reduction should only be performed with respect to future economic damages.[~~]]**

In determining [*name of plaintiff***]'s loss, do not consider:**

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

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

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

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

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

New September 2003; Revised December 2005, February 2007, April 2008, December 2009, June 2011

Directions for Use

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

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table—Male and Life Expectancy Table—Female, following the Damages series.) The first column shows the age interval between the two exact ages indicated. For example, 50–51 means the one-year interval between the fiftieth and fifty-first birthdays.

For an instruction, worksheets, and tables for use in reducing future economic damages to present value, see CACI No. 3904B, *Use of Present-Value Tables.*

The paragraph concerning not reducing noneconomic damages to present cash value is bracketed

because the law is not completely clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87]; cf. Restat 2d of Torts, § 913A [future *pecuniary* losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, 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]), so there is no further reduction to present value. (See CACI No. 3904A, *Present Cash Value*, and CACI No. 3904B, *Use of Present-Value Tables*.) While it seems ~~reasonable~~ probable that *Salgado* should apply to wrongful death actions, no court has expressly so held.

Assuming that *Salgado* applies to wrongful death, this paragraph is important to ensure that the jury does not apply any tables and worksheets provided to reduce future economic damages to present value (see CACI No. 3904B) to the noneconomic damages also. ~~Include the last sentence only if both future economic and noneconomic damages are sought.~~ Note that ~~if~~ because only future economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages and for past and present economic damages. (See CACI No. VF-3905, *Damages for Wrongful Death (Death of an Adult)*.)

Sources and Authority

- Code of Civil Procedure section 377.60 provides:

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

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

  (b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, "putative spouse" means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.

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

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

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

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

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

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

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

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

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

- "Damages for wrongful death are not limited to compensation for losses with 'ascertainable economic value.' Rather, the measure of damages is the value of the benefits the heirs could reasonably expect to receive from the deceased if she had lived." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

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

- "These benefits include the personal services, advice, and training the heirs would have received from the deceased, and the value of her society and companionship. 'The services of children, elderly parents, or nonworking spouses often do not result in measurable net income to the family unit, yet unquestionably the death of such a person represents a

substantial "injury" to the family for which just compensation should be paid.' " (*Allen, supra,* 109 Cal.App.3d at p. 423, internal citations omitted.)

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

- "Where, as here, decedent was a husband and father, a significant element of damages is the loss of financial benefits he was contributing to his family by way of support at the time of his death and that support reasonably expected in the future. The total future lost support must be reduced by appropriate formula to a present lump sum which, when invested to yield the highest rate of return consistent with reasonable security, will pay the equivalent of lost future benefits at the times, in the amounts and for the period such future benefits would have been received." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 52–521 [196 Cal.Rptr. 82], internal citations omitted.)

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647, original italics.)

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

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

- "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59, 72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)

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

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of

monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin, supra,* 148 Cal.App.3d at pp. 535–536.)

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

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

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

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

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1690–1697

California Tort Damages (Cont.Ed.Bar 2d ed.) Wrongful Death, §§ 3.1–3.58

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

15 California Forms of Pleading and Practice, Ch. 177, *Damages,* §§ 177.162–177.167 (Matthew Bender)

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

California Civil Practice: Torts (Thomson Reuters West) ~~Torts,~~ §§ 23:8–23:8.2

3922. Wrongful Death (Parents' Recovery for Death of a Minor Child)

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

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

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

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

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

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

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

4. **The reasonable value of household services that [***name of minor***] would have provided.**

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

[*Name of plaintiff***] also claims the following noneconomic damages: The loss of [***name of minor***]'s love, companionship, comfort, care, assistance, protection, affection, society, and moral support.**

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

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

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

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

2. [*Name of minor*]'s pain and suffering.

In computing these damages, you should deduct the present cash value of the probable costs of [*name of minor*]'s support and education.

In deciding a person's life expectancy, consider, among other factors, that person's health, habits, activities, lifestyle, and occupation. Life expectancy tables are evidence of a person's life expectancy but are not conclusive.

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

New September 2003; Revised December 2005, April 2008, December 2009, June 2011

Directions for Use

Use of the life tables in *Vital Statistics of the United States*, published by the National Center for Health Statistics, is recommended. (See Life Expectancy Table—Male and Life Expectancy Table—Female, following the Damages series.) The first column shows the age interval between the two exact ages indicated. For example, 50–51 means the one-year interval between the fiftieth and fifty-first birthdays.

For an instruction, worksheets, and tables for use in reducing future economic damages to present value, see CACI No. 3904B, *Use of Present-Value Tables*.

The paragraph concerning not reducing noneconomic damages to present cash value is bracketed because the law is not completely clear. It has been held that all damages, pecuniary and nonpecuniary, must be reduced to present value. (See *Fox v. Pacific Southwest Airlines* (1982) 133 Cal.App.3d 565, 569 [184 Cal.Rptr. 87]; cf. Restat 2d of Torts, § 913A [future *pecuniary* losses must be reduced to present value].) The view of the court in *Fox* was that damages for lost value of society, comfort, care, protection and companionship must be monetarily quantified, and thus become pecuniary and subject to reduction to present value. However, the California Supreme Court subsequently held that with regard to future pain and suffering, 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]), so there is no further reduction to present value. (See CACI No. 3904A, *Present Cash Value*, and CACI No. 3904B, *Use of Present-Value Tables*.) While it seems ~~reasonable~~ probable that *Salgado* should apply to wrongful death actions, no court has expressly so held.

Assuming that *Salgado* applies to wrongful death, this paragraph is important to ensure that the jury does not apply any tables and worksheets provided to reduce future economic damages to present value (see CACI No. 3904B) to the noneconomic damages also. ~~Include the last sentence only if both future economic and noneconomic damages are sought.~~ Note that ~~if~~because only future economic damages are to be reduced to present value, the jury must find separate amounts for economic and noneconomic damages and for past and present economic damages. (See CACI No. VF-3906, *Damages for Wrongful Death (Parents' Recovery for Death of a Minor Child)*.)

