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REPORT TO THE JUDICIAL COUNCIL

For business meeting on December 13, 2013

Title
Civil Jury Instructions (CACI): New, Revised, Restored, Renumbered, and Revoked Instructions and Verdict Forms

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
December 13, 2013

Date of Report
October 4, 2013

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Executive Summary

The Advisory Committee on Civil Jury Instructions recommends approving for publication the civil jury instructions prepared by the committee. On Judicial Council approval, the instructions will be published in the official 2014 edition of the *Judicial Council of California Civil Jury Instructions*.

Recommendation

The Advisory Committee on Civil Jury Instructions recommends that the Judicial Council, effective December 13, 2013, approve for publication under rules 2.1050 and 10.58 of the California Rules of Court the civil jury instructions prepared by the committee. On Judicial Council approval, the instructions will be published in the official 2014 edition of the *Judicial Council of California Civil Jury Instructions (CACI).*

A table of contents and the proposed revised, new, restored, revoked, and renumbered civil jury instructions are attached at pages 51–161.

Previous Council Action

At its meeting on July 16, 2003, the Judicial Council adopted what is now rule 10.58 of the California Rules of Court, which established the advisory committee and its charge.[1] At this meeting, the council voted to approve the *CACI* instructions under 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 23rd release of *CACI*. The council approved *CACI* release 22 at its June 2013 meeting.

Rationale for Recommendation

The committee recommends proposed additions and revisions to, and revocation of, the following 36 instructions and verdict forms: 304, 323, 408, 409, 410, 428, 1245, 1621, 1731, 1900, 1902, 1903, 1905, 1907, 1908, 2201, 2202, 2203, VF-2201, VF-2202, 2440, 2512, 2513, 2543, VF-2515, 2700, 2730, 2731, 3027, 3517, 4109, 4302, VF-4300, VF-4301, 4552, and 5000. Of these, 21 are proposed to be revised, 10 are newly drafted, 2 (CACI Nos. 1905 and 2203) are proposed to be revoked, 1 (CACI No. 428) is to be renumbered, and 2 (CACI Nos. 2440 and 2543) are proposed to be restored and revised after having been temporarily revoked in the last release.

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 54 additional instructions under a delegation of authority from the council to RUPRO.[2]

The instructions were revised or added based on comments or suggestions from justices, judges, and attorneys; proposals by staff and committee members; and recent developments in the law. Below is a summary of the more significant changes recommended to the council.

New instructions

The committee proposes adding 10 new instructions. All 10 are based on recent cases.[3]

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[1] Rule 10.58(a) states in part: "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 and corrections and minor substantive changes to jury instructions 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. Further, under its delegation of authority from RUPRO, the advisory committee has made other nonsubstantive grammatical, typographical, and technical corrections.

[3] Two proposed new instructions, CACI Nos. 2512 and VF-2515, are discussed under *Harris*, below.

In *Nalwa v. Cedar Fair, L.P.*,[4] the California Supreme Court addressed the defense of primary assumption of risk with regard to an amusement park bumper car ride. The court allowed the defense with regard to nonsport *recreational* activities. In response, the committee proposes adding new CACI No. 410, *Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors,* as a third instruction on primary assumption of risk.[5] In order to group the three instructions together, the committee proposes renumbering current CACI No. 410, *Parental Liability (Nonstatutory),* as CACI No. 428.

The recent case of *City of Costa Mesa v. D'Alessio Investments, LLC*[6] involved the not-often-litigated tort of trade libel. The committee proposes new instruction CACI No. 1731, *Trade Libel—Essential Factual Elements*.

In *Veronese v. Lucasfilm Ltd.*,[7] the court held that it was error for the trial court not to give the jury a "business judgment" instruction. This instruction essentially emphasizes to the jury that it is not unlawful for the employer to discharge an employee for an unfair reason as long as it is not for a legally prohibited reason such as discrimination. The jury is not to evaluate the wisdom of the employer's action, only its lawfulness. In response, the committee proposes new instruction CACI No. 2513, *Business Judgment.*

In *Harris v. City of Santa Monica*[8] the court rejected the plaintiff's argument that the court should import the "mixed-motive" statutory rule for whistleblower protection under Labor Code section 1102.6 into the Fair Employment and Housing Act (FEHA). The committee believes that a specific instruction under Labor Code section 1102.6 would be helpful to clarify that the rules of *Harris* do not apply under this statute. The committee proposes new instruction CACI No. 2731, *Affirmative Defense—Same Decision*.

In *Sims v. Stanton*,[9] the Ninth Circuit Court of Appeals distinguished between the law enforcement affirmative defenses to a warrantless search of exigency and emergency. Current CACI No. 3026 presents the defense of exigent circumstances. Proposed new CACI No. 3027 presents the defense of emergency.

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[4] *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148.

[5] See CACI No. 408, to be renamed *Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Recreational Activity,* and CACI No. 409, *Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches.*

[6] *City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358.

[7] *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1.

[8] *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 239. See discussion under *Harris*, below.

[9] *Sims v. Stanton* (9th Cir. 2013) 706 F.3d 954.

In *County of Glenn v. Foley,*[10] an eminent domain case, the court admitted evidence of comparable sales to assist the jury in its valuation of the property. The committee proposes new instruction CACI No. 3517, *Comparable Sales,* to assist the jury in evaluating comparable-sales evidence.

In 2010, in *Holmes v. Summer*,[11] the court held that the real estate broker for the seller breached a duty to the buyer by not disclosing that the property was heavily encumbered and that the sale could not close with only the purchase price loan in escrow. The committee has been working on crafting an instruction based on the duty stated in *Holmes* for some time. It now proposes new CACI No. 4109, *Duty of Disclosure by Seller's Real Estate Broker to Buyer.*

Finally, in *Neiman v. Leo A. Daly Co.,*[12] the court held that an architect was no longer liable for a patent design defect in a construction project because the project had been completed and accepted by the owner. In response, the committee proposes new instruction CACI No. 4552, *Affirmative Defense—Work Completed and Accepted—Patent Defect.*

Revoked instructions

The committee proposes revoking CACI No. 1905, *Definition of Important Fact/Promise*. The reason for this proposed revocation is stated in more detail under Fraud: Materiality/Importance, below.

The committee also proposes revoking CACI No. 2203, *Intent,* in the Economic Interference series. The committee proposes incorporating No. 2203's "substantially certain" language as an option for intent in the "essential factual elements" instructions for interference with contractual relations (CACI No. 2201) and interference with prospective economic relations (CACI No. 2202). Although the proposed revocation of No. 2203 was not posted for public comment, the committee believes that revocation is implicit in the posted changes for Nos. 2201 and 2202, which address the purpose and include the content of No. 2203.

Restored and revised instructions

In the previous release, CACI No. 2440, *False Claims Act: Whistleblower Protection—Essential Factual Elements,* was temporarily revoked because legislative amendments to Government Code section 12653 made it no longer a fully correct statement of law. The committee has now revised the instruction to conform to the new statutory language and proposes restoring it as revised.

The committee also temporarily revoked CACI No. 2543, *Disability Discrimination—"Essential Job Duties" Explained,* in the previous release. The committee noted that the burden of proof

[10] *County of Glenn v. Foley* (2012) 212 Cal.App.4th 393.

[11] *Holmes v. Summer* (2010) 188 Cal.App.4th 1510.

[12] *Neiman v. Leo A. Daly Co.* (2012) 210 Cal.App.4th 962.

was no longer correctly presented.[13] The committee has now revised the instruction to correctly present the burden of proof and to expand the instruction to consider factors included in statute[14] and regulation.[15]

Fraud: Materiality/Importance (CACI Nos. 1900, 1902, 1903, 1905, 1907, 1908)

The advisory committee proposes revisions to several instructions in the Fraud or Deceit series to present the question of the materiality (or importance) in a way that is more in line with case authority. Currently, the instructions are inconsistent in the way that materiality is presented. CACI Nos. 1900, *Intentional Misrepresentation,* and 1903, *Negligent Misrepresentation,* present it as part of the representation element.[16] CACI No. 1902, *False Promise,* presents it as a separate element. CACI No. 1905, *Definition of Important Fact/Promise,* then presents the rule defining materiality.

However, in *Engalla v. Permanente Medical Group, Inc.*,[17] the court stated (italics added):

> [A] presumption, or at least an inference, *of reliance* arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be "material" if "a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question," and as such, materiality is generally a question of fact unless the "fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.[18]

Therefore, the committee believes that materiality should be presented as a condition precedent to justifiable reliance in CACI No. 1908, *Reasonable Reliance.* The essence of CACI No. 1905 has been moved to CACI No. 1908. The committee proposes removing reference to importance from CACI Nos. 1900, 1902, and 1903 and revoking CACI No. 1905.

In addition to merging 1905 into 1908, the committee has further revised 1908 to better express the shifting objective and subjective standards. If materiality is shown by an objective "reasonable person" standard, then the inquiry shifts to a subjective standard in light of the particular plaintiff's level of intelligence, knowledge, education, and experience, subject to a

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[13] See *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 972−973.

[14] See Gov. Code, § 12926(f).

[15] See Cal. Code Regs., tit. 2, § 7293.6(e)(2).

[16] CACI No. 1901, *Concealment,* presents materiality as part of the element on the failure to disclose. The committee is concerned that concealment may present different and additional considerations regarding materiality and has deferred revisions to CACI No. 1901 to the next release cycle.

[17] *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977.

[18] See also *Charpentier v. Los Angeles Rams* (1999) 75 Cal.App.4th 301, 312–313 [reliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material, quoting Restatement of Torts].

limitation for a statement that is facially preposterous or if there are observable facts that show that it is obviously false.[19]

Causation and mixed motive under the Fair Employment and Housing Act

Harris v. City of Santa Monica. On February 7, 2013, the California Supreme Court handed down its long-awaited opinion in *Harris v. City of Santa Monica*.[20] The court in *Harris* addressed the causation standard under the Fair Employment and Housing Act (FEHA) in so-called mixed-motive cases—that is, when there is evidence that both a discriminatory and a legitimate reason led an employer to take an adverse employment action against an employee.

Harris presented two holdings relevant to jury instructions. First, the court held that there is a defense of "same decision" by which the employer can attempt to prove that it would have taken the adverse action anyway for the legitimate reason even if it may have also acted for a discriminatory reason. But the defense is to remedies only, not to liability. It denies recovery for reinstatement, back-pay, and damages, but allows injunctive relief and attorney fees.[21] Second, the court held that CACI No. 2500, *Disparate Treatment—Essential Factual Elements*, was insufficient in stating the causation standard as "a motivating reason." Instead, the court held that the standard had to be a *substantial* motivating reason.[22]

The committee addressed this second holding in the previous release approved in June 2013. It revised all FEHA instructions that presented causation as "motivating reason" to change it to "substantial motivating reason."[23] And CACI No. 2507, *"Motivating Reason" Explained,* was revised to instead define *substantial* motivating reason.

The committee deferred consideration of the *Harris* holding on the "same decision" defense to this release. The committee now proposes new CACI No. 2512, *Limitation on Remedies—Same Decision*. Proposed new verdict form CACI No. VF-2515 incorporates the same-decision defense into an employee's claim for discrimination or retaliation. If the jury finds either discrimination or retaliation, it proceeds to consider whether the employer also acted for a lawful reason. If it finds that the employer did, the jury does not reach the damages question.

In *Harris*, the court in summing up its holdings stated that "a jury in a mixed-motive case alleging unlawful termination *should be instructed* … that a same-decision showing precludes an

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[19] *Blankenheim v. E. F. Hutton, Co., Inc.* (1990) 217 Cal.App.3d 1463, 1474.

[20] *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203.

[21] *Id.* at p. 243.

[22] *Id.* at p. 232.

[23] See CACI Nos. 2505, *Retaliation—Essential Factual Elements;* 2511, *Adverse Action Made by Decision Maker Without Animus (Cat's Paw);* 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements;* 2560, *Religious Creed Discrimination—Failure to Accommodate—Essential Factual Elements;* 2570, *Age Discrimination—Disparate Treatment—Essential Factual Elements;* and related verdict forms.

award of reinstatement, backpay, or damages."[24] The committee has reluctantly followed this directive and included this language in CACI No. 2512. Under CACI standards, the jury is not instructed on matters that it will not be called on to decide. Since the jury has no role in determining remedies under the same-decision defense, the committee would not have included this language in the instruction but for the explicit directive from the court in *Harris*.

Damages in unlawful detainer involving breach of the warranty of habitability (CACI No. VF-4301)

A trial judge proposed expansion of CACI No. VF-4301, *Termination Due to Failure to Pay Rent—Affirmative Defense—Breach of Implied Warranty of Habitability*. The judge pointed out that the current verdict form is incomplete because it lacks questions about unpaid rent and holdover damages. The judge also requested a question by which the jury would find either the amount or the percent of rent reduction based on uninhabitable conditions.

The committee proposes a revised VF-4301 to address these omissions. However, there were significant obstacles to presenting these additional questions in a way that is both legally correct and comprehensible to a jury. The obstacles involve both complexities and ambiguities in the law.

The complexities concern the question on finding the amount of unpaid rent that would be due under the lease if there were no habitability breach. The committee has placed this question before the questions addressing the habitability defense. Several public commentators thought that this question should follow the habitability questions and be presented only if the jury finds for the landlord on habitability. But a finding of uninhabitability does not completely defeat the landlord's entitlement to some of the unpaid rent; it only entitles the tenant to a reduction.[25] Before a reduction can be made, there must be a finding as to the amount of unpaid rent under the lease. The committee believes that this finding should be made before the jury moves to the habitability questions.[26]

The ambiguities concern the respective roles of judge and jury under Code of Civil Procedure section 1174.2, specifically, the question as to who decides the amount of the rent reduction if the jury finds some uninhabitability. The statute says that "the court … shall determine the reasonable rental value of the premises in its untenantable state to the date of trial."[27] But the statute also says that "[n]othing in this section is intended to deny the tenant the right to a trial by jury."[28] The judge who initiated this proposal believes that the latter section unquestionably

[24] *Harris, supra,* at p. 241.

[25] Code Civ. Proc., § 1174.2(a).

[26] Because this finding should be a simple computation of multiplying the number of days for which rent is unpaid by the rental amount under the lease, some committee members feel that this step should be done by the court and this question omitted entirely.

[27] Code Civ. Proc., § 1174.2(a).

[28] Code Civ. Proc., § 1174.2(d).

means that the jury and not the judge is to make this determination. Some on the committee are equally certain that the court must make the determination.[29]

The majority of the committee believes that the question is unsettled and that the statute cannot clearly be construed either way. Those for the jury determination argue that subdivision (d) (affirming the right to a jury trial) means that wherever subdivision (a) says that "the court shall" do something, it should be read as "the jury shall" in a jury trial. But one of the matters that the court can do under (a) is to order the landlord to make repairs, which would clearly not be an appropriate jury role. So the committee majority is unconvinced that the statute must be read in this way.

But neither is the majority convinced that subdivision (a) should be read literally to give the rent reduction task to the court. Code of Civil Procedure section 1171 says: "Whenever an issue of fact is presented by the pleadings, it must be tried by a jury." Because the amount of rent reduction attributable to uninhabitability is arguably an issue of fact, section 1171 would presumably give that task to the jury despite the language in section 1174.2(a) that gives it to the court.

Because of this uncertainty, the proposed revisions to CACI No. VF-4301 present an optional question that can be given if the court wants the jury to make the rent reduction. The Directions for Use explain the lack of clarity in the law.

Juror contempt for electronic research and communications (CACI No. 5000)

The committee continues to receive requests for additional instructions and language addressing the problem of jurors surfing, tweeting, posting, and otherwise using electronic media in violation of the court's admonitions against outside research and communications.[30] In 2011, the Legislature amended Code of Civil Procedure section 1209 to include this kind of misconduct as civil contempt.[31] CACI No. 100, *Preliminary Admonitions,* was then revised to include optional language advising jurors of this consequence. The language was made optional because none of the trial judges on the committee are comfortable with threatening jurors with contempt or other punitive consequences.[32]

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[29] *California Judges Benchguide 31: Landlord-Tenant Litigation: Unlawful Detainer* (CJER rev. 2013) § 31.28, says: "If the action is tried by a jury, the jury determines whether there was a breach of the warranty of habitability and, if so, the judge determines the amount of the rent adjustment."

[30] The committee has previously made substantial revisions to CACI No. 100, *Preliminary Admonitions,* and CACI No. 5000, *Duties of the Judge and Jury,* and has added CACI No. 116, *Why Electronic Communications and Research Are Prohibited,* to address this issue.

[31] See Code Civ. Proc., § 1209(a)(6) [contempt includes: "Willful disobedience by a juror of a court admonishment related to the prohibition on any form of communication or research about the case, including all forms of electronic or wireless communication or research."

[32] The committee has previously rejected requests to include threats of felony prosecution under Penal Code section 96 in CACI.

A retired justice requested that this section 1209 language be added to CACI No. 5000, *Duties of the Judge and Jury,* also. The committee accepted this proposal primarily because it agreed that the warning would be more likely to have its intended effect if given immediately before deliberations rather than at the beginning of the trial. CACI No. 5000 is proposed to be revised accordingly. The committee, however, has rejected requests made in public comments to make the language mandatory rather than optional.

The committee is aware that there is significant concern in the courts that section 1209 is problematic to implement.[33] Judges are concerned that any efforts to hold a juror in contempt will invoke a right to counsel and a right to remain silent. These rights will interfere with the court's ability to question the juror to determine whether the misconduct has infected the verdict. Hence, the committee has concerns about the advisability of instructing on section 1209, whether before trial or before deliberations.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from July 22 to August 30, 2013. Comments were received from 13 different commentators. Both landlord and tenant organization representatives commented on CACI No. VF-4301, *Termination Due to Failure to Pay Rent—Affirmative Defense—Breach of Implied Warranty of Habitability,* as discussed under Rationale for Recommendation, above. The California Employment Lawyers Association (CELA) submitted extensive comments on the proposed revisions to the Fair Employment and Housing Act instructions. 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 xx–xx.

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 to submit its recommendations to the council for approval. The proposed new, revised, restored, renumbered, and revoked instructions are presented 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 publish a new 2014 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

[33] The committee has been advised that the Criminal Law Advisory Committee is considering whether to recommend to the Judicial Council that it sponsor legislation to repeal the Penal Code counterpart of the Code of Civil Procedure section 1209(a)(6).

publishers, the AOC will register the copyright of 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 provides a broad public license for their noncommercial use and reproduction.

Attachments

1. Charts of comments, at pages xx–xx
2. Full text of new and revised *CACI* instructions, at pages 51–161

Instruction	Commentator	Comment	Advisory Committee Response
304, *Oral or Written Contract Terms*	California Judges Association	The modifications to the Directions for Use are modest and appear to accurately reflect the case law. They properly refer parties to the opinion for further detail. These changes appear useful and unobjectionable and CJA supports this proposal.	No response is necessary.
408, *Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Recreational Activity*	Los Angeles County Superior Court, by Janet Garcia, Court Manager	We recommend that the phrase "sport or other activity" remain in element No. 1. Therefore, element 1 of the instruction would read as follows: "…Conduct is entirely outside the range of ordinary activity involved in [*sport or other activity*…]".	This change is just to conform the format to CACI standards. When an example is given after an italicized direction, as here, CACI drops the direction and only presents the example after the occurrence.
408 and 409, *Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches*	Orange County Bar Association, by Wayne R. Gross, President	This change does one of two things: it either (1) eliminates this instruction for nonsport or nonrecreational activities (by eliminating the wording "sport or other activity", with" activity" undefined), which would preclude the instruction for nonsport or nonrecreational activities. This would be inconsistent with current law (as indicated by the final comment to the instruction, which was moved from earlier in the instructions), or (2) it creates confusion, if it was intended to expand "sport activity" to "sport or other recreational activity", while not eliminating the instruction for activities that are neither sport nor recreational (e.g. training for police, etc.). If it was not intended to so limit the activities covered by the instruction, it should read "... while participating in [*specify sport, recreational or other activity*]...". This would be consistent with the law, and less confusing.	While the court in *Nalwa* does not really discuss a limitation to recreational activities, it does consistently use the word "recreational" in defining the scope of the doctrine. Hence, the intent is as the commentator stated in number (1). The first case excerpt was moved to the end because some of its examples are now questionable in light of *Nalwa*. Police officer training is one such activity.
410, *Primary Assumption of Risk - Liability of*	California Judges Association, by Lexi Howard, Legislative	Once past motions for summary judgment or adjudication on the issue and the case reaches the jury, the proposed instruction is a correct statement of law as to the factual determination a jury is supposed to make.	No response is necessary.

Instruction	Commentator	Comment	Advisory Committee Response
Facilities Owners and Operators and Event Sponsors	Director	These changes appear useful and unobjectionable and CJA supports this proposal.	
1245, *Affirmative Defense—Product Misuse or Modification*	Toyota Motor Sales USA, by Don L. Marshall, Attorney at Law	It has never been the rule, nor should it become the rule, that it is up to the product manufacturer to prove that their product is not defective. We recognize a manufacturer is frequently in a better position to determine a modification to their product. However, this affirmative defense instruction shifts the burden of proving product misuse or modification onto the manufacturer.	This comment is beyond the scope of the proposed revision posted for comments. The proposal is only to delete a cross reference to CACI No. 432. But the committee considered this point in detail and rejected it when the instruction was first adopted back in 2009. Product misuse or modification is an affirmative defense. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56; *Perez v. VAS S.p.A.* (2010) 188 Cal.App.4th 658, 679−680.)
		This jury instruction requires the unusually high threshold for the manufacturer to prove that the misuse or modification was "highly extraordinary." There is no definition and no guidelines as to what constitutes "highly extraordinary" other than the jury must also conclude that it "should be considered as the sole cause" of a plaintiff's harm. In our view, there is no good basis for this enhanced burden of "highly extraordinary" misuse or modification. In addition, the inclusion of the notion of the "sole cause" of the harm is overly restrictive and conflicts with other causation instructions.	See the response above. This instruction provides for a complete defense only when product misuse or modification is a superseding cause. A superseding cause must be highly extraordinary. (*Torres v. Xomox Corp.* (1996) 49 Cal.App.4th 1, 18−19.)
1621, *Negligent Infliction of Emotional Distress—Bystander—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee suggests that “it” in element 2 should be replaced by a specific reference to the injury-causing event to make it clear that the plaintiff must observe that event rather than only observe the victim suffering from an injury after that event. This requirement is stated in the third bullet point in the Sources and Authority quoting *Thing v. La Chusa* (1989) 48 Cal.3d 644, 647.	The committee has made this revision.
		We also suggest that “then” in element 3 should be replaced by more specific language to make it clear that	The committee believes that “then” is helpful and that there is no need to repeat “present at the scene.”

Instruction	Commentator	Comment	Advisory Committee Response
		the plaintiff, while he or she was present at the scene, must have been aware that the event was causing injury to or the death of the victim.	
1731, *Trade Libel—Essential Factual Elements*	California Judges Association, by Lexi Howard, Legislative Director	We concur with the language and Directions for Use and Sources and Authority. These changes appear useful and unobjectionable and CJA supports this proposal.	No response is necessary.
	David Hicks, Attorney at Law, Dunsmuir	The notes themselves seem to contain internal inconsistencies in terms of how it would apply to disparagement of a professional and his firm's services. If we say Oil Changers wrecked my car by leaving my oil pan bolt loose, then we have disparaged a service that is a trade libel. The corporation itself, or a sole proprietor owner, is not disparaged and thus lacks a claim for slander. A doctor, I think, may have both a slander per se and a trade libel claim if someone says "he is the worst doctor in the county and his hospital privileges have been suspended" (slander per se if untrue) and also says "Dr. Rex runs a pill mill" (trade libel disparagement of his medical office operations).	The committee does not see any inconsistencies. No case has been found that addresses who owns a cause of action for trade libel based on the form of doing business. The medical examples raise interesting, but unresolved questions, which need not be addressed in this instruction at this time.
		Quantification is easy if you can count cans of peas that didn't get sold, but not so easy if medical patients were turned away. This instruction is short on that point too.	As noted in the Directions for Use, quantification of economic loss is a significant burden to recovery in all cases, including loss of sales of peas. A jury instruction cannot say anything to ameliorate the burden.
		Opinion is NOT a defense. For example, "In my opinion Judge X is a child molester." This is actionable slander even if it's an honestly held opinion but untrue. Your 1955 citation is out dated.	The citation on opinion is to *Hofmann Co. v. E. I. du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 397. It's not out of date; it's just does not fully discuss the issue. That is reason the instruction cross refers to CACI No. 1707, *Fact Versus Opinion*.
1900, *Intentional Misrepresentation*, 1902,	Hon. Geoffrey Glass, Judge of the Superior Court of Orange	I disagree with the removal of the word "important" from the fraud instructions. I think it is important that we not force the jury to find fraud for unimportant misrepresentations. It does not look as though the	The requirement of materiality/importance has been made a component of reasonable reliance in CACI No. 1908 rather than as a separate element of the plaintiff's various fraud causes of action. (See *Engalla v.*

Instruction	Commentator	Comment	Advisory Committee Response
False Promise, 1903, *Negligent Misrepresentation*	County	change is required by changes in the law, and the present instruction allows support for the application of common sense.	*Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977 [presumption or inference of reliance arises if there is a showing that a misrepresentation was material].) There really is no authority that it is an element of any of these fraud causes of action.
	Los Angeles County Superior Court, by Janet Garcia, Court Manager	In CACI 1900 we recommend that in element No. 1, the words "an important" should not be deleted.	See response above
1900	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary
1902	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary
1903	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Agree	No response is necessary
1905	State Bar of	Agree	No response is necessary

Instruction	Commentator	Comment	Advisory Committee Response
	California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair		
1907, *Reliance*	Andrew Watry, Attorney at Law, LexisNexis	Add "otherwise" to element 2 so that it would read "[Plaintiff} would not *otherwise* have [bought the house].	The committee does not see this proposed change as an improvement.
1908, *Reasonable Reliance*	Los Angeles County Superior Court, by Janet Garcia, Court Manager	We also recommend that to make CACI 1908 consistent with 1900, "reliance on an important fact" should be included in CACI 1908. Otherwise, a jury could possibly base liability on a trivial or insignificant fact.	The new first paragraph of the instruction presents the materiality requirement.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	This instruction should be more concise and simpler. By instructing the jury that the plaintiff "must first prove that the matter was material" and then defining "material," and by instructing that "if . . . then . . ." and "[h]owever," this instruction seems to be creating things for the jury to keep track of, which may complicate the jury's deliberations. Moreover, we do not agree that "materiality" necessarily comes first in order or importance. Instead, we believe that all of the requirements stated in the instruction are essential to a finding of reliance. We propose the following language in lieu of the proposed instruction: "[*Name of plaintiff*]'s reliance on [*name of defendant*]'s [misrepresentation/concealment/ false promise] was reasonable if: 1. A reasonable person would find the	The committee does not view the proposed rewrite as improving the instruction. There are three points to this instruction: materiality; plaintiff's particular intelligence etc. and things too preposterous to believe. If there is no materiality, then there is no need to proceed to the other two issues. Therefore, it is appropriate to set up materiality as an initial condition. Words like "if," "then." and "however," help guide the jury through the steps.

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		representation important in determining his or her choice of action; and "2. It was reasonable for [*name of plaintiff*] to rely on the [misrepresentation/ concealment/false promise] considering [his/her] intelligence, knowledge, education, and experience. It is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] if facts that are within [his/her/its] observation show that it is obviously false." OR "In determining whether [*name of plaintiff*]'s reliance was reasonable, you must consider whether a reasonable person would find the [misrepresentation/concealment/false promise] important in determining his or her choice of action and whether it was reasonable for [*name of plaintiff*] to rely on the representation considering [*name of plaintiff*]'s intelligence, knowledge, education, and experience. "It is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] if facts that are within [his/her] observation show that it is obviously false."	
		The Directions for Use should alert the user to special circumstances involving the instruction and may include references to other instructions and suggestions for modification of the instruction, as appropriate, as stated in the User Guide. The revised Directions for Use for this instruction, however, do not include such information. We suggest that consideration be given to	The proposed Directions for Use explain the three components of the instruction with citations. Then in the Sources and Authority, the cases cited are excerpted for the points made in the Directions for Use. The committee does not believe that there is pertinent information that has been omitted.