Sources and Authority

- Code of Civil Procedure section 377.60 provides:

> A cause of action for the death of a person caused by the wrongful act or neglect of another may be asserted by any of the following persons or by the decedent's personal representative on their behalf:
>
> (a) The decedent's surviving spouse, domestic partner, children, and issue of deceased children, or, if there is no surviving issue of the decedent, the persons, including the surviving spouse or domestic partner, who would be entitled to the property of the decedent by intestate succession.
>
> (b) Whether or not qualified under subdivision (a), if they were dependent on the decedent, the putative spouse, children of the putative spouse, stepchildren, or parents. As used in this subdivision, 'putative spouse' means the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid.
>
> (c) A minor, whether or not qualified under subdivision (a) or (b), if, at the time of the decedent's death, the minor resided for the previous 180 days in the decedent's household and was dependent on the decedent for one-half or more of the minor's support.
>
> (d) This section applies to any cause of action arising on or after January 1, 1993.
>
> (e) The addition of this section by Chapter 178 of the Statutes of 1992 was not intended to adversely affect the standing of any party having standing under prior law, and the standing of parties governed by that version of this section as added by Chapter 178 of the Statutes of 1992 shall be the same as specified herein as amended by Chapter 563 of the Statutes of 1996.
>
> (f) For the purpose of this section, "domestic partner" has the meaning provided in Section 297 of the Family Code.

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

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

- "Where the deceased was a minor child, recovery is based on the present value of reasonably probable future services and contributions, deducting the probable cost of rearing the child." (6

Witkin, Summary of Cal. Law (10th ed. 2005) Torts, § 1695.)

- "There is authority in such cases for deducting from the loss factors-including the pecuniary loss a parent suffers by being deprived of the comfort, protection and society of a child-the prospective cost to the parent of the child's support and education. [¶] Although neither the loss factors nor such offsets are readily measurable in a particular case—nor need they be measured in precise terms of dollars and cents—in the case at bench the jury had before it for consideration a court order subject to mathematical computation which required plaintiff to pay support for his child in the sum of $125 monthly. The jury was entitled and required to take into consideration the prospective cost to plaintiff of the boy's maintenance and rearing, and they may well have offset their reasonable appraisal of such costs, under the general verdict, against any pecuniary loss which they found that plaintiff suffered." (*Fields v. Riley* (1969) 1 Cal.App.3d 308, 315 [81 Cal.Rptr. 671], internal citations omitted.)

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

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

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

- "Damages for wrongful death are not limited to compensation for losses with 'ascertainable economic value.' Rather, the measure of damages is the value of the benefits the heirs could reasonably expect to receive from the deceased if she had lived." (*Allen v. Toledo* (1980) 109 Cal.App.3d 415, 423 [167 Cal.Rptr. 270], internal citations omitted.)

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

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

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

- "California cases have uniformly held that damages for mental and emotional distress, including grief and sorrow, are not recoverable in a wrongful death action." (*Krouse v. Graham* (1977) 19 Cal.3d 59,

72 [137 Cal.Rptr. 863, 562 P.2d 1022], internal citations omitted.)

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

- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount *in current dollars paid at the time of judgment* that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647, original italics.)

- "[T]he competing and conflicting interests of the respective heirs, the difficulty in ascertaining individual shares of lost economic support when dealing with minors, the lack of any reason under most circumstances to apportion the lump-sum award attributable to loss of monetary support where minors are involved, the irrelevance of the heirs' respective interests in that portion of the award pertaining to lost economic support in determining the aggregate award, and the more efficient nature of court proceedings without a jury, cumulatively establish [that] apportionment by the court, rather than the jury, is consistent with the efficient administration of justice." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 535–536 [196 Cal.Rptr. 82].)

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

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

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

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

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1695

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

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

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, §§ 177.162–177.167 (Matthew Bender)

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

2 California Civil Practice: Torts (Thomson Reuters West) §§ 23:8–23:8.2

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

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

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

2. **That [***name of plaintiff***] [leased/subleased] the property to [***name of defendant***] until [***insert end date***];**

3. **That [***name of plaintiff***] did not give [***name of defendant***] permission to continue occupying the property after the [lease/rental agreement/sublease] ended; and**

4. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011

Directions for Use

~~Uncontested elements may be deleted from this instruction.~~

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

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

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

Sources and Authority

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

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

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

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

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

- " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)

- "The most important difference between a periodic tenancy and a tenancy for a fixed term—such as six months—is that the latter terminates at the end of such term, without any requirement of notice as in the former. In order to create an estate for a definite period, the duration must be capable of exact computation when it becomes possessory, otherwise no such estate is created." (*Camp v. Matich* (1948) 87 Cal.App.2d 660, 665–666 [197 P.2d 345], internal citations omitted.)

- "It is well established that it is the duty of the tenant as soon as his tenancy expires by its own limitations, to surrender the possession of the premises and that no notice of termination is necessary, the lease itself terminating the tenancy; and if he continues in possession beyond that period without the permission of the landlord, he is guilty of unlawful detainer, and an action may be commenced against him at once, under the provisions of subdivision 1 of section 1161 of the Code of Civil Procedure, without the service upon him of any notice." (*Ryland v. Appelbaum* (1924) 70 Cal.App. 268, 270 [233 P. 356], internal citations omitted.)