Instruction	Commentator	Comment	Advisory Committee Response
		including in the Sources and Authority the matters discussed in the revised Directions for Use and that the language in the revised Direction for Use be replaced with the following: "Give this instruction with CACI No. 1907, *Reliance*."	The committee agrees that a cross reference to CACI No. 1907 is useful and has added it. However, 1907 need not always be given. There may be no dispute as to actual reliance.
2201, *Intentional Interference With Contractual Relations—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees with the proposed revisions, except that we believe the jury should be instructed on the two alternatives in element 3 in the disjunctive, rather than only one or the other. *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1154, stated that the plaintiff may plead that the defendant intended to interfere with the plaintiff's prospective economic advantage or "may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." We see no reason that the plaintiff should be required to choose between these two alternatives for purposes of jury instructions if the evidence may support either finding and can see nothing in *Korea Supply* suggesting that the plaintiff can proceed on only one theory and not the other.	The committee agrees and has made this revision.
2202, *Intentional Interference With Prospective Economic Relations—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee suggests modifications to this instruction similar to those suggested above to CACI No. 2201 for the same reason:	The committee agrees and has made this revision.
2203, *Intent*	State Bar of California, Litigation	We also believe that the proposed revisions to CACI Nos. 2201 and 2202 make unnecessary a separate instruction that "intent" for the purpose of these	The committee agrees and proposes revoking CACI No. 2203 at this time. Although revoking 2203 was not posted for public comment, the committee believes that

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	Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	instructions includes knowledge of certainty or substantial certainty to occur. We therefore would delete CACI No. 2203, *Intent*. Moreover, we find the language of that instruction somewhat inaccurate in stating that the jury "may" rather than "must" consider whether the defendant knew that a disruption was substantially likely to occur.	revocation is noncontroversial and need not be posted. The purpose of 2203 is now fully addressed by the revisions proposed for 2201 and 2202.
VF-2201, *Intentional Interference With Contractual Relations*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We suggest modifying this verdict form to reflect our proposed modifications to CACI No. 2201.	The committee agrees and has made this revision.
VF-2202, *Intentional Interference With Prospective Economic Relations*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We suggest modifying this verdict form to reflect our proposed modifications to CACI No. 2202.	The committee agrees and has made this revision.
2440, *False Claims Act: Whistleblower Protection—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee commented at length on this instruction when it was first proposed in CACI 12-02. We have many of the same concerns with this revised instruction. We believe that the essential elements should be fewer in number and should incorporate the alternative grounds for an "act in furtherance" of a false claims action, rather than state those grounds at the end of the instruction. This is consistent with CACI's policy to "avoid separate definitions of legal terms wherever possible. Instead, definitions have been incorporated into the language of the instructions," as stated in the User Guide, Titles and Definitions.	The commentator misconstrues the User Guide. The policy is not to avoid definitions. It is to, whenever appropriate, to define terms within the instruction in which the term appears rather than to have a separate definitional instruction. The way that this instruction addresses "acts in furtherance" conforms to the preferred practice. The commentator would collapse all of the "in furtherance of" points into the substantial-factor element. The committee believes that this would make that element unnecessarily complex.

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		We can see no support in the Sources and Authority for the stated requirement in element 2 that the false claimant must be under investigation for or charged with submitting a false claim. This purported requirement would not be satisfied in many cases where no false claims action was ever filed but the plaintiff had reasonable suspicions of a false claim.	The committee has revised element 2 to remove the option group for things that the false claimant might have done to defraud the government. Instead, this element now simply states that the false claimant "was alleged to have defrauded the government … ."
		Replace current elements 3 and 4 with a new element 2: 2. That [*name of plaintiff*] [filed a false claims action/acted in furtherance of a false claims action/had reasonable suspicions of a false claim, and it was reasonably possible for [*name of plaintiff*]'s conduct to lead to a false claims action/acted to stop a false claim]; ~~3. That [*name of plaintiff*] [*specify acts done in furthering the false claims action or to stop a false claim*];~~ ~~4. That [*name of plaintiff*] acted [in furtherance of a false claim action/to stop a false claim];~~	The commentator does not say exactly why elements 3 and 4 should be deleted, other than the general comment that we have too many elements. Proposed element 2 is an expanded version of the committee's element 4, bringing in the definitions of "in furtherance of," which the committee presents separately at the end. Element 3 tells the jury the specific conduct that the plaintiff allegedly did that led to the adverse action. The committee believes that this is important and should not be deleted. Element 4 is a conclusion from the element 3 acts. The commentator's proposed element 2 does the same thing. The committee does not believe that any of the commentator's proposed revisions improve the instruction.
		A "false claims action" is defined in the initial paragraph largely by reference to a "false claim," but the latter term is not defined. We suggest adding a definition or description of a "false claim" to the initial paragraph of the instruction.	The committee agrees and has added a sentence to the initial paragraph defining a false claim.

Instruction	Commentator	Comment	Advisory Committee Response
		Government Code section 12653 protects not only employees, but also contractors and agents. We believe that the Directions for Use should note the need to modify the instruction if a contractor or an agent, rather than an employee, is involved.	The statute is included in the Sources and Authority. The committee does not believe that that this point is so crucial that it also requires special attention in the Directions for Use.
		Government Code section 12653 provides protection not only where the employee, contractor or agent committed an act in furtherance of a false claims action or made efforts to stop a false claim, but also where "associated others" did so. We suggest noting this in the Directions for Use and stating that the instruction can be modified if an act in furtherance by "associated others" is at issue.	The committee also does not believe that that this point is so crucial that it also requires special attention in the Directions for Use.
2512, *Limitation on Damages—Same Decision*	California Employment Law Association, by David M. deRubertis	CELA submits that the second paragraph should be changed as follows with the changes identified in bold: If you find that [discrimination/retaliation] was a substantial motivating reason for [*name of plaintiff*]'s [discharge/[*other adverse employment action*]], you must then **decide whether** [*name of defendant*]' s stated reason for the [*discharge/ other adverse employment action*] **was also a motivating reason for the [discharge/***other adverse employment action***] and whether based on that stated reason, standing alone, the employer would have taken the same action in [discharging/engaging in other adverse employment action] against [*plaintiff*] even if [***name of defendant***] had not been substantially motivated by [discrimination/retaliation].** The second paragraph of the proposed draft somewhat misleads the jury by instructing it that it must merely "consider" the employer's stated reason. In fact, the jury must do more than merely "consider" the employer's stated reason, it must initially conclude that the employer's stated reason did motivate the adverse action	The committee believes that the commentator's proposed sentence attempts too much, and it's not necessary. The second paragraph of the committee's proposed instruction tells the jury to move on and consider the employer's reason. The third paragraph then tells the jury what that "consideration" requires. The committee finds this to be clearer than the proposed revision.

Instruction	Commentator	Comment	Advisory Committee Response
		and then it must consider whether based on that legitimate stated reason, standing alone, the employer would have made the same decision. CELA submits that there is no reason for the second paragraph to fail to explain this entire framework of the defense. The proposed revision above corrects this because it explains to the jury the process it must engage in before telling the jury how to engage in that process, which the third and fourth paragraphs then do.	
		Without the changes suggested above to the second paragraph, the jury may not realize that it actually must make a finding that the employer was truly motivated by the stated legitimate reason. In the proposed draft, the second paragraph as phrased just tells the jury it "must then consider [the employer's] stated reason .. .. " But, it never actually tells the jury that it must find that the employer was, in fact, motivated by the stated reason. The third paragraph seemingly does so, but only in a less than direct way- i.e., "If you find that [e.g., plaintiff's poor job performance] was also a motivating reason then you must determine .... "	The fourth paragraph of the committee's proposed instruction tells the jury that "In determining whether [*e.g., plaintiff's poor job performance*] was a substantial motivating reason, determine what actually motivated [*name of defendant*], not what [he/she/it] might have been justified in doing.
		The phrase "even if [he/she/it] had not taken the [discriminatory/retaliatory] reason into account"- is confusing and misleading. The problem with this phraseology is it focuses on a discriminatory or retaliatory reason when, in fact, the real issue is whether one's discriminatory and retaliatory animus or state of mind influenced the decision to take certain action. This can be easily fixed by using the same language as we propose to include in the second paragraph above. Thus, we propose the following language instead: **" … had not been substantially motivated by a discriminatory or retaliatory reason."**	The committee agrees and has made this change.
		The fourth paragraph fails to require all essential findings for the defense to be proven. A key requirement	The purpose of the fourth paragraph is simply to clarify to the jury that this is a subjective, not an objective,

Instruction	Commentator	Comment	Advisory Committee Response
		of the defense is that the jury find not only that the employer was in fact motivated in part by legitimate reasons, but also that "the employer proves it would have made the same decision without any discrimination." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232.) The fourth paragraph does not require such a finding. Instead, it only requires that the jury find that the employer was "actually motivated" by the stated reason. We acknowledge that the required findings are stated in the third paragraph. However, it makes no sense and is confusing to repeat one of these required findings (i.e. , whether the employer was motivated by the stated legitimate reason) and not to include the additional required finding (i.e., that it would have taken the same action based solely on that legitimate reason). This is a recipe for juror confusion, and inadequate findings.	query. It does not make any difference what a reasonable employer might have been justified in doing. The question is what did this employer actually do. The committee believes that this is a point that merits emphasis in a separate paragraph, but that there is no need to repeat the third paragraph in the fourth.
		The fourth paragraph (and the instruction as a whole) never tells the jury the effect of a proven same-decision defense. Other CACI instructions properly advise the jury of the effect of a finding, and this should be no different. For example, CACI 2407 says: "[*Name of defendant*] claims that if [*name of plaintiff*] is entitled to any damages, they should be reduced by the amount that [he/she] could have earned from other employment." Thus, here too, the instruction should explain that if a defendant employer proves its same-decision defense, the employee cannot be awarded any damages.	Unlike the examples cited in the comment, there is no role for the jury with regard to the limitation on remedies under *Harris*. Nevertheless, for reasons advanced by the State Bar Litigation Section Jury Instruction Committee below, the committee has added an additional paragraph informing the jury of the effect of its finding the employer's same-decision defense to be proved. See also the committee's report to the Judicial Council, page 6.
		The inclusion of the word "actually" before "motivated" in the fourth paragraph creates a potential problem in cases of implicit bias or action taken based on biased stereotyping. In such cases, a biased action can be taken by someone who may not not "actually" realize he or she is acting out of biased motives. This is because bias has become ingrained in one's world view so that the	This paragraph has nothing to do with whether or not there was discrimination, overt or implicit. It has to do with whether the employer was *actually* motivated also by its alleged *nondiscriminatory* reason.

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		individuals is not necessarily consciously aware of the biased reasoning, but acts on it nonetheless (such as through the application of biased stereotypes). The inclusion of the word "actually" permits a decision-maker to deny liability by saying he or she did not "actually intend" to discriminate, when in some cases the actual intent to discriminate may be lacking, but the implicit bias may produce a discriminatory result nonetheless.	
		The "Directions for Use" should clarify that this instruction only applies to claims for disparate treatment discrimination and retaliation. This is necessary to ensure confusion does not result, such as by an attempt to apply a mixed-motive defense to non-intent based claims, such as a failure to accommodate or failure to engage in the interactive process claim.	The committee does not believe that this would be an appropriate addition. The court in *Harris* did not say to what conduct its holding does *not* apply. That is left for another day.
	California Judges Association	This instruction follows and correctly states the law from the recent case of *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203.	No response is necessary.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The title "Limitation on Damages—Same Decision" suggests a limitation on the amount of damages, but a same-decision showing precludes an award of damages altogether. "*Affirmative Defense—Same Decision*" would be a more accurate title. We suggest that the title should be so modified.	The committee agrees that the title should be changed by changing "Limitation of Damages" to "Limitation on Remedies." However, the committee does not believe that same-decision is a true affirmative defense. An affirmative defense bars all liability, which is not the case here. Yet the procedural stance is the same as an affirmative defense; the employer must plead and prove it. In *Alamo v. Practice Management Information Corp.* (2013) – Cal.App.4th --, -- , the court recognizes this distinction, yet still uses "affirmative defense."
		We believe that this instruction should be more concise. The first paragraph begins with a recap of the plaintiff's claim, but this is unnecessary because this instruction	The committee believes that this paragraph is very helpful to a jury because it sets forth the essence of the case: Was the plaintiff fired for a discriminatory

Instruction	Commentator	Comment	Advisory Committee Response
		will follow another instruction in which the plaintiff's claim will be clearly stated.	reason or a valid reason?
		The second paragraph states that if the jury finds that discrimination or retaliation was a substantial motivating reason, then it must consider the defendant's stated reason. But the jury should consider the defendant's stated reason in deciding whether the defendant was motivated by discrimination or retaliation or instead acted for a legitimate, nondiscriminatory reason, rather than only after making that determination. We believe that "if . . . then . . ." does not accurately describe the appropriate thought processes and provides no useful guidance to the jury.	While it is true that the jury must first evaluate the employer's stated reason for the adverse action in determining whether it was pretext to disguise a prohibited motive, the committee believes that the second paragraph does provide useful guidance to the jury. On finding that there was a prohibited motivating reason, the jury must turn once again to the employer's purported reason and evaluate it under *Harris* (unless it previous determined that the reason was pretext).
		The fourth paragraph conveys the point that the defendant's stated reason counts only if that reason actually motivated the defendant's decision, at least in part. We believe that this could be stated more clearly and concisely. It seems inaccurate to state that the jury must determine "what actually motivated [*name of defendant*], not what [he/she/it] might have been justified in doing" if what actually motivated the defendant was a combination of discrimination or retaliation and a legitimate reason. Our suggested language states that the defendant must have based its decision on both discrimination or retaliation and a legitimate reason for the defense to apply, and we believe this is sufficient to convey the point.	The committee believes that it is important to stress to the jury that it is the employer's actual (subjective) reason that it must evaluate, not what an (objective) reasonable employer could have done. The commentator's proposed revised instruction does not make this distinction adequately.
		Harris, supra, 56 Cal.4th 213 at p. 241, states "[A] jury in a mixed-motive case alleging unlawful termination should be instructed that it must find the employer's action was substantially motivated by discrimination before the burden shifts to the employer to make a same-decision showing, *and that a same-decision showing precludes an award of reinstatement, backpay, or damages*." (italics added) The proposed instruction	The committee reluctantly agrees with this comment. See its report to the Judicial Council for further discussion.

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		does not explain the consequences of a same-decision showing, as we believe it should.	
		We suggest the following complete instruction in lieu of the proposal: "[*Name of defendant*] claims that [*name of plaintiff*] [was discharged/[*other adverse employment action*]] because of [*specify reason, e.g., plaintiff's poor job performance*], which is a lawful reason. [*Name of defendant*] is not liable for any damages if [his/her/its] decision to [discharge/refuse to hire/[*other adverse employment action*]] [*name of plaintiff*] was motivated by both wrongful [discrimination/retaliation] and a legitimate, [nondiscriminatory/nonretaliatory] reason and [*name of defendant*] proves by a preponderance of the evidence that [he/she/it] would have [discharged/refused to hire/[*other adverse employment action*]] [*name of plaintiff*] at the time based on that legitimate reason alone."	This proposed revised instruction contains things that are not needed (preponderance of the evidence) and does not comply with the direction in *Harris* to tell the jury about reinstatement and back pay. It also lacks the point about what actually motivated the employer rather than what a reasonable employer might have done. The committee believes that its proposed instruction is much clearer to the jury. The first paragraph sets out the positions of the two sides. The second paragraph tells the jury what to do next. The third tells them how to do it, and the fourth emphasizes a point that may likely be misapplied.
		The second paragraph of the Directions for Use distinguishes pretext from mixed motive. We believe that the distinction does not affect the decision whether to give this instruction. The instruction should be given if the defendant asserts the defense and there is substantial evidence that the decision was based at least in part on a legitimate, nondiscriminatory reason. The jury then decides (1) whether wrongful discrimination or retaliation was a substantial motivating factor, (2) whether the decision was also motivated by a legitimate reason, and (3) whether the defendant would have made the same decision anyway for that legitimate reason. The jury's answers to these questions may indicate pretext or establish the same decision defense, but this does not affect the decision whether to give the instruction and therefore does not belong in the	As noted above by this commentator, the jury must evaluate the employer's purported nondiscriminatory reason at two different steps. First, it must determine whether it was or was not just a pretext to disguise an unlawful reason at the commentator's step (1). By determining that it was not a pretext, the jury effectively decides the commentator's step (2). It then proceeds to the commentator's step (3). The committee believes that it is very important to point out to the jury how pretext and same-decision interact. It does not find anything in the comment that would lead to the conclusion that this paragraph should be deleted.

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		Directions for Use. We also find the language of the second paragraph somewhat troublesome, but rather than revise it would delete the second paragraph entirely.	
		The third and fourth bullet points in the Sources and Authority concern pretext, which is not the subject of this instruction. We would delete them and also would delete the fifth bullet point on the "same actor" defense, which seems out of place here. We believe that the authorities cited should be more specific to the instruction.	The committee believes that the third and fourth case excerpts in the Sources and Authority, which address pretext, are very relevant to this instruction. The committee does agree that the same-actor excerpt is off point and has removed it.
		Add to Sources and Authority: " '[W]e hold that preponderance of the evidence is the standard of proof applicable to an employer's same-decision showing.' (*Harris, supra,* 53 Cal.4th at p. 239.)"	The committee agrees and has added this excerpt.
		Add to Sources and Authority: " 'To be clear, when we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision at the time it made its actual decision. (See Price Waterhouse, supra, 490 U.S. at p. 252 ["proving ' "that the same decision would have been justified . . . is not the same as proving that the same decision would have been made" ' "]; ibid. [employer cannot make a same-decision showing "by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision"].)' (*Harris, supra,* 56 Cal.4th at p. 224.)"	The committee agrees and has added this excerpt.
		Add to Sources and Authority: "Same decision is an affirmative defense. (*Harris, supra,* 53 Cal.4th at pp. 239-240.)"	The committee does not believe that this excerpt is appropriate. First, it is not a direct quote from *Harris*. The court calls it a "defense," but does not use the word "affirmative." The committee does not believe

Instruction	Commentator	Comment	Advisory Committee Response
			that same-decision is a true affirmative defense, as noted above.
	Andrew Watry, Attorney at Law, LexisNexis	Will users understand the use of "same decision" in title? I think the committee discussed a bit, but it seems a vague term. It'll make word searches difficult I think.	It's the term adopted in *Harris*. The committee believes that the term used by the supreme court should be used in the instruction.
2513, *Business Judgment*	California Employment Law Association, by David M. deRubertis	New 2513 "Business Judgment" is proposed in response to *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, which held that it was error to refuse to give a "business judgment rule" instruction. There, the appellate court approved of the following instruction (which the trial court denied): "All employment in California is what is called 'at will,' unless there is a written contract providing that the employee can only be terminated for 'good cause. At will employment means that either the employee or the employer may end the employment relationship at any time, or for no reason, except that the employer may not end the employment relationship if motivated to do so by discrimination or retaliation." *Veronese, supra,* 212 Cal.App.4th at 23, fn. 11. The proposed instruction is phrased in a wholly argumentative, repetitive manner that unduly emphasizes an employer's "at will" prerogative. Rather than simply stating that the "at will" nature of the employment means that an employer can terminate an employee for any nondiscriminatory/nonretaliatory reason (even if the reason is a poor reason), the proposed instruction contains a literal barrage of repetitive argumentative words- "for no reason, or for a good, bad, mistaken, unwise, or even unfair reason." This unduly emphasized and repetitious phraseology casts a much wider net of immunity over the employer's decision making than the instruction approved in	The trial court actually gave the instruction quoted in the comment. The appellate court in *Veronese* found it insufficient. The committee believes that *Veronese* stands for the proposition that stronger language on "at will" than that given by the trial court is required. This conclusion is bolstered by the fact that the author of *Veronese* is a member of the committee. The committee's proposed instruction is lifted from the language of the case.

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		Veronse. In fact, CELA submits that not one single CACI instruction has ever been phrased in such an argumentative and repetitive manner.	
	California Judges Association	The Directions for Use to this instruction correctly cite *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, that it is error not to give this instruction. The instruction correctly sets forth the law from that case.	No response is necessary.
	Orange County Bar Association, by Wayne R. Gross, President	This proposed Instruction uses the word "fire," in connection with bracketed language at its third line regarding the adverse action allegedly taken by an employer. The use of this term, while consistent with the language of the authority cited for the proposed Instruction and understood only to be a suggestion, is inconsistent with other instructions which, in similar circumstances, use the word "discharge." The use of the word "fire" not only appears pejorative, but the introduction of another term for what is and had always been referred to as "discharge," may actually cause confusion or speculation in the mind of the juror. For these reasons, it is believed that the word "discharge" should be substituted for "fire."	The committee agrees on the consistency point and has changed "fired" to "discharged."
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We believe that an instruction on the business judgment rule should more closely follow the instruction that was improperly refused in *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, which stated: "You may not find that [employer] discriminated or retaliated against [employee] based upon a belief that [employer] made a wrong or unfair decision. Likewise, you cannot find liability for discrimination or retaliation if you find that [employer] made an error in business judgment. Instead, [employer] can only be liable to [employee] if the decisions made were motivated by discrimination or retaliation related to [employee's protected status]" (*Veronese, supra,* 212 Cal.App.4th at	The court in *Veronese* did say that it was error not to give this instruction. Nevertheless, the committee does not believe that this exact language is required. The committee believes that any language that adequately makes the points is sufficient. The main problem that the committee has with this instruction is the inclusion of the term "business judgment." The committee is concerned that a jury will misapply the pretext analysis, finding that the employer's reason must be valid if it reflects its business judgment, even if the reason is a pretext for discrimination.

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		p. 20.)	
		The proposed instruction states that the plaintiff must prove each element, which is stated in the essential factual elements instruction and need not be repeated here.	The committee agrees and has removed the first sentence of the instruction.
		The instruction states that employment is presumed to be "at will," but *Veronese* never stated that the business judgment rule is limited to "at will" employment. It seems that the business judgment rule precludes liability for discrimination or retaliation whenever an adverse employment decision is based on a nondiscriminatory and nonretaliatory reason, regardless of whether the employment is at will or terminable only for cause. (*Veronese, supra*, 212 Cal.App.4th at p. 21.)	The committee believes that this instruction would only be given for at-will employment. If there is a "good cause" limitation, then there must be cause, which means that no reason, a bad reason, or an unfair reason would not be sufficient.
		We believe that the instruction refused in Veronese accurately states the rule and that the proposal does not.	See response above to same comment made by CELA.
	Andrew Watry, Attorney at Law, LexisNexis	I strongly feel "business judgment" in the title of 2513 will create a lot of confusing hits for folks looking for the business judgment rule by word searches.	The committee presumes that the commentator is referring to a different business judgment rule, for which this instruction will produce a false hit in a search. The term "business judgment" is used in *Veronese*. The committee's instruction uses the term only in the title.
		I know the cases say "good, bad, mistaken, etc..." but I worry that using the word "bad" in the text of the instruction may lead jurors who aren't up on this stuff to not discriminate between a bad but legal decision and a bad but illegal one. I would take "bad" out of the instruction text.	The committee does not think that there is any significant likelihood of confusion.

Instruction	Commentator	Comment	Advisory Committee Response
2527, *Failure to Prevent Harassment, Discrimination, or Retaliation—Essential Factual Elements—Employer or Entity Defendant*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Government Code section 12940(k) states that it is an unlawful employment practice "to fail to take all reasonable steps *necessary* to prevent discrimination and harassment from occurring" (italics added). Yet the instruction refers to only "reasonable steps." We believe that "all reasonable steps" could be construed as broader than "all reasonable steps necessary." We therefore would insert "necessary" after "reasonable steps" where those words appear in elements 3 and 5 of this instruction and in its title in order to more closely comport with the statutory requirement.	CACI No. 2527 is in this release only to add a cross reference to proposed new CACI No. 2528. Because the committee has decided to withdraw 2528 for further consideration, 2527 will also be withdrawn. This comment will be considered in the next release cycle.
2528, "*Reasonable Steps to Prevent Harassment" Explained*	California Employment Law Association, by David M. deRubertis	CELA submits that this instruction should also include an item as follows: "(f) Took reasonable steps to investigate and remedy any prior allegations of harassment and did not retaliate against those who reported harassment." The California Supreme Court has made clear that evidence of prior complaints of harassment and the employer's response to them is probative evidence of whether the employer took reasonable steps to prevent and correct harassment (an element required for an "avoidable consequences" defense). (*State Department of Health Services v. Superior Court (McGinnis)* (2003) 31 Cal.4th 1026, 1044.) Thus, the one key component of effectively taking all reasonable steps to prevent harassment is promptly investigating and remedying such complaints. (*Id.* at p. 1046.)	The committee has decided to withdraw this instruction at this time for further consideration in the next release cycle. The regulation on which this instruction is based addresses only the employer's general anti-harassment policies. If a "failure to prevent" claim does focus primarily how the employer investigated (or did not investigate) the particular harassment claim at issue in the case (or in previous ones), that point should most likely be included in the instruction itself. Further research is required.
	California Judges Association	This instruction correctly sets forth the law contained in Fair Employment and Housing Commission Regulations Title 2, §7287.6(b)(3).	No response is necessary.
	State Bar of California,	The committee disagrees with this proposed new instruction. Government Code section 12940(k)	The comment is correct in that the regulation is specifically directed toward harassment under (j)(1)

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	Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	imposes liability for an employer's failure to take all reasonable steps necessary to prevent discrimination and harassment from occurring. There is no requirement that the employer must have known of discriminatory or harassing conduct to be liable under this provision. Section 12940(j)(1) imposes liability against an employer for harassment by a co-worker or a nonemployee, but only if the employer knew or should have known of the harassment but failed "to take immediate and appropriate corrective action." The cited regulation (2 Cal. Code Regs., § 7287.6(b)(3)) identifies "reasonable steps to prevent harassment from occurring" not for the purposes of establishing liability for failure "to take all reasonable steps necessary to prevent discrimination and harassment from occurring" under section 12940(k), but for the purpose of imputing knowledge to the employer and establishing liability under section 12940(j)(1) for harassment by a co-worker or nonemployee. The proposal cites no authority for the proposition that the nonexclusive list of reasonable steps in the regulation is an appropriate guide for purposes of liability under section 12940(k) for failure to take all reasonable steps necessary to prevent (discrimination and) harassment from occurring.	and not under (k). This point will be considered in the next release cycle.
		We are concerned that instructing on such a list of "reasonable steps" could cause the jury to conclude that an employer necessarily satisfies its duty by performing the listed steps. We believe that the reasonableness standard does not necessarily lend itself to a listing in this manner. We note that the listed steps do not include taking immediate and appropriate corrective action when discrimination or harassment occurs, which seems necessary to prevent similar conduct in the future.	This comment will be considered further in the next release cycle.
2543, *Disability*	California Employment Law	Any instruction defining "essential functions" must include the threshold point that an "essential function"	The regulation includes the "marginal" point but not the "desired result" point. The committee has added

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Determination – "Essential Job Duties" Explained	Association, by David M. deRubertis	focuses on the desired result not the means or manner of achieving it. It should also define what constitutes a "marginal" and nonessential function. (See 2 Cal. Code Regs. § 7293.6(e)(3).) CELA proposes the following addition to the introductory paragraph: "Essential job duties do not include the marginal duties of the position. "Marginal duties" of a position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way. The essential function analysis focuses on the desired end result not on the particular means or method used to accomplish the desired end result."	the regulation, but at the end of the instruction, not in the opening paragraph.
		The FEHC's recently adopted disability regulations provide a clearer, more plain language and more complete list of evidence of what constitutes an essential function. (See 2 Cal. Code Regs. § 7293.6(e)(2).) CELA proposes that the factors be revised to include the factors listed in the revised disability regulations.	The regulation adds one more factor in (e)(2)(H). The committee has added this factor. Factors (A)−(G) are essentially the same as those in the statute. The statutory language has been changed for plain-English purposes. The committee sees no need to reevaluate these choices just because the regulation may deviate in some slight way from the statute.
	California Judges Association	This instruction correctly sets forth the law contained in Government Code §12926(f).	No response is necessary.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The first sentence of this instruction repeats an essential element on which the jury will be instructed under another instruction. We believe that to repeat an essential element in this manner creates an undue emphasis on that element and should be avoided.	The committee agrees and has removed the first sentence.
		The first sentence also seems to place the burden of proof on the defendant that plaintiff was unable to perform an essential job duty, but the law is that the plaintiff has the burden to prove that he or she was able to perform the essential job duties. (*Green v. State of*	The committee agrees and has removed the first sentence.