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

Secondary Sources

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

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

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

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

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

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

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

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:43

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

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

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

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

3. **That under the [lease/rental agreement/sublease], [***name of defendant***] was required to pay rent in the amount of $[***specify amount***] per [***specify period, e.g., month***];**

4. **That [***name of plaintiff***] properly gave [***name of defendant***] three days' written notice to pay the rent or vacate the property[, or that [***name of defendant***] actually received this notice at least three days before [***date on which action was filed***]];**

5. **That as of [***date of three-day notice***], at least the amount stated in the three-day notice was due;**

6. **That [***name of defendant***] did not pay [or attempt to pay] the amount stated in the notice within three days after [service/receipt] of the notice; and**

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

New August 2007; Revised June 2011

Directions for Use

~~Uncontested elements may be deleted from this instruction.~~

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

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

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 4. Defective service ~~is~~ may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546]~~*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96]~~.) If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

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

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

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

Sources and Authority

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

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

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

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

- "[M]ere failure of a tenant to quit the premises during the three-day notice period does not necessarily justify an unlawful detainer action. If a tenant vacates the premises and surrenders possession to the landlord prior to the complaint being filed, then no action for unlawful detainer will lie even though the premises were not surrendered during the notice period. This is true because the purpose of an unlawful detainer action is to recover possession of the premises for the landlord. Since an action in unlawful detainer involves a

forfeiture of the tenant's right to possession, one of the matters that must be pleaded and proved for unlawful detainer is that the tenant remains in possession of the premises. Obviously this cannot be established where the tenant has surrendered the premises to landlord prior to the filing of the complaint. In such a situation the landlord's remedy is an action for damages and rent." (*Briggs v. Electronic Memories & Magnetics Corp.* (1975) 53 Cal.App.3d 900, 905–906 [126 Cal.Rptr. 34], footnote and internal citations omitted.)

- "Proper service on the lessee of a valid three-day notice to pay rent or quit is an essential prerequisite to a judgment declaring a lessor's right to possession under section 1161, subdivision 2. A lessor must allege and prove proper service of the requisite notice. Absent evidence the requisite notice was properly served pursuant to section 1162, no judgment for possession can be obtained." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 513 [65 Cal.Rptr.2d 457] internal citations omitted.)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business *and* sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich, supra,* 56 Cal.App.4th at p. 516, original italics, internal citations omitted.)

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

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 723–725

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

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

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:96 (The Rutter Group)

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

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

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

Miller & Starr, California Real Estate ~~(Thomson West),~~ Ch. 19, *Landlord-Tenant*, § 19:200 (Thomson Reuters West)

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

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

1. **That the notice informed [***name of defendant***] in writing that [he/she/it] must pay the amount due within three days or vacate the property;**

2. **That the notice stated [no more than/a reasonable estimate of] the amount due, and the name, telephone number, and address of the person to whom the amount should be paid, and**

   [*Use if payment was to be made personally*~~.~~**:**

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

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

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

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

   that payment could be made by electronic funds transfer; 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 or more of the following manners of service:***]**

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

~~[or:~~

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

[~~or~~*for a residential tenancy*:

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) ~~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].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was [received by [***name of defendant***]/placed in the mail].]**

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

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

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

New August 2007; Revised December 2010; June 2011

Directions for Use

Use the reasonable-estimate option in the first sentence of element 2 and include the final paragraph only in cases involving commercial leases. (Code Civ. Proc., § 1161.1(a); see also

Code Civ. Proc., § 1161.1(e) [presumption that if amount found to be due is within 20 percent of amount stated in notice, then estimate was reasonable].)

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

Select the manner of service used~~,~~ : personal service, substituted service by leaving the notice at the defendant's home or place of work or at the commercial rental property, or substituted service by posting on the property. (See 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, and fourth bracketed options for the manner of service.

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

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

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the next-to-last paragraph. Defective service ~~is~~ may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546]~~*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96]~~.) If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

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

Sources and Authority

- Code Civil Procedure section 1161(2) provides~~,~~ in part: "When he or she continues in possession … without the permission of his or her landlord … after default in the payment of rent … and three days' notice, in writing, requiring its payment, stating the amount which is due, the name, telephone number, and address of the person to whom the rent payment shall be made, and, if payment may be made personally, the usual days and hours that person will be available to receive the payment (provided that, if the address does not allow for personal

delivery, then it shall be conclusively presumed that upon the mailing of any rent or notice to the owner by the tenant to the name and address provided, the notice or rent is deemed received by the owner on the date posted, if the tenant can show proof of mailing to the name and address provided by the owner), or the number of an account in a financial institution into which the rental payment may be made, and the name and street address of the institution (provided that the institution is located within five miles of the rental property), or if an electronic funds transfer procedure has been previously established, that payment may be made pursuant to that procedure, or possession of the property, shall have been served upon him or her and if there is a subtenant in actual occupation of the premises, also upon the subtenant."

- Code of Civil Procedure 1161.1 provides~~,~~ in part:

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

  (a) If the amount stated in the notice provided to the tenant pursuant to subdivision (2) of Section 1161 is clearly identified by the notice as an estimate and the amount claimed is not in fact correct, but it is determined upon the trial or other judicial determination that rent was owing, and the amount claimed in the notice was reasonably estimated, the tenant shall be subject to judgment for possession and the actual amount of rent and other sums found to be due. However, if (1) upon receipt of such a notice claiming an amount identified by the notice as an estimate, the tenant tenders to the landlord within the time for payment required by the notice, the amount which the tenant has reasonably estimated to be due and (2) if at trial it is determined that the amount of rent then due was the amount tendered by the tenant or a lesser amount, the tenant shall be deemed the prevailing party for all purposes. If the court determines that the amount so tendered by the tenant was less than the amount due, but was reasonably estimated, the tenant shall retain the right to possession if the tenant pays to the landlord within five days of the effective date of the judgment (1) the amount previously tendered if it had not been previously accepted, (2) the difference between the amount tendered and the amount determined by the court to be due, and (3) any other sums as ordered by the court.

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

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

(a) 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.

(b) The notices required by Section 1161 may be served upon a commercial tenant by any of the following methods:

(1) By delivering a copy to the tenant personally.

(2) If he or she is absent from the commercial rental property, by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated.

(3) If, at the time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated. Service upon a subtenant may be made in the same manner.

(c) For purposes of subdivision (b), "commercial tenant" means a person or entity that hires any real property in this state that is not a dwelling unit, as defined in subdivision (c) of Section 1940 of the Civil Code, or a mobilehome, as defined in Section 798.3 of the Civil Code.