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		California (2007) 42 Cal.4th 254, 262.)	
		The second listed factor should more closely follow the statutory language, which makes it clear that a job function can be distributed to more than one employee and need not be taken on by a single employee. We also believe that the wording of the three factors should be more closely parallel. Accordingly, we would modify the second factor as follows: "b. ~~The~~ Whether a limited number of employees are available ~~who can perform~~ among whom that duty can be distributed;"	The committee agrees that parallel language is better and has revised the factor to begin with "whether." The committee does not find "among whom that duty can be distributed" to be appropriate plain English.
VF-2515, *Limitation on Remedies—Same Decision*	California Employment Law Association, by David M. deRubertis	*Harris* made clear that mixed-motive is in the order of an affirmative defense. (*Harris, supra*, 56 Cal. 4th at pp. 239-241.) Thus, it only comes into play if and after the plaintiff has proven the elements of the claim. Interjecting elements of an affirmative defense into the elements of the prima facie case makes no sense, is unsupported by any law, and contrary to the CACI approach to other affirmative defenses. For example, CACI has affirmative defense verdict forms for many other defenses that are their own separate verdict forms to be answered following a full determination of the plaintiff's prima facie case. See e.g., CACI Nos. VF-2510, VF-2512.	The committee has revised this verdict form to incorporate the same-decision defense with the plaintiff's discrimination or retaliation claim into a complete verdict form. The proposed approach of presenting the defense only with directions on how to incorporate it into another verdict form actually would yield the same result. However, the committee has decided to retain its more traditional approach of presenting defenses. (For purposes of constructing a verdict form, the committee agrees that same-decision should be treated as if it were a true affirmative defense.)
		The way that this verdict form is constructed is a recipe for needless burden on our courts- both at the trial and appellate levels. Consider a case in which the trial or appellate court finds instructional error on the defense, but the jury found the defense to have merit. By having a jury decide only part of the elements of the prima facie case and then decide the defense's elements before finishing deciding the prima facie case elements, the	All CACI verdict forms that combine claims and defenses place the defense before the substantial factor and damages questions. Whatever risk there might be of having to retry liability on reversal based on the defense is outweighed by the inefficiency of having the jury find damages before making a finding on the defense. If the defense is found to bar liability, the time spent on damages is wasted.

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		jury may end up not fully deciding whether the plaintiff proved the prima facie elements. If the case is then appealed and there is a determination that the instruction or verdict form as to the defense was erroneous, an entire plenary new trial would be required because the jury did not even find all of the elements of the prima facie case. In contrast, if the defense is its own separate verdict form, any error that is limited to the defense may only require a retrial for the defense itself. The jury's prima facie liability findings could be kept intact.	
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	We would entitle this verdict form "Affirmative Defense—Same Decision" because we believe that same decision is an affirmative defense, as explained above.	See response to commentator's same issue with regard to CACI No. 2512 above. The committee has changed "Limitation on Damages" to "Limitation on Remedies." It does not believe that "Affirmative Defense" should be added.
		The word "solely" in question c does not accurately reflect the holding in *Harris, supra,* 56 Cal.4th 203, which states that the employer must prove that it would have made the same decision absent discrimination, not that it would have made the decision based "solely" on a nondiscriminatory reason.	The committee has deleted the word "solely," both here and in CACI No. 2512.
		The second line of the Directions for Use refers to "VF-2500, Disparate Impact." The reference should be to "VF-2500, Disparate Treatment."	The committee has corrected this error.
2700, *Nonpayment of Wages—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Several of the citations to the California Practice Guide: Employment Litigation (The Rutter Group) in the Secondary Sources seem out of place. We recommend that the Advisory Committee review all of the citations to this treatise here. Examples of possibly incongruous citations are: Citation to ¶ 5:173. This instruction is for use in a case alleging failure to pay wages. Section 5:173 identifies the statutory right to receive wages as a potential basis for a violation of public policy claim. The two are very	Thomson Reuters, who provides the Secondary Sources for Rutter Group publications, confirms that all of the sources referenced in the comment should be removed.

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		different claims, and citing 5:173 as support for the essential elements listed in CACI 2700 seems illogical. Citation to ¶ 11:499. This section contains no content ("reserved"). Citation to ¶ 11:513. This section discusses the timing of payment when an employee resigns. If the drafters consider this authority for the instruction, then ¶ 11:512, which discusses the timing of payment on discharge, and section ¶ 11:514, discussing the requirement that vacation pay be paid upon discharge or termination, should also be cited. Citation to ¶¶ 11:545, 11:547. ¶ 11:540, entitled "Deductions from Wages," explains the rules regarding deducting items from earned wages, and contains a number of subsections that list permissible and impermissible deductions. Nothing in this section serves as direct authority for CACI No. 2700. Further, selecting two items from the list of impermissible deductions seems arbitrary. (Those two items are no right of offset for an employee's debts to employer, ¶ 11:545, and no deduction for business losses caused by employee negligence, ¶ 11:547.)	
2730, *Whistleblower Protection—Essential Factual Element*s	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	Labor Code section 1102.5 protects employees from retaliation not only for disclosing a legal violation but also for refusing to participate in an activity that would result in a legal violation, as stated in this instruction. The new language "Disclosure of Legal Violation" in the title is an incomplete description of this instruction and therefore is somewhat misleading. We would delete this new language.	The committee agrees and has removed this language from the instruction title.
		We would insert the words "by a preponderance of the evidence" in the last sentence of the instruction so it	CACI No. 2730 is in the release primarily to add a cross reference to new CACI No. 2731. This comment

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		reads, "In order to establish this claim, [*name of plaintiff*] must prove by a preponderance of the evidence all of the following:" Labor Code section 1102.6 states that the standard of proof under section 1102.5 is preponderance of the evidence, as quoted in the Sources and Authority. Particularly when CACI No. 2731 is given, which states the clear and convincing evidence standard applicable to the same decision affirmative defense, it would be helpful to specify the different standard of proof applicable under this instruction.	presents new material not within the scope of the Invitation to Comment. However, the committee elects to address it at this time. CACI standards do not include "preponderance of the evidence" as an expression of the burden of proof. Preponderance is the default burden; if no burden is included, the burden is preponderance.
2731, *Affirmative Defense—Same Decision*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees with the proposal except that we would add the words "for damages" after "the employer may avoid liability" in the Directions for Use. It is not clear from Labor Code section 1102.6 whether the same decision defense is only a defense to damages, as it is for FEHA violations under *Harris, supra,* 56 Cal.4th 203, or a complete defense.	The committee does not see any reason to think that *Harris's* FEHA holding might apply under Labor Code section 1102.6.
		The second bullet point in the Sources and Authority states that the clear and convincing standard under Labor Code section 1102.6 is inapplicable for other statutory violations. We believe that this quotation from *Harris, supra,* 56 Cal.4th 203, is not authority for this instruction and should be deleted.	The committee agrees and has deleted this excerpt from the Sources and Authority.
3027, *Affirmative Defense—Emergency*	California Judges Association, by Lexi Howard, Legislative Director	This new instruction appears useful and CJA supports it. However, there are no Directions for Use. One might conclude that it would apply when a law enforcement officer or agency is charged with unlawful trespass in violation of the 4th Amendment (in essence a civil rights violation under the color of authority) in a civil case seeking damages.	The committee has added a Directions for Use section about the difference between Emergency and Exigent Circumstances.
		The Sources and Authority accurately reflect the current state of the law and are accurately reflected in this CACI instruction with one exception. That exception is that there is one other "prong" in the exceptions to the 4th Amendment "search and seizure" protections. That	Exigency is the subject of CACI No. 3026, *Affirmative Defense—Exigent Circumstances*.

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		prong is "exigency" which is covered in the "Sources and Authority" section and the cited 9th Circuit case, *Sims v. Stanton* (9th Cir. 2013) 706 F.3d 965, 960, and to which this CACI instruction is silent. The *Sims* case does cover emergency as well as exigency. Perhaps "exigency" is so seldom seen in a civil context that a decision was made that no such inclusion is needed; we raise the question of why it is not included, at least in bracketed language, or set forth in a separate CACI instruction.	
3517	California Judges Association, by Lexi Howard, Legislative Director	This instruction appears to accurately reflect the law as most recently expressed in *County of Glenn v. Foley* (2012) 212 Cal.App.4th 393, providing that after the trial judge rules on the reliability of the comparable sales, the jury may consider the evidence that the court allows to be presented through expert testimony. These changes appear useful and unobjectionable and CJA supports this proposal.	No response is necessary.
4109, *Duty of Disclosure by Seller's Real Estate Broker to Buyer*	California Association of REALTORS, by June Babiracki Barlow, Vice President and General Counsel	The placement of this proposed instruction in the series for Breach of Fiduciary Duty is arguably misleading. Acknowledgment of this can be found in the proposal itself. The first sentence under the second paragraph in the "Directions for Use" explicitly states that instruction for breach of fiduciary duty flowing from a real estate broker to his or her client is found in CACI # 4107, *Duty of Disclosure by Real Estate Broker to Client*. The proposed 4109 does not, however, concern a fiduciary relationship between a real estate broker and a client but rather the nonfiduciary relationship between a real estate broker representing a seller and a non-client buyer. The second to the last excerpt in the Sources and Authority recognizes the distinction and explicitly states that the seller's real estate broker does not become a fiduciary of the buyer just because the seller's real estate broker owes some duties to the buyer.	The committee agrees with the comment and has been searching for a more expansive title for this series. But so far, it has not come up with one. The committee will continue the search.

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		The first sentence should be modified as follows: A real estate broker for the seller of property must disclose to the buyer all facts known to the broker regarding the property ~~or relating to the transaction~~ that materially affect the value or desirability of the property. This sentence, as the rest of the proposed jury instruction, is patently derived from, and an attempt to paraphrase, language enunciated in the statutorily required form contained in Civil Code Section 2079.16. The first part of that form defines the duties flowing from a seller's real estate agent to a buyer. The form is created in the context of other parts of Section 2079 which require the real estate broker to conduct a visual inspection of the property. Therefore ,the language "or relating to the transaction" is an inappropriate extension of the legislatively recognized duty that exists between a seller's real estate broker and the buyer.	This instruction is not derived from Civil Code section 2709.16; it is based primarily on *Holmes v. Summer*. ((2010) 188 Cal.App.4th 1510.) *Holmes* is about failure to disclose encumbrances on the property. The committee sees this as "relating to the transaction" and not necessarily captured by "regarding the property.
		The third sentence in the proposed instruction is either unnecessary or out of place. This sentence reads as follows: "A broker must disclose these facts if he or she knows or should know that the buyer is not aware of them and cannot reasonably be expected to discover them through diligent attention and observation." This sentence duplicates the concept in the second sentence, but is stated using a double negative ("is not aware" and "cannot . . . discover"). Taken in its entirety, the proposed instruction first instructs on what the broker is required to do, then what the broker is not required to do, followed by what the broker is required to do-- but only if the double negative exists. As such, the proposed instruction is confusing to follow. Accordingly, C.A.R. recommends that the third sentence	The third sentence is very important to the claim and cannot be removed. But see response immediately below.

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		be removed.	
		If deleting the sentence entirely is not possible, then an alternative would be to place the third sentence before the second sentence. At the very least, the resulting order flow would be easier for a jury to follow because the instructions would first describe what the affirmative duty is. Second, the instruction would state the limitation or subset of the requirement. And then, finally, the instruction would explain when the duty does not exist at all.	The committee agrees that this is a very good idea and has made the proposed revision.
		C.A.R. believes that additional language needs to be added to the proposed instruction in order to make it complete. As stated earlier, the proposed instruction mimics to a great extent the recognized disclosure obligations as set forth in the form mandated by Civil Code Section 2079.16. There is one glaring omission, however. The statute includes the following language, which the proposed instruction does not: "An agent is not obligated to reveal to either party any confidential information obtained from the other party that does not involve the affirmative duties set forth above."	This instruction is not based on the Civil Code section 2079 duties and the form in Civil Code section 2079.16. The "affirmative duties set forth above" relate to the duty to inspect, which is CACI No. 4108, *Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements.*
		There is authority that the following should be added: "Also the broker has no duty to disclose information that is cumulative to information already disclosed by the seller, by the broker or by another third party." (Miller and Starr, California Real Estate; Section 3:39, *Vaill v. Edmonds* (1991) 4 Cal.App.4th 247, 261−263.)	The quoted language is not found in *Vaill*. While the point is undoubtedly correct and *Vaill* implicitly leads to that result, The committee believes that the point is adequately covered by "facts buyer already knows."
		C.A.R. believes there is an overemphasis on the 2010 case of *Holmes v Summer*. Over 60 percent (5 of 8) of the excerpts in the Sources and Authority are to that one particular case. C.A.R. asserts that *Holmes* was an aberration in the real estate market.	Whether or not the case is a factual aberration, the duty set forth in the case is good law.
		With respect to the proposed list of Secondary Sources,	The inclusion of the *Cooper* case is sufficient to make

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		Witkin Summary of California Law, Torts, § 794 primarily focuses on liability for concealment when a defendant has a fiduciary or other confidential relationship with the plaintiff. Although one of the real estate cases cited in § 794, *Cooper v. Jevne* (1976) 56 Cal.App.3d 860 examined a real estate listing broker's duty to disclose materials facts to the buyer when they were not known to the buyer or within reach of the buyer's diligent attention and observation, the title of § 794 and the majority of its content address fiduciary relationships (e.g., architect to client, stockbroker to customer). So § 794 is largely inapplicable to CACI 4109 which deals with the nonfiduciary relationship of a seller's broker to the buyer.	the source relevant.
		The reference to § 61.05 of California Real Estate Law and Practice should be removed, as it is titled "Broker's Fiduciary Duties" and describes a broker's duties to the principal.	LexisNexis Matthew Bender, which provides the Secondary Sources from California Real Estate Law and Practice, agrees that this reference should be removed.
	California Judges Association, by Lexi Howard, Legislative Director	We concur with the language of the proposed instruction, do not suggest any changes to it, and fully concur with the Directions for Use and the Sources and Authority also cited with the proposed instruction. These changes appear useful and unobjectionable and CJA supports this proposal.	No response is necessary.
4302, *Termination for Failure to Pay Rent—Essential Factual Elements*	Richard L. Spix, Attorney at Law, Santa Ana	Trial courts are in need of clear guidance as to the proper plaintiff to maintain an eviction action. The comments should reflect the long term restriction that the property management is not a proper plaintiff. The Cal. Judges Benchguide 31 at § 31.12 states: Only the proper plaintiff, the landlord or successor in estate to the landlord (see CCP §1161(1)), may bring the action. See CCP §§1165, 369. An agent, such as the property manager, cannot sue in his or her own name	Who can and who cannot be an unlawful detainer plaintiff is not a jury issue.

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		(see CC §2322) even if the agent has been given a power of attorney (see *Drake v Superior Court* (1994) 21 CA4th 1826, 1831, 26 CR2d 829).	
VF-4300, *Termination Due to Failure to Pay Rent*	Richard L. Spix, Attorney at Law, Santa Ana	Questions Numbers 3 and 5 are unclear in the use of the term "actually owed," which is ambiguous in that it could be referring to: (1) the amount owed under the contract, or (2) the residual amount owed "taking into account the defective conditions" established by habitability evidence. The questions should specifically refer to the amounts due under the [lease/rental agreement/sublease] consistent with the language used in Question No. 1. Allowing the latter meaning would violate CCP 1174.2 which requires that, upon a finding of a habitability breach, a conditional judgment be entered in favor of the tenant(s). There is no statutory authorization for service by the landlord of some unilaterally reduced three-day notice in anticipation of a habitability defense in order to avoid the "pay and stay" judgment specified in that section.	This verdict form is for use when there is NOT a habitability defense. VF-4301 is for habitability. Therefore, the committee does not see the relevance of the concerns expressed in the comment. (Question 5 does not contain "actually owed.")
		Question Number 6 requests a finding through the "[*date of trial*]," which is used in CCP § 1174.2. But there is ambiguity in that it could mean commencement of trial. However, the landlord is entitled to damages due through the date of the verdict in order to provide complete relief.	As the commentator points out, the Cal. Judges Benchguide 31 at § 31.77 states: " 'Damages' include the reasonable rental value of the premises for the period the tenant continues in possession after expiration of the 3-day notice until entry of judgment. *Superior Motels, Inc. v Rinn Motor Hotels, Inc.* (1987) 195 CA3d 1032, 1066. *Superior Motels* does not say "entry of" judgment, just "judgment. But either makes the computation impossible for the jury as it will have been discharged when judgment is rendered and entered. Therefore, the committee agrees that using the date of the verdict is the best that can be done with an impossible situation.
VF-4301,	California	The verdict form should reference a finding of	The committee has revised Question 6 to reference

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Termination Due to Failure to Pay Rent – Affirmative Defense – Breach of Implied Warranty of Habitability	Apartment Association, by Hedi Palutke, Research Counsel	"substantial" compliance with the implied warranty of habitability, and if the unit was not in compliance, the specific conditions that constitute noncompliance and a substantial breach.	"substantially habitable premises."
		The Directions for Use state that "the court might include a special interrogatory asking the jury to identify those conditions that it found to create uninhabitability and the dates on which the conditions existed." These questions should be part of the instruction text as these are elements of the defense.	While the jury must find uninhabitability to establish the defense, the committee does not think that the particular conditions and the dates need to be identified in the verdict form in order for the jury to determine the defense. CACI standards do not include placing interrogatory questions into a verdict form. The invitation in the Directions for Use is sufficient.
		Consistent with CACI No. 4320, there should be a question to indicate the finding with respect to the tenant's compliance with the affirmative obligations of Civil Code 1941.2. This too is an essential element of the defense.	The committee agrees and has added this question.
	Orange County Bar Association, by Wayne R. Gross, President	The addition of Question 5 and the new language under Question 6 are also confusing and conflict with the proposed "Directions for Use." The Directions provide that for a jury trial, the jury is to decide the amount or percent of rent reduction based on uninhabitable conditions per C.C.P. § 1174.2(d); this instruction always has the judge deciding the amount of rent reduction.	The Directions for Use do not say that the jury is to decide the amount or percent of rent reduction based on uninhabitable conditions. They say that the matter is unresolved. There are judges who feel quite strongly that the issue is clearly one for the jury. Other judges feel equally strongly that the issue is for the court. The committee has expanded the discussion in the Directions for Use to more fully present the problems with the statute. See also the committee's report to the Judicial Council, p. 7.
		It is also confusing to ask the jury to decide the amount of rent due "assuming" habitability when this instruction is based on a lack of habitability.	The committee believes that the verdict form must ask about the unpaid rent before presenting the habitability defense. Unlike holdover damages, the landlord will be entitled to some of the rent even if there is a breach of habitability. Judges want to know the amount of the unpaid rent so that there is a starting point for

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			determining any habitability reduction (whether done by the court or the jury). However, the committee agrees that the use of the word "assuming" can be both confusing and argumentative and has reworded the question to remove "assuming."
	Richard L. Spix, Attorney at Law, Santa Ana	Question Number 3 is unclear in the use of the term "actually owed," which is ambiguous in that it could be referring to: (1) the amount owed under the contract, or (2) the residual amount owed "taking into account the defective conditions" established by habitability evidence. The question should specifically refer to the amounts due under the [lease/rental agreement/sublease] consistent with the language used in question 1. Allowing the latter meaning would violate CCP 1174.2, which requires that, on a finding of a habitability breach, a conditional judgment be entered in favor of the tenant(s). There is no statutory authorization for service by the landlord of some unilaterally reduced three-day rent notice in anticipation of a habitability defense in order to avoid the judgment specified in that section. Since an unlawful detainer is wholly statutory and the plaintiff must strictly comply with the statute as to notice, the question should be clarified.	The committee does not really think that the verdict form need address the possibility that the landlord will consider a possible habitability defense in the three-day notice. However, the committee agrees that specifically referring to the amounts due "under the [lease/rental agreement/sublease]" as used in question 1 is better and has made this change.
		Question No. 5 is conceptually flawed when it instructs the jury to "assume that the property was in habitable condition". That assumption has no place in a neutral verdict form. Instead, Question 5 should merely follow the format of Question Numbers 1 and 3 and use "amounts due pursuant to the [lease/rental agreement/sublease]".	As noted above, the committee has reworded the question to remove the word "assuming."
		Question Number 6 contradicts the law and is confusing to a jury in that it fails to provide a tenant with a defense for a "substantial breach of habitability" as required by	The committee does in fact believe that the habitability defense is a light switch. "Substantial" is required in order to flip the switch. But once flipped, judgment is

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		CCP § 1174.2 (a) and (c). The defense of habitability is not all-or-nothing like a "light-switch", as implied by the current language. The question should be framed in reverse: Did the plaintiff substantially breach the duty to provide habitable premises during the time period rents are claimed in the action?" Directions following Question Number 6 should also be modified to reflect this reversing of the issue.	for the tenant. The landlord will probably still get some rent, but that is irrelevant to question 6. However, the committee agrees that reversing the question along the lines suggested in the comment is a good idea and has made this change. It follows the preferred CACI verdict form standard of having a "no" answer mean "stop" and a "yes" answer mean "go on." The committee has also included the word "substantial."
		The Directions for Use also contradicts the law and encourages trial courts to deny rights to a jury trial on contested issues of fact when it purports to reserve the amount of any habitability reduction to the "court". As acknowledged, CCP § 1174.2(d) provides that "Nothing in this section is intended to deny the tenant the right to a trial by jury." See CCP § 1171. The Directions for Use already make clear that the verdict form is a model only and can be changed if warranted by the facts of the case. The form should not assume a rare occurrence, that the parties have waived important rights to findings by the jury as to the amount of damages. The Cal. Judges Benchguide 31 at §31.73 states: -3- An unlawful detainer action is considered to be an action at law and therefore triable by a jury unless a jury is waived. (CCP §§ 1171, 631 (waiver of jury); *Marquez-Luque v Marquez* (1987) 192 CA3d 1513, 1519; see *Department of Transp. v Kerrigan* (1984) 153 Cal.App.3d Supp 41, 45–46 (defense of breach of warranty of habitability is legal defense triable by jury).	See the committee's response to the comment by the Orange County Bar Association, above, and the committee's report to the Judicial Council, above at p. 7. . (*Department of Transp. v Kerrigan* holds that the defense of retaliatory eviction is a legal defense triable by a jury.).
		In question 8, the term "damages" applies to amounts due after termination of a tenancy by the expiration of a	The instruction does not say "fair market value;" it says "reasonable rental value."

Instruction	Commentator	Comment	Advisory Committee Response
		proper notice to quit. The Cal. Judges Benchguide 31 at § 31.77 states: " 'Damages' include the reasonable rental value of the premises for the period the tenant continues in possession after expiration of the 3-day notice until entry of judgment. *Superior Motels, Inc. v Rinn Motor Hotels, Inc.* (1987) 195 CA3d 1032, 1066. Thus, "damages" may be more or less than the "rents" due under the contract depending on the fair market value of the premises. However, as to a habitability defense, it is important that the jury be given a clear understanding that the residual amount due in VF-4301 has nothing to do with "fair market value". The instruction should use the language found in CCP § 1174.2 (a) "the reasonable rental value of the premises in its . . . [uninhabitable] state." The instruction should avoid the use of "tenantability" which is a narrower concept than habitability as defined in CCP § 1941.1. There is no reason to confuse the jury with the term "tenantability" unless there is an issue of repair and deduct.	The words "untenantable state" are used in the Directions for Use, but not in the instruction itself, so the jury will not hear them.
		Question 7 requests a finding through the "date of trial" which is ambiguous in that it could mean commencement of trial. However, the jury is required to find the reasonable rental value in its uninhabitable state through the date of its verdict in order to provide complete relief.	See response to same comment with regard to VF-4300, above.
	Tenants Together, by Leah Simon-Weisberg, Legal Director	The order of the questions presented in Verdict Form 4301 regarding the breach of the warranty of habitability creates a bias and should be restructured. Question 5 asks the jury to assume that the property is habitable when evaluating damages owed to the plaintiff. Creating	As noted in response to a similar comment by Richard L. Spix above, the committee has reworded the question to remove the word "assuming." The committee does not believe that this question can be moved to follow the habitability question.

Instruction	Commentator	Comment	Advisory Committee Response
		this assumption creates a bias because it asks the jury to assume the property is habitable, even if it is not. Having question 6 then follow, which is limited to a yes or no answer, may lead jurors into believing that finding that a unit is habitable or not is a black and white decision instead of a degreed analysis. We recommend that the instruction include a step by step analysis under California Code of Civil Procedure § 1174.2 before the jurors are asked to look at what contract rent might have been owed at the time of the service of the notice. This same step-by-step analysis should also be included in the corresponding verdict forms.	
		California Code of Civil Procedure § 1174.2 describes the process for applying a breach of warranty defense to an un lawful detainer. The section uses the term "the court" whenever referring to the fact finder. As noted in the Directions for Use, section 1174.2(d) clarifies that nothing in CCP § 1174.2 is intended to deny the tenant the right to a trial by jury. Both the jury instructions and the verdict forms should include the various steps that the juror would take to determine habitability, rental damages and/or reduction of rent. The purpose of the CACI jury instructions and verdict forms is to make available model versions to help with the sometimes contentious process. Rather than solely acknowledging that the jurors can be the fact finders on the amount of rental damages due, it would be extremely helpful to actually include models of what those questions should be.	As noted in response to similar comments above, the committee does not believe that this question is settled.. However, the committee agrees with adding an optional question that can be included if the judge wants to send the issue to the jury.
4302, VF-4300, VF-4301	Hon. Geoffrey Glass, Judge of the Superior	I am not sure why “attempt to pay” was removed from the U/D instruction. Under the new instruction, if the landlord hides and closes the pay slot, so that the tenant	Tender is an affirmative defense. See CACI No. 4327, *Affirmative Defense—Landlord’s Refusal of Rent*. So proof that the tenant did not “attempt to pay” should

Instruction	Commentator	Comment	Advisory Committee Response
	Court of Orange County	cannot actually pay, tenant's attempts to pay become irrelevant. Unless the law has changed, I would allow for unsuccessful attempts to pay.	never have been part of the landlord's elements. But the committee agrees that "attempt to pay" should not have been removed from the verdict forms. CACI verdict forms do not include burden-of-proof language. The committee has restored this language to the verdict forms and has added a sentence to the Directions for Use cross referring to CACI No. 4327.
	Orange County Bar Association, by Wayne R. Gross, President	The only change indicated is the deletion of the "or attempt to pay" language in element 6. However, absolutely no explanation is given for the change, and without more we believe the deletion is incorrect. Some explanation or citation to new authority is necessary as we do not comprehend its purpose. Does not a "tender" of rent within 3 days by the tenant constitute an "attempt to pay" which defeats the claim? (*Mau vs. Hollywood Comm. Buildings* (1961) 194 Cal.App.2d 459; *Walker vs. Houston* (1932) 215 Cal. 742, 746; *Owen vs. Herzihoff* (1906) 2 Cal.App. 622, 623.)	See response to comment of Judge Glass, above.
	Tenants Together, by Leah Simon-Weisberg, Legal Director	The "attempt to pay" provision should remain in the models and not be removed from CACI Nos. 4302, VF-4300, and VF-4301 By omitting the "or attempt to pay" provision, the tenant would be unfairly prejudiced because it would eliminate the valid defense that a tenant may have reasonably and diligently attempted to cure the back rent owed. If this proposed change goes through, it would additionally conflict with the rule that landlords may not thwart the payment of rent by a tenant and must act in good faith. *Strom v. Union Oil Co.* 88 Cal. App. 2d 78 (1948). By removing this provision, tenants would lose their opportunity to use their attempt to tender rent as a defense to an unlawful detainer action.	See response to comment of Judge Glass, above.
4552,	California Judges	Element #1: A definition of "completion" should be	There is no settled definition of "completion;" what it