- "A valid three-day pay rent or quit notice is a prerequisite to an unlawful detainer action. Because of the summary nature of an unlawful detainer action, a notice is valid only if the lessor strictly complies with the statutorily mandated notice requirements. [¶] A three-day notice must contain 'the amount which is due.' A notice which demands rent in excess of the amount due does not satisfy this requirement. This rule ensures that a landlord will not be entitled to regain possession in an unlawful detainer action unless the tenant has had the opportunity to pay the delinquent rent." (*Bevill v. Zoura* (1994) 27 Cal.App.4th 694, 697 [32 Cal.Rptr.2d 635], internal citations and footnote omitted.)

- "[W]e do not agree that a proper notice may not include anything other than technical rent. It is true that subdivision 2 of Code of Civil Procedure section 1161 relates to a default in the payment of rent. However, the subdivision refers to the 'lease or agreement under which the property is held' and requires the notice state 'the amount which is due.' The language is not 'the amount of rent which is due' or 'the rent which is due.' We think the statutory language is sufficiently broad to encompass any sums due under the lease or agreement under which the property is held." (*Canal-Randolph Anaheim, Inc. v. Wilkoski* (1978) 78 Cal.App.3d 477, 492 [144 Cal.Rptr. 474].)

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "Section 1162 does not authorize service of a three-day notice to pay rent or quit by mail delivery alone, certified or otherwise. It provides for service by: personal delivery; leaving a copy with a person of suitable age and discretion at the renter's residence or usual place of business and sending a copy through the mail to the tenant's *residence*; or posting *and* delivery of a copy to a person there residing, if one can be found, *and* sending a copy through the mail. Strict compliance with the statute is required." (*Liebovich v. Shahrokhkhany* (1997) 56 Cal.App.4th 511, 516 [65 Cal.Rptr.2d 457], original italics, internal citation omitted.)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

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

- "An unlawful detainer action based on failure to pay rent must be preceded by a three-day notice to the tenant to pay rent or quit the premises. Failure to state the exact amount of rent due in the notice is fatal to the subsequent unlawful detainer action." (*Lynch & Freytag v. Cooper* (1990) 218 Cal.App.3d 603, 606, fn. 2 [267 Cal.Rptr. 189], internal citations omitted.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra*, 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, 722–725, 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, 6.10–6.30, Ch. 8

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶¶ 5:224.3, 5:277.1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.10, 7:327 (The Rutter Group)

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

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

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

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

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

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

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[*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, June 2011

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~~ may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546]~~*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96]~~.) If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

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, 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~~Unlawful Use—Essential Factual Elements*.

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. 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.)

- "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~~726

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

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 12-G, *Termination Of Section 8 Tenancies*, ¶¶ 12:200 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:93 et seq. (The Rutter Group)

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 (Thomson Reuters West)

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 or more of the following manners of service:***]**

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

~~[or:~~

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

[~~or~~*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3)~~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].]**

[or for a commercial tenancy:

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial 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, June 2011

Directions for Use

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~~Unlawful Use*.

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 at the commercial rental property, or substituted service by posting on the property. (See 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, and fourth 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~~ may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546]~~*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96]~~.) If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

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:

(a) 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.

(b) The notices required by Section 1161 may be served upon a commercial tenant by any of the following methods:

(1) By delivering a copy to the tenant personally.

(2) If he or she is absent from the commercial rental property, by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated.

(3) If, at the time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated. Service upon a subtenant may be made in the same manner.

(c) For purposes of subdivision (b), "commercial tenant" means a person or entity that hires any real property in this state that is not a dwelling unit, as defined in subdivision (c) of Section 1940 of the Civil Code, or a mobilehome, as defined in Section 798.3 of the Civil Code.

- "[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.)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra,* 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 720, ~~723~~726, 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 (Thomson Reuters West)

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

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

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

2. **That [***name of plaintiff***] [rented/subleased] the property to [***name of defendant***] under a month-to-month [lease/rental agreement/sublease];**

3. **That [***name of plaintiff***] gave [***name of defendant***] proper [30/60] days' written notice that the tenancy was ending[, or that [***name of defendant***] actually received this notice at least [30/60] days before [***date on which action was filed***]]; and**

4. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New August 2007; Revised June 2011

Directions for Use

~~Uncontested elements may be deleted from this instruction.~~

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

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

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

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

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 3. Defective service ~~is~~ may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546]~~*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96]~~.) If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

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

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

Sources and Authority

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

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

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

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

days before the expiration of the term thereof. The notice herein required shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail addressed to the other party. In addition, the lessee may give such notice by sending a copy by certified or registered mail addressed to the agent of the lessor to whom the lessee has paid the rent for the month prior to the date of such notice or by delivering a copy to the agent personally."

- Civil Code section 1946.1 provides~~,~~ in part:

  (a) Notwithstanding Section 1946, a hiring of residential real property for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his or her intention to terminate the tenancy, as provided in this section.

  (b) An owner of a residential dwelling giving notice pursuant to this section shall give notice at least 60 days prior to the proposed date of termination. A tenant giving notice pursuant to this section shall give notice for a period at least as long as the term of the periodic tenancy prior to the proposed date of termination.

  (c) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if any tenant or resident has resided in the dwelling for less than one year.

  (d) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if all of the following apply:

    (1) The dwelling or unit is alienable separate from the title to any other dwelling unit.
    (2) The owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent, as defined in Sections 17004 and 17200 of the Financial Code, or a licensed real estate broker, as defined in Section 10131 of the Business and Professions Code.
    (3) The purchaser is a natural person or persons.
    (4) The notice is given no more than 120 days after the escrow has been established.
    (5) Notice was not previously given to the tenant pursuant to this section.
    (6) The purchaser in good faith intends to reside in the property for at least one full year after the termination of the tenancy.

  (e~~...~~) *(omitted)*

(f) The notices required by this section shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail.

- Civil Code section 1944 provides: "A hiring of lodgings or a dwelling-house for an unspecified term is presumed to have been made for such length of time as the parties adopt for the estimation of the rent. Thus a hiring at a monthly rate of rent is presumed to be for one month. In the absence of any agreement respecting the length of time or the rent, the hiring is presumed to be monthly."

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

- " 'In order that such an action may be maintained the conventional relation of landlord and tenant must be shown to exist. In other words, the action is limited to those cases in which the tenant is estopped to deny the landlord's title.' " (*Fredericksen v. McCosker* (1956) 143 Cal.App.2d 114, 116 [299 P.2d 908], internal citations omitted.)

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

- "The Act provides that as a prerequisite to filing an unlawful detainer action based on a terminated month-to-month tenancy, the landlord must serve the tenant with a 30-day written notice of termination." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 113 [78 Cal.Rptr.2d 799], internal citations omitted.)

Secondary Sources

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

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

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

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

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

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

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

Miller & Starr, California Real Estate, ~~(Thomson West)~~ Ch. 19, *Landlord-Tenant*, § 19:188 (Thomson Reuters West)

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

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

1. **That the notice informed [***name of defendant***] in writing that the tenancy would end on a date at least [30/60] days after notice was given to [him/her/it];**

2. **That the notice was given to [***name of defendant***] at least [30/60] days before the date that the tenancy was to end; and**

3. **That the notice was given to [***name of defendant***] at least [30/60] days before [***insert date on which action was filed***];**

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

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

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

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

[*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3) ~~[a responsible person was not present at [***name of defendant***]'s home or work, and the notice was posted on the property in a place where it would easily be noticed, and~~ a copy was also mailed to the property in an envelope addressed to [***name of defendant***]. In this case, notice is considered given on the date the second notice was placed in the mail.]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial property in an envelope addressed to [*name of defendant***]. In this case, notice is considered given on the date the second notice was placed in the mail.]**

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

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

New August 2007; Revised December 2010, June 2011

Directions for Use

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

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

Select all manners of service used, including personal service, certified or registered mail, substituted service by leaving the notice at the defendant's home or place of work or at the rental property, and substituted service by posting on the property. (See Civ. Code, §§ 1946, 1946.1(f); Code Civ. Proc., § 1162~~(a)~~.) ~~Adapt if needed for a commercial tenancy. (See Code Civ. Proc., § 1162(b).)~~

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

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the last paragraph. Defective service ~~is~~ may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546]~~*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96]~~.) If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110

Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

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

Sources and Authority

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

- Civil Code section 1946.1 provides, in part:

  (a) Notwithstanding Section 1946, a hiring of residential real property for a term not specified by the parties, is deemed to be renewed as stated in Section 1945, at the end of the term implied by law unless one of the parties gives written notice to the other of his or her intention to terminate the tenancy, as provided in this section.

  (b) An owner of a residential dwelling giving notice pursuant to this section shall give notice at least 60 days prior to the proposed date of termination. A tenant giving notice pursuant to this section shall give notice for a period at least as long as the term of the periodic tenancy prior to the proposed date of termination.

  (c) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if any tenant or resident has resided in the dwelling for less than one year.

  (d) Notwithstanding subdivision (b), an owner of a residential dwelling giving notice pursuant to this section shall give notice at least 30 days prior to the proposed date of termination if all of the following apply:

(1) The dwelling or unit is alienable separate from the title to any other dwelling unit.
(2) The owner has contracted to sell the dwelling or unit to a bona fide purchaser for value, and has established an escrow with a licensed escrow agent, as defined in Sections 17004 and 17200 of the Financial Code, or a licensed real estate broker, as defined in Section 10131 of the Business and Professions Code.
(3) The purchaser is a natural person or persons.
(4) The notice is given no more than 120 days after the escrow has been established.
(5) Notice was not previously given to the tenant pursuant to this section.
(6) The purchaser in good faith intends to reside in the property for at least one full year after the termination of the tenancy.

(e) (*omitted*)
...

(f) The notices required by this section shall be given in the manner prescribed in Section 1162 of the Code of Civil Procedure or by sending a copy by certified or registered mail.

- Code of Civil Procedure section 1162~~(a)~~ provides~~,~~ in part:

(a) Except as provided in subdivision (b), the notices required … 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.

(b) The notices required by Section 1161 may be served upon a commercial tenant by any of the following methods:

(1) By delivering a copy to the tenant personally.

(2) If he or she is absent from the commercial rental property, by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated.

(3) If, at the time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated. Service upon a subtenant may be made in the same manner.

(c) For purposes of subdivision (b), "commercial tenant" means a person or entity that hires any real property in this state that is not a dwelling unit, as defined in subdivision (c) of Section 1940 of the Civil Code, or a mobilehome, as defined in Section 798.3 of the Civil Code.

- "[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].)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov, supra,* 168 Cal.App.3d at p. 876.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P., supra*, 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P., supra*, 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, § 680, 727

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

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

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

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

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

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

Miller & Starr, California Real Estate, ~~(Thomson West)~~ Ch. 19, *Landlord-Tenant*, §§ 19:188, 19:192 (Thomson Reuters West)

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; Revised June 2011

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~~ may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546]~~*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96]~~.) If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners East #1, L.P. v. Baja Fresh Westlake Village, Inc.* (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

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. 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, §§ 674, 726~~720 et seq.~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.55, 8.58, 8.59

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.46, 6.48, 6.49

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:136 et seq. (The Rutter Group)

7 California Real Estate Law and Practice, Ch. ~~210~~200, ~~*Unlawful Detainer*~~*Termination of Tenancies*, ~~§~~§§ 200.38 (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

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[*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 or more of the following manners of service:***]**