Instruction	Commentator	Comment	Advisory Committee Response
Affirmative Defense—Work Completed and Accepted—Patent Defect	Association, by Lexi Howard, Legislative Director	inserted or at least cross-referenced. "Completion" can be a term of art in the construction law context, yet the draft does not give the trial judge any guidance as to how to define "completion" for the jury.	means is for the jury to decide. The instruction does provide two situations regarding completion. The Directions for Use note that a project can be complete even in the contractor continues to work on other components of the project. The Sources and Authority cite a case for language that failure to comply with the specifications does not mean that the project is not completed. The committee does not think it necessary to elevate either to the instruction text.
		Element #2: A definition of "acceptance" should be inserted or at least cross-referenced. "Acceptance" is also a term of art yet there is no guidance as to how to define it for the jury. Without such guidance, it is likely that there will be many questions from jurors about what that means but little or no help for a judge to decide the definition in that context. It may be clear from the committee's research but, if it is not defined in the directions, it will take too long for a judge to have a reasonable chance to make the correct decision.	As with "completion" above, there is no settled definition of "acceptance." The plaintiff says that there was no acceptance and here's why not. The defendant says there was too acceptance and here's why. The jury decides who's right based on each side's position. The committee does not think that anything more need be said.
		Element #3 requires that the defect would have been discovered by an average person during the course of a reasonable inspection. That definition is the same as used in element #1 in CACI No. 4550, *Affirmative Defense—Statute of Limitations—Patent Construction Defect*, yet there is no cross-reference to it. There should be some explicit incorporation of, or cross-reference to, the CACI 4550's definition of patent defect. The lack of such a reference could cause needless confusion.	The committee has added a cross reference to CACI No. 4550 to the Directions for Use.
		We are concerned that the supporting material does not discuss when the instruction may not be appropriate. A recent unpublished case, *Murrieta Development Company, Inc. v. Superior Court* (2012) 2012 Cal.App. Unpub. LEXIS 7514, upheld the use of the doctrine in the case of a single vehicle rollover accident that was	There is no suggestion anywhere in the instruction that the doctrine extends outside of negligence. *Murrieta Development* is a negligence case, just like the cases on which the instruction is based. Justice King's dissent in *Murrieta Development*

Instruction	Commentator	Comment	Advisory Committee Response
		alleged to have been caused by a dangerous condition of public property. In that case the driver sued on the theory that a dangerous condition was created during the construction of a development on neighboring property. The majority granted summary judgment for a subcontractor, in part based on the completed and accepted doctrine. Justice King, in dissent, disagreed with the majority as to whether the completed and accepted doctrine can shield a third party from liability. He had an interesting duty analysis and felt that the completed and accepted doctrine is but one factor in determining whether a duty exists. This analysis seems to reflect an evolution in the law governing the liability of contractors who negligently create dangerous conditions on land. (See 6 Witkin, Summary of California Law (10th Ed.) Torts § 1160). We recommend the supporting materials contain a note cautioning that the instruction is suitable for negligence claims but there may be some uncertainty beyond that.	basically says that "completed and accepted" should not be a complete defense, a view that is shared by some committee members as a matter of policy. But it is a dissent in an unpublished opinion. Nevertheless, the committee has added "in negligence" to the Directions for Use.
5000	Hon. Geoffrey Glass, Judge of the Superior Court of Orange County	I would take out the proposed paragraph about the penalties for violating the restrictions on social media. Isn't it in fact contempt to fail to follow any instruction? Why single out this scenario for a "sanctions" speech?	Social media is singled out because jurors' use of it has become a major problem.
	Los Angeles County Superior Court, by Janet Garcia, Court Manager	We are concerned that the reference to being held in contempt for violation of prohibitions on communications and research might be intimidating to jurors, as well as too harsh. The suggested alternative is to advise jurors that there may be "serious legal consequences and/or sanctions" for violating the prohibitions on communications and research.	The committee does not see the proposed language as any less harsh.
		We recommend that the Sources and Authority should make reference to Code of Civil Procedure section 1209(a)(6), which allows for a juror to be held in	The committee has added section 1209(a)(6) to the Sources and Authority.

Instruction	Commentator	Comment	Advisory Committee Response
		contempt for willful disobedience of a court admonishment related to the prohibition on any form of communication or research about the case. See Also Cal. Pen. Code section 1128.	
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben A. Ginsberg, Chair	The committee agrees with the proposal except that we would not bracket the new language either here or in CACI No. 100, Preliminary Admonitions, where the same language appears. It appears that violations of the prohibitions on electronic communications and research are increasingly common, so that an instruction on potential penalties is warranted as a matter of course in every case and should not be optional.	The trial judges on the committee are unanimous in their opposition to mandatory threatening of jurors with contempt or criminal charges.
		We also suggest that some authority be cited for the statement that contempt and other sanctions may apply.	The committee has added section 1209(a)(6) to the Sources and Authority.
All except as noted above	Orange County Bar Association, by Wayne R. Gross, President	Agree	No response is necessary.

CIVIL JURY INSTRUCTIONS (CACI 13–02)
WINTER 2013 REVISIONS—TABLE OF CONTENTS

304. Oral or Written Contract Terms

[Contracts may be written or oral.]

[Contracts may be partly written and partly oral.]

Oral contracts are just as valid as written contracts.

New September 2003; Revised December 2013

Directions for Use

Give the bracketed alternative that is most applicable to the facts of the case.

If the written agreement is fully integrated, the second option may not be appropriate~~is instruction should not be given~~. Parol evidence is inadmissible if the judge finds that the written agreement is fully integrated. (Code Civ. Proc., § 1856(d).)~~:~~ ~~"~~The parol evidence rule generally prohibits the introduction of extrinsic evidence, oral or written, to vary or contradict the terms of an integrated written instrument.~~"~~ (*EPA Real Estate Partnership v. Kang* (1992) 12 Cal.App.4th 171, 175 [15 Cal.Rptr.2d 209]; see Civ. Code, § 1625, Code Civ. Proc., § 1856(a).)

There are, however, exceptions to the parol evidence rule. (See, e.g., *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1174−1175 [151 Cal.Rptr.3d 93, 291 P.3d 316] [fraud exception]; see also Code Civ. Proc., § 1856.) If an exception has been found as a matter of law, the second option may be given. If there are questions of fact regarding the applicability of an exception, additional instructions on the exception will be necessary.

Sources and Authority

- Civil Code section 1622 provides that "all contracts may be oral, except such as are specially required by statute to be in writing." (See also Civ. Code, § 1624.)

- ~~In *Lande v. Southern California Freight Lines* (1948) 85 Cal.App.2d 416, 420 [193 P.2d 144], the court answered the question "May a contract be partly written and partly oral?" as follows:~~ "This question posed by defendant [may a contract be partly written and partly oral] must be answered in the affirmative in this sense: that a contract or agreement in legal contemplation is neither written nor oral, but oral or written evidence may be received to establish the terms of the contract or agreement between the parties. ... A so-called partly written and partly oral contract is in legal effect a contract, the terms of which may be proven by both written and oral evidence." (*Lande v. Southern California Freight Lines* (1948) 85 Cal.App.2d 416, 420–421 [193 P.2d 144].)

- ~~Evidence of a contract that is partly oral may be admitted if only part of the contract is fully integrated:~~ "When the parties to a written contract have agreed to it as an 'integration'—a complete and final embodiment of the terms of an agreement—parol evidence cannot be used to add to or vary

its terms ... [However,] '[w]hen only part of the agreement is integrated, the same rule applies to that part, but parol evidence may be used to prove elements of the agreement not reduced to writing.' " (*Masterson v. Sine* (1968) 68 Cal.2d 222, 225 [65 Cal.Rptr. 545, 436 P.2d 561].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts § 117

Wegner et al., California Practice Guide: Civil Trials & Evidence, Ch. 8E-G, *Parol Evidence Rule*, ¶ 8:3145 (The Rutter Group)

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.83 (Matthew Bender)

27 California Legal Forms Transaction Guide, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.12 (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

323. Waiver of Condition Precedent

[*Name of plaintiff***] and [***name of defendant***] agreed in their contract that [***name of defendant***] would not have to [***insert duty***] unless [***insert condition precedent***]. That condition did not occur. Therefore, [***name of defendant***] contends that [he/she/it] did not have to [***insert duty***].**

To overcome this contention, [*name of plaintiff***] must prove by clear and convincing evidence that [***name of defendant***], by words or conduct, gave up [his/her/its] right to require [***insert condition precedent***] before having to [***insert duty***].**

New September 2003; Revised December 2013

Directions for Use

~~Do not give this instruction unless the defendant has testified or offered other evidence in support of his or her contention.~~For an instruction on waiver as an affirmative defense, see CACI No. 336, *Affirmative Defense—Waiver*.

Sources and Authority

- "Ordinarily, a plaintiff cannot recover on a contract without alleging and proving performance or prevention or waiver of performance of conditions precedent and willingness and ability to perform conditions concurrent." (*Roseleaf Corp. v. Radis* (1953) 122 Cal.App.2d 196, 206 [264 P.2d 964].)

- "All case law on the subject of waiver is unequivocal: ' "Waiver always rests upon intent. Waiver is the intentional relinquishment of a known right after knowledge of the facts. [Citations]. The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and "doubtful cases will be decided against a waiver." ' " (*DRG/Beverly Hills, Ltd. v. Chopstix Dim Sum Cafe & Takeout III, Ltd.* (1994) 30 Cal.App.4th 54, 60 [35 Cal.Rptr.2d 515] [plaintiff's claim that defendant waived occurrence of conditions must be proved by clear and convincing evidence].)

- "A condition is waived when a promisor by his words or conduct justifies the promisee in believing that a conditional promise will be performed despite the failure to perform the condition, and the promisee relies upon the promisor's manifestations to his substantial detriment." (*Sosin v. Richardson* (1962) 210 Cal.App.2d 258, 264 [26 Cal.Rptr. 610].)

- "Waiver [of a condition] … is a question of fact and not of law; hence the intention to commit a waiver must be clearly expressed." (*Moss v. Minor Properties, Inc.* (1968) 262 Cal.App.2d 847, 857 [69 Cal.Rptr. 341].)

- Section 84 of the Restatement Second of Contracts provides:

  (1) Except as stated in Subsection (2), a promise to perform all or part of a conditional

duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless

(a) occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or

(b) uncertainty of the occurrence of the condition was an element of the risk assumed by the promisor.

(2) If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if

(a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and

(b) reinstatement of the requirement of the condition is not unjust because of a material change of position by the promisee or beneficiary; and

(c) the promise is not binding apart from the rule stated in Subsection (1).

Secondary Sources

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 8, *Seeking or Opposing Equitable Remedies in Contract Actions,* 8.48

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.44 (Matthew Bender)

27 California Legal Forms Transaction Guide, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.231 (Matthew Bender)

408. Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Recreational Activity

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[*Name of plaintiff***] claims [he/she] was harmed while participating in [***specify sport or other recreational activity, e.g., touch football***] and that [***name of defendant***] is responsible for that harm. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] either intentionally injured [***name of plaintiff***] or acted so recklessly that [his/her] conduct was entirely outside the range of ordinary activity involved in [~~sport or other activity~~e.g., touch football];**

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

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

Conduct is entirely outside the range of ordinary activity involved in [~~sport or other activity~~e.g., touch football] if that conduct can be prohibited without discouraging vigorous participation or otherwise fundamentally changing the [sport/activity].

[*Name of defendant***] is not responsible for an injury resulting from conduct that was merely accidental, careless, or negligent.**

New September 2003; Revised April 2004, October 2008, April 2009, December 2011, December 2013

Directions for Use

This instruction sets forth a plaintiff's response to the affirmative defense of primary assumption of risk asserted by a defendant who was a coparticipant in the sport or other recreational activity. For an instruction applicable to coaches, instructors, or trainers, see CACI No. 409, *Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches*. For an instruction applicable to facilities owners and operators and to event sponsors, see CACI No. 410, *Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors*.

Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) Element 1 sets forth the exceptions in which there is a duty.

While duty is generally a question of law, there may be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

Sources and Authority

- ~~"Though most cases in which the doctrine of primary assumption of risk exists involve recreational sports, the doctrine has been applied to dangerous activities in other contexts (see, e.g., *Saville v. Sierra College* (2005) 133 Cal.App.4th 857 [36 Cal.Rptr.3d 515] [training in peace officer takedown maneuvers]; *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 [2 Cal.Rptr.3d 168] [training on physical restraint methods]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112 [75 Cal.Rptr.2d 801] [practice of cheerleader routines]; *Bushnell [v. Japanese-American Religions & Cultural Center*], 43 Cal.App.4th 525 [50 Cal.Rptr.2d 671] [practice of moves in judo class]; and *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 [53 Cal.Rptr.2d 713] [injury to nurse's aide by nursing home patient])." (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 999–1000 [70 Cal.Rptr.3d 519], internal citation omitted.)~~

- "Primary assumption of risk arises where a plaintiff voluntarily participates in an activity or sport involving certain inherent risks; primary assumption of risk ... bar[s] recovery because no duty of care is owed as to such risks." (*Connelly v. Mammoth Mountain Ski Area* (1995) 39 Cal.App.4th 8, 11 [45 Cal.Rptr.2d 855], internal citations omitted.)

- " '[A]n activity falls within the meaning of "sport" if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury.' " (*Amezcua v. Los Angeles Harley-Davidson, Inc.* (2011) 200 Cal.App.4th 217, 229 [132 Cal.Rptr.3d 567].)

- "A coparticipant in an active sport ordinarily bears no liability for an injury resulting from conduct in the course of the sport that is merely careless or negligent." (*Ford v. Gouin* (1992) 3 Cal.4th 339, 342 [11 Cal.Rptr.2d 30, 834 P.2d 724].)

- "[W]e conclude that a participant in an active sport breaches a legal duty of care to other participants—i.e., engages in conduct that properly may subject him or her to financial liability—only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport." (*Knight, supra,* 3 Cal.4th at p. 320.)

- "The *Knight* rule, however, 'does not grant unbridled legal immunity to all defendants participating in sporting activity. The Supreme Court has stated that "it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." Thus, even though "defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself," they may not increase the likelihood of injury above that which is inherent.' " (*Distefano v. Forester* (2001) 85 Cal.App.4th 1249, 1261 [102 Cal.Rptr.2d 813], internal citations omitted.)

- "In *Freeman v. Hale,* the Court of Appeal advanced a test ... for determining what risks are inherent in a sport: '[C]onduct is totally outside the range of ordinary activity involved in the sport (and thus any risks resulting from that conduct are not inherent to the sport) if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.' " (*Distefano, supra,* 85 Cal.App.4th at p. 1261.)

- "[G]olfers have a limited duty of care to other players, breached only if they intentionally injure them or engage in conduct that is 'so reckless as to be totally outside the range of the ordinary activity involved in the sport.' " (*Shin, supra,* 42 Cal.4th at p. 497.)

- "[W]hether defendant breached the limited duty of care he owed other golfers by engaging in conduct that was 'so reckless as to be totally outside the range of the ordinary activity involved in [golf]' depends on resolution of disputed material facts. Thus, defendant's summary judgment motion was properly denied." (*Shin, supra,* 42 Cal.4th at p. 486, internal citation omitted.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588].)

- "[Plaintiff] has repeatedly argued that primary assumption of the risk does not apply because she did not impliedly consent to having a weight dropped on her head. However, a plaintiff's expectation does not define the limits of primary assumption of the risk. 'Primary assumption of risk focuses on the legal question of duty. It does not depend upon a plaintiff's implied consent to injury, nor is the plaintiff's subjective awareness or expectation relevant. … .' " (*Cann v. Stefanec* (2013) 217 Cal.App.4th 462, 471 [158 Cal.Rptr.3d 474]~~Primary assumption of the risk is an objective test. It does not depend on a particular plaintiff's subjective knowledge or appreciation of the potential for risk." (*Saville, supra,* 133 Cal.App.4th at p. 866~~.)

- "A jury could find that, by using a snowboard without the retention strap, in violation of the rules of the ski resort and a county ordinance, defendant unnecessarily increased the danger that his

snowboard might escape his control and injure other participants such as plaintiff. The absence of a retention strap could therefore constitute conduct not inherent to the sport which increased the risk of injury." (*Campbell v. Derylo* (1999) 75 Cal.App.4th 823, 829 [89 Cal.Rptr.2d 519].)

- "The existence and scope of a defendant's duty depends on the role that defendant played in the activity. Defendants were merely the hosts of a social gathering at their cattle ranch, where [plaintiff] asked to ride one of their horses; they were not instructors and did not assume any of the responsibilities of an instructor." (*Levinson v. Owens* (2009) 176 Cal.App.4th 1534, 1550–1551 [98 Cal.Rptr.3d 779], internal citation omitted.)

- "[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity.' " (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)

- "Whether a duty exists 'does not turn on the reasonableness or unreasonableness of the plaintiff's conduct, but rather on [(1)] the nature of the activity or sport in which the defendant is engaged and [(2)] the relationship of the defendant and the plaintiff to that activity or sport.' It is the 'nature of the activity' and the parties' relationship to it that determines whether the doctrine applies—not its characterization as a sporting event." (*McGarry v. Sax* (2008) 158 Cal.App.4th 983, 999–1000 [70 Cal.Rptr.3d 519]~~, *supra*, 158 Cal.App.4th at p. 999~~, internal citations omitted.)

- "[T]o the extent that ' " 'a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence,' " ' he or she is subject to the defense of comparative negligence but not to an absolute defense. This type of comparative negligence has been referred to as ' "secondary assumption of risk." ' Assumption of risk that is based upon the absence of a defendant's duty of care is called ' "primary assumption of risk." ' 'First, in "primary assumption of risk" cases—where the defendant owes no duty to protect the plaintiff from a particular risk of harm—a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was *reasonable* or unreasonable. Second, in "secondary assumption of risk" cases—involving instances in which the defendant has breached the duty of care owed to the plaintiff—the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such breach, simply because the plaintiff's conduct in encountering the risk of such an injury was reasonable rather than unreasonable.' " (*Kindrich v. Long Beach Yacht Club* (2008) 167 Cal.App.4th 1252, 1259 [84 Cal.Rptr.3d 824], original italics, internal citations omitted.)

- "Even were we to conclude that [plaintiff]'s decision to jump off the boat was a voluntary one, and that therefore he assumed a risk inherent in doing so, this is not enough to provide a complete defense. Because voluntary assumption of risk as a complete defense in a negligence action was abandoned in *Li v. Yellow Cab Co.* (1975) 13 Cal.3d 804, 829 [119 Cal.Rptr. 858, 532 P.2d 1226], only the absence of duty owed a plaintiff under the doctrine of primary assumption of risk would provide such a defense. But that doctrine does not come into play except when a plaintiff and a defendant are engaged in certain types of activities, such as an 'active sport.' That was not the case here; plaintiff was merely the passenger on a boat. Under *Li,* he may have been contributorily negligent but this would only go to reduce the amount of damages to which he is entitled." (*Kindrich,*

supra, 167 Cal.App.4th at p. 1258.)

- "Though most cases in which the doctrine of primary assumption of risk exists involve recreational sports, the doctrine has been applied to dangerous activities in other contexts (see, e.g., *Saville v. Sierra College* (2005) 133 Cal.App.4th 857 [36 Cal.Rptr.3d 515] [training in peace officer takedown maneuvers]; *Hamilton v. Martinelli & Associates* (2003) 110 Cal.App.4th 1012 [2 Cal.Rptr.3d 168] [training on physical restraint methods]; *Aaris v. Las Virgenes Unified School Dist.* (1998) 64 Cal.App.4th 1112 [75 Cal.Rptr.2d 801] [practice of cheerleader routines]; *Bushnell* [*v. Japanese-American Religions & Cultural Center*], 43 Cal.App.4th 525 [50 Cal.Rptr.2d 671] [practice of moves in judo class]; and *Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761 [53 Cal.Rptr.2d 713] [injury to nurse's aide by nursing home patient])." (*McGarry*, *supra*, ~~*v. Sax* (2008)~~ 158 Cal.App.4th at pp. ~~983,~~ 999–1000 ~~[70 Cal.Rptr.3d 519]~~, internal citation omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1339, 1340, 1343–1350

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03, Ch. 15, *General Premises Liability*, § 15.21 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.30 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.172 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* § 165.401 (Matthew Bender)

409. Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches

[*Name of plaintiff***] claims [he/she] was harmed by [***name of defendant***]'s [coaching/training/instruction]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was [***name of plaintiff***]'s [coach/trainer/instructor];**

2. **[That [***name of defendant***] intended to cause [***name of plaintiff***] injury or acted recklessly in that [his/her] conduct was entirely outside the range of ordinary activity involved in teaching or coaching [***sport or other recreational activity, e.g., horseback riding***] in which [***name of plaintiff***] was participating;]**

   [or]

   [That [*name of defendant***] ~~'s failure to use reasonable care~~ unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [~~*sport or other activity*~~*e.g., horseback riding*];]**

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.**

New September 2003; Revised April 2004, June 2012, December 2013

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].)

There are exceptions, however, in which there is a duty of care. Use the first option for element 2 if it is alleged that the coach or trainer intended to cause the student's injury or engaged in conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport or activity. Use the second option if it is alleged that the coach's or trainer's failure to use ordinary care increased the risk of injury to the plaintiff, for example, by encouraging or allowing him or her to participate in the sport or activity when he or she was physically unfit to participate or by allowing the plaintiff to use unsafe equipment or instruments. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 845 [120 Cal.Rptr.3d 90].) If the second option is selected, also give CACI No. 400, *Negligence—Essential Factual Elements.*

While duty is ~~generally~~ a question of law, courts have held that whether the defendant has unreasonably

increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].) ~~there~~ There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 408, *Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to facilities owners and operators and to event sponsors, see CACI No. 410, *Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors.*

Sources and Authority

- "In order to support a cause of action in cases in which it is alleged that a sports instructor has required a student to perform beyond the student's capacity or without providing adequate instruction, it must be alleged and proved that the instructor acted with intent to cause a student's injury or that the instructor acted recklessly in the sense that the instructor's conduct was 'totally outside the range of the ordinary activity' involved in teaching or coaching the sport." (*Kahn v. East Side Union High School District* (2003) 31 Cal.4th 990, 1011 [4 Cal.Rptr.3d 103, 75 P.3d 30], internal citation omitted.)

- "[T]he primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants … where the risk cannot be eliminated without altering the fundamental nature of the activity.' " (*Nalwa v. Cedar Fair, L.P.* (2102) 55 Cal.4th 1148, 1156 [150 Cal.Rptr.3d 551, 290 P.3d 1158].)

- "Here, we do not deal with the relationship between coparticipants in a sport, or with the duty that an operator may or may not owe to a spectator. Instead, we deal with the duty of a coach or trainer to a student who has entrusted himself to the former's tutelage. There are precedents reaching back for most of this century that find an absence of duty to coparticipants and, often, to spectators, but the law is otherwise as applied to coaches and instructors. For them, the general rule is that coaches and instructors owe a duty of due care to persons in their charge. The coach or instructor is not, of course, an insurer, and a student may be held to notice that which is obvious and to ask appropriate questions. But all of the authorities that comment on the issue have recognized the existence of a duty of care." (*Tan v. Goddard* (1993) 13 Cal.App.4th 1528, 1535–1536 [17 Cal.Rptr.2d 89, internal citations omitted.)

- "[D]ecisions have clarified that the risks associated with learning a sport may themselves be inherent risks of the sport, and that an instructor or coach generally does not increase the risk of harm inherent in learning the sport simply by urging the student to strive to excel or to reach a new level of competence." (*Kahn, supra*, 31 Cal.4th at p. 1006.)

- "To the extent a duty is alleged against a coach for 'pushing' and/or 'challenging' a student to improve and advance, the plaintiff must show that the coach intended to cause the student's injury or engaged in reckless conduct—that is, conduct totally outside the range of the ordinary activity involved in teaching or coaching the sport. Furthermore, a coach has a duty of ordinary care not to

increase the risk of injury to a student by encouraging or allowing the student to participate in the sport when he or she is physically unfit to participate or by allowing the student to use unsafe equipment or instruments." (*Eriksson, supra,* 191 Cal.App.4th at p. 845, internal citation omitted.)

- "[T]he mere existence of an instructor/pupil relationship does not necessarily preclude application of 'primary assumption of the risk.' Learning any sport inevitably involves attempting new skills. A coach or instructor will often urge the student to go beyond what the student has already mastered; that is the nature of (inherent in) sports instruction." (*Allan v. Snow Summit, Inc.* (1996) 51 Cal.App.4th 1358, 1368–1369 [59 Cal.Rptr.2d 813].)

- "Instructors, like commercial operators of recreational activities, 'have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant.'" (*Fortier v. Los Rios Community College Dist.* (1996) 45 Cal.App.4th 430, 435 [52 Cal.Rptr.2d 812], internal citations omitted.)

- "'Primary assumption of the risk' applies to injuries from risks 'inherent in the sport'; the risks are not any the less 'inherent' simply because an instructor encourages a student to keep trying when attempting a new skill." (*Allan, supra,* 51 Cal.App.4th at p. 1369.)

- Coaches and sports instructors "owe students a duty 'not to increase the risks inherent in the learning process undertaken by the student.' But this does not require them to 'fundamentally alter the nature of the sport and, in some instances, effectively preclude participation altogether ... .' Instead, '[b]y choosing to participate in a sport that poses the obvious possibility of injury, the student athlete must learn to accept an adverse result of the risks inherent in the sport.'" (*Lupash v. City of Seal Beach* (1999) 75 Cal.App.4th 1428, 1436–1437 [89 Cal.Rptr.2d 920], internal citations omitted.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d

325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn*, *supra*, 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna*, *supra*, 169 Cal.App.4th at pp. 112–113~~'[T]he existence and scope of a defendant's duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury.' Thus, when the injury occurs in a sports setting the court must decide whether the nature of the sport and the relationship of the defendant and the plaintiff to the sport as coparticipant, coach, premises owner or spectator support the legal conclusion of duty." (*Mastro v. Petrick* (2001) 93 Cal.App.4th 83, 88 [112 Cal.Rptr.2d 185], internal citations omitted~~.)

- "The existence of a duty of care is a separate issue from the question whether (on the basis of forseeability among other factors) a particular defendant breached that duty of care, which is an essentially factual matter." (*Kockelman v. Segal* (1998) 61 Cal.App.4th 491, 498 [71 Cal.Rptr.2d 552].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ -1090A–1090C, 1339, 1340, 1343–1350

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:234–3:254.30 (The Rutter Group)

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.31 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* § 165.401 et seq. (Matthew Bender)

410. Primary Assumption of Risk—Liability of Facilities Owners and Operators and Event Sponsors

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[*Name of plaintiff***] claims [he/she] was harmed while [participating in/watching] [***sport or other recreational activity e.g., snowboarding***] at [***name of defendant***]'s [***specify facility or event where plaintiff was injured, e.g., ski resort***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] was the [owner/operator/sponsor/***other***] of [***e.g., a ski resort***];**

2. **That [***name of defendant***] unreasonably increased the risks to [***name of plaintiff***] over and above those inherent in [***e.g., snowboarding***];**

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.**

New December 2013

Directions for Use

This instruction sets forth a plaintiff's response to a defendant's assertion of the affirmative defense of primary assumption of risk. Primary assumption of risk generally absolves the defendant of a duty of care toward the plaintiff with regard to injury incurred in the course of a sporting or other recreational activity covered by the doctrine. (See *Knight v. Jewett* (1992) 3 Cal.4th 296, 320 [11 Cal.Rptr.2d 2, 834 P.2d 696].) There is, however, a duty applicable to facilities owners and operators and to event sponsors not to unreasonably increase the risks of injury to participants and spectators beyond those inherent in the activity. (See *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1162 [150 Cal.Rptr.3d 551, 290 P.3d 1158] [participants]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [spectators].)

While duty is a question of law, courts have held that whether the defendant has increased the risk is a question of fact for the jury. (See *Luna v. Vela* (2008) 169 Cal.App.4th 102, 112–113 [86 Cal.Rptr.3d 588] [and cases cited therein].) There may also be disputed facts that must be resolved by a jury before it can be determined if the doctrine applies. (See *Shin v. Ahn* (2007) 42 Cal.4th 482, 486 [64 Cal.Rptr.3d 803, 165 P.3d 581].)

For an instruction on primary assumption of risk applicable to coparticipants, see