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

~~[or:~~

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

**[~~or~~*for a residential tenancy:*

[*name of defendant***]'s place of residence and work could not be discovered, or a responsible person could not be found at either place, and (1) the notice was posted on the property in a place where it would easily be noticed, (2) a copy was given to a person living there if someone could be found, and (3)~~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].]**

[*or for a commercial tenancy:*

at the time of attempted service, a responsible person could not be found at the commercial rental property through the exercise of reasonable diligence, and (1) the notice was posted on the property in a place where it would easily be noticed, and (2) a copy was also mailed to the address of the commercial 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; Revised June 2011

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 at the commercial property, or substituted service by posting on the property. (See 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, and fourth 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~~ may be waived if defendant admits timely receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546]~~*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96]~~.) If a commercial lease requires service by a particular method, actual receipt by the tenant will not cure the landlord's failure to comply with the service requirements of the lease. (*Culver Center Partners*

East #1, L.P. v. Baja Fresh Westlake Village, Inc. (2010) 185 Cal.App.4th 744, 752 [110 Cal.Rptr.3d 833].) Whether the same rule applies to a residential lease that specifies a method of service has not yet been decided.

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:

(a) 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.

(b) The notices required by Section 1161 may be served upon a commercial tenant by any of the following methods:

(1) By delivering a copy to the tenant personally.

(2) If he or she is absent from the commercial rental property, by leaving a copy with some person of suitable age and discretion at the property, and sending a copy through the mail addressed to the tenant at the address where the property is situated.

(3) If, at the time of attempted service, a person of suitable age or discretion is not found at the rental property through the exercise of reasonable diligence, then by affixing a copy in a conspicuous place on the property, and also sending a copy through the mail addressed to the tenant at the address where the property is situated. Service upon a subtenant may be made in the same manner.

(c) For purposes of subdivision (b), "commercial tenant" means a person or entity that hires any real property in this state that is not a dwelling unit, as defined in subdivision (c) of Section 1940 of the Civil Code, or a mobilehome, as defined in Section 798.3 of the Civil Code.

- "[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].)

- "[D]efendant admitted in his answer that he 'ultimately received [the relevant] notice' but 'affirmatively allege[d] that he was not properly and legally served' with a valid notice. We find that, under the circumstances of this case, the defendant waived any defect in the challenged service of the notice under section 1162, subdivision 1." (*Valov*, *supra*, 168 Cal.App.3d at p. 876.)

- "In commercial leases the landlord and commercial tenant may lawfully agree to notice procedures that differ from those provided in the statutory provisions governing unlawful detainer." (*Culver Center Partners East #1, L.P.*, *supra*, 185 Cal.App.4th at p.750.)

- "[E]ven if some policy rationale might support such a waiver/forfeiture [by actual receipt] rule in the residential lease context, there is no basis to apply it in the commercial context where matters of service and waiver are prescribed in the lease itself. Nothing in the parties' lease suggests actual receipt of a notice to quit results in the waiver or forfeiture of [tenant]'s right to service accomplished in the manner prescribed. To the contrary, the lease specifically provides, 'No covenant, term or condition, or breach' of the lease 'shall be deemed waived except if expressly waived in a written instrument executed by the waiving party.' Although [tenant's agent] acted on the notice to quit by attempting to deliver the rent check, neither her fortuitous receipt of the notice nor her actions in response to it constitutes an express waiver of the notice provisions in the lease." (*Culver Center Partners East #1, L.P.*, *supra*, 185 Cal.App.4th at p. 752, internal citation omitted.)

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2006) Real Property, §§ 674, 726, 727~~720 et seq.~~

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.62–8.68

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 6.25–6.29

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 7-C, *Bases For Terminating Tenancy*, ¶¶ 7:98.5 et seq., 7:137 et seq. (The Rutter Group)

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)

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

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[*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.**

New December 2010; Revised June 2011

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 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,* §§ 27:63–27:64

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, 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

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[*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.**

New December 2010; Revised June 2011

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 tortuous [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.**

New December 2010; Revised June 2011

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. 1, *Contracts,* §§ 1:80, 1:82

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

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[*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.**

New December 2010; Revised June 2011

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. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 132 [87 Cal. Rptr. 3d 5].)

- "[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 California 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

Acret, California Construction Law Manual (Thompson Reuters West 6th ed. 2005) Ch. 5, *Construction Defects,* § 5:39

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

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

5000. Duties of the Judge and Jury

Members of the jury, you have now heard all the evidence [and the closing arguments of the attorneys]. [The attorneys will have one last chance to talk to you in closing argument. But before they do, it] [It] is my duty to instruct you on the law that applies to this case. You must follow these instructions [as well as those that I previously gave you]. You will have a copy of my instructions with you when you go to the jury room to deliberate. [I have provided each of you with your own copy of the instructions.] [I will display each instruction on the screen.]

You must decide what the facts are. You must consider all the evidence and then decide what you think happened. You must decide the facts based on the evidence admitted in this trial.

Do not allow anything that happens outside this courtroom to affect your decision. Do not talk about this case or the people involved in it with anyone, including family and persons living in your household, friends and coworkers, spiritual leaders, advisors, or therapists. Do not do any research on your own or as a group. Do not use dictionaries~~, the Internet,~~ or other reference materials.

These prohibitions on communications and research extend to all forms of electronic communications. Do not use any electronic devices or media, such as a cell phone or smart phone, PDA, computer, tablet device, the Internet, any Internet service, any text or instant-messaging service, any Internet chat room, blog, or website, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.

Do not investigate the case or conduct any experiments. Do not contact anyone to assist you, such as a family accountant, doctor, or lawyer. Do not visit or view the scene of any event involved in this case. If you happen to pass by the scene, do not stop or investigate. All jurors must see or hear the same evidence at the same time. [Do not read, listen to, or watch any news accounts of this trial.] You must not let bias, sympathy, prejudice, or public opinion influence your decision.

I will now tell you the law that you must follow to reach your verdict. You must follow the law exactly as I give it to you, even if you disagree with it. If the attorneys [have said/say] anything different about what the law means, you must follow what I say.

In reaching your verdict, do not guess what I think your verdict should be from something I may have said or done.

Pay careful attention to all the instructions that I give you. All the instructions are important because together they state the law that you will use in this case. You must consider all of the instructions together.

After you have decided what the facts are, you may find that some instructions do not apply. In that case, follow the instructions that do apply and use them together with the facts to reach your verdict.

If I repeat any ideas or rules of law during my instructions, that does not mean that these ideas or

rules are more important than the others. In addition, the order in which the instructions are given does not make any difference.

[Most of the instructions are typed. However, some handwritten or typewritten words may have been added, and some words may have been deleted. Do not discuss or consider why words may have been added or deleted. Please treat all the words the same, no matter what their format. Simply accept the instruction in its final form.]

New September 2003; Revised April 2004, October 2004, February 2005, December 2009, June 2011

Directions for Use

As indicated by the brackets in the first paragraph, this instruction can be read either before or after closing arguments. The advisory committee recommends that this instruction be read to the jury before reading instructions on the substantive law.

Sources and Authority

- Code of Civil Procedure section 608 provides that "[i]n charging the jury the court may state to them all matters of law which it thinks necessary for their information in giving their verdict." It also provides that the court "must inform the jury that they are the exclusive judges of all questions of fact." (See also Code Civ. Proc., § 592.)

- Evidence Code section 312(a) provides that "[e]xcept as otherwise provided by law, where the trial is by jury [a]ll questions of fact are to be decided by the jury."

- An instruction to disregard any appearance of bias on the part of the judge is proper. (*Gist v. French* (1955) 136 Cal.App.2d 247, 257–259 [288 P.2d 1003], disapproved on other grounds in *Deshotel v. Atchinson, Topeka & Santa Fe Ry. Co.* (1958) 50 Cal.2d 664, 667 [328 P.2d 449] and *West v. City of San Diego* (1960) 54 Cal.2d 469, 478–479 [6 Cal.Rptr. 289, 353 P.2d 929].)

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

- An instruction to consider all the instructions together can help avoid instructional errors of conflict, omission, and undue emphasis. (*Escamilla v. Marshburn Brothers* (1975) 48 Cal.App.3d 472, 484 [121 Cal.Rptr. 891].)

- Providing an instruction stating that, depending on what the jury finds to be the facts, some of the instructions may not apply can help avoid reversal on the grounds of misleading jury instructions. (See *Rodgers v. Kemper Construction Co.* (1975) 50 Cal.App.3d 608, 629–630 [124 Cal.Rptr. 143].)

- In *Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57–59 [118 Cal.Rptr. 184, 529 P.2d 608], the Supreme Court held that the giving of cautionary instructions stating that no undue emphasis was intended by repetition and that the judge did not intend to imply how any issue should be decided, ought to be considered in weighing the net effect of the instructions on the jury.

Secondary Sources

7 Witkin, California Procedure (~~4th~~ 5th ed. ~~1997~~2008) Trial, § ~~268~~281

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 14-D, *Preparing Jury Instructions*, ¶¶ 14:151, 14:190 (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.20 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.21 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 16, *Jury Instructions*, 16.19 et seq.

5009. Predeliberation Instructions

When you go to the jury room, the first thing you should do is choose a presiding juror. The presiding juror should see to it that your discussions are orderly and that everyone has a fair chance to be heard.

It is your duty to talk with one another in the jury room and to consider the views of all the jurors. Each of you must decide the case for yourself, but only after you have considered the evidence with the other members of the jury. Feel free to change your mind if you are convinced that your position should be different. You should all try to agree. But do not give up your honest beliefs just because the others think differently.

Please do not state your opinions too strongly at the beginning of your deliberations or immediately announce how you plan to vote as it may interfere with an open discussion. Keep an open mind so that you and your fellow jurors can easily share ideas about the case.

You should use your common sense, but do not use or consider any special training or unique personal experience that any of you have in matters involved in this case. Your training or experience is not a part of the evidence received in this case.

Sometimes jurors disagree or have questions about the evidence or about what the witnesses said in their testimony. If that happens, you may ask to have testimony read back to you [or ask to see any exhibits admitted into evidence that have not already been provided to you]. Also, jurors may need further explanation about the laws that apply to the case. If this happens during your discussions, write down your questions and give them to the [clerk/bailiff/court attendant]. I will talk with the attorneys before I answer so it may take some time. You should continue your deliberations while you wait for my answer. I will do my best to answer them. When you write me a note, do not tell me how you voted on an issue until I ask for this information in open court.

[At least nine jurors must agree on a verdict. When you have finished filling out the form, your presiding juror must write the date and sign it at the bottom and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.]

Your decision must be based on your personal evaluation of the evidence presented in the case. Each of you may be asked in open court how you voted on each question.

While I know you would not do this, I am required to advise you that you must not base your decision on chance, such as a flip of a coin. If you decide to award damages, you may not agree in advance to simply add up the amounts each juror thinks is right and then, without further deliberations, make the average your verdict.

You may take breaks, but do not discuss this case with anyone, including each other, until all of you are back in the jury room.

New September 2003; Revised April 2004, October 2004, February 2007, December 2009, June 2011

Directions for Use

The advisory committee recommends that this instruction be read to the jury after closing arguments and after reading instructions on the substantive law.

Read the sixth paragraph if a general verdict form is to be used. If a special verdict will be used, give CACI No. 5012, *Introduction to Special Verdict Form*.

Judges may want to provide each juror with a copy of the verdict form so that the jurors can use it to keep track of how they vote. Jurors can be instructed that this copy is for their personal use only and that the presiding juror will be given the official verdict form to record the jury's decision. Judges may also want to advise jurors that they may be polled in open court regarding their individual verdicts.

Delete the reference to reading back testimony if the proceedings are not being recorded.

Sources and Authority

- Code of Civil Procedure section 613 provides, in part: "When the case is finally submitted to the jury, they may decide in court or retire for deliberation; if they retire, they must be kept together, in some convenient place, under charge of an officer, until at least three-fourths of them agree upon a verdict or are discharged by the court."

- Code of Civil Procedure section 614 provides: "After the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, or if they desire to be informed of any point of law arising in the cause, they may require the officer to conduct them into court. Upon their being brought into court, the information required must be given in the presence of, or after notice to, the parties or counsel."

- Code of Civil Procedure section 618 and article I, section 16, of the California Constitution provide that three-fourths of the jurors must agree to a verdict in a civil case.

- ~~The prohibition on chance or quotient verdict is stated in~~ Code of Civil Procedure section 657 provides in part:

  > The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:
  >
  > 1. [omitted]

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

- "Chance is the 'hazard, risk, or the result or issue of uncertain and unknown conditions or forces.' Verdicts reached by tossing a coin, drawing lots, or any other form of gambling are examples of improper chance verdicts. 'The more sophisticated device of the *quotient verdict* is equally improper: The jurors agree to be bound by an *average* of their views; each writes the amount he favors on a slip of paper; the sums are added and divided by 12, and the resulting "quotient" pursuant to the prior agreement, is accepted as the verdict without further deliberation or consideration of its fairness.' ", ~~which provides that a verdict may be vacated and a new trial ordered "whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance.~~" (~~See also~~ *Chronakis v. Windsor* (1993) 14 Cal.App.4th 1058, 1064~~–1065~~ [18 Cal.Rptr.2d 106], original italics.)

- " '[T]here is no impropriety in the jurors making an average of their individual estimates as to the amount of damages for the purpose of arriving at a basis for discussion and consideration, nor in adopting such average if it is subsequently agreed to by the jurors; but to agree beforehand to adopt such average and abide by the agreement, without further discussion or deliberation, is fatal to the verdict.' " (*Chronakis*, *supra*, 14 Cal.App.4th at p. 1066.)

- Jurors should be encouraged to deliberate on the case. (*Vomaska v. City of San Diego* (1997) 55 Cal.App.4th 905, 911 [64 Cal.Rptr.2d 492].)

- The jurors may properly be advised of the duty to hear and consider each other's arguments with open minds, rather than preventing agreement by stubbornly sticking to their first impressions. (*Cook v. Los Angeles Ry. Corp.* (1939) 13 Cal.2d 591, 594 [91 P.2d 118].)

- "The trial court properly denied the motion for new trial on the ground that [the plaintiff] did not demonstrate the jury reached a chance or quotient verdict. The jury agreed on a high and a low figure and, before calculating an average, they further agreed to adjust downward the high figure and to adjust upward the low figure. There is no evidence that this average was adopted without further consideration or that the jury agreed at any time to adopt an average and abide by the agreement without further discussion or deliberation." (*Lara v. Nevitt* (2004) 123 Cal.App.4th 454, 462–463 [19 Cal.Rptr.3d 865].)

Secondary Sources

7 Witkin, California Procedure (~~4th~~ 5th ed. ~~1997~~2008) Trial, §§ ~~330, 336~~318, 321, 380

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 15-A, *Jury Deliberations: General Considerations*, ¶¶ 15:15 et seq. (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.01 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326, *Jury Instructions*, § 326.32[3]

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.14 (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 17, *Dealing With the Jury*, 17.33

5019. Questions From Jurors

If, during the trial, any of you had a question that you believed should be asked of a witness, you were instructed to write out the question and provide it to me through my courtroom staff. I shared your questions with the attorneys, after which, I decided whether the question could be asked.

If a question was asked and answered, you are to consider the answer as you would any other evidence received in the trial. Do not give the answer any greater or lesser weight because it was initiated by a juror question.

If the question was not asked, do not speculate as to what the answer might have been or why it was not asked. There are many legal reasons why a suggested question cannot be asked of a witness. Give the question no further consideration.

New June 2011

Directions for Use

This is an optional instruction for use if the jurors will be allowed to ask questions of the witnesses. For a similar instruction to be given at the beginning of the trial, see CACI No. 112, *Questions From Jurors*. This instruction may be modified to account for an individual judge's practice.

Sources and Authority

- Rule 2.1033 of the California Rules of Court provides: "A trial judge should allow jurors to submit written questions directed to witnesses. An opportunity must be given to counsel to object to such questions out of the presence of the jury."

- "In a proper case there may be a real benefit from allowing jurors to submit questions under proper control by the court. However, in order to permit the court to exercise its discretion and maintain control of the trial, the correct procedure is to have the juror write the questions for consideration by the court and counsel prior to their submission to the witness." (*People v. McAlister* (1985) 167 Cal.App.3d 633, 644 [213 Cal.Rptr. 271].)

- "[T]he judge has discretion to ask questions submitted by jurors or to pass those questions on and leave to the discretion of counsel whether to ask the questions." (*People v. Cummings* (1993) 4 Cal.4th 1233, 1305 [18 Cal.Rptr.2d 796, 850 P.2d 1].)

- "The appellant urges that when jurymen ask improper questions the defendant is placed in the delicate dilemma of either allowing such question to go in without objection or of offending the jurors by making the objection and the appellant insists that the court of its own motion should check the putting of such improper questions by the jurymen, and thus relieve the party injuriously affected thereby from the odium which might result from making that objection thereto. There is no force in this contention. Objections to questions, whether asked by a juror or by opposing counsel, are

presented to the court, and its ruling thereon could not reasonably affect the rights or standing of the party making the objection before the jury in the one case more than in the other." (*Maris v. H. Crummey, Inc.* (1921) 55 Cal.App. 573, 578–579 [204 P. 259].)

Secondary Sources

3 Witkin, California Evidence (4th ed. 2000) Presentation at Trial, § 85

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 7-E, *Juror Questioning Of Witnesses*, ¶¶ 7:45.10 et seq. (The Rutter Group)

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, §§ 91.01–91.03 (Matthew Bender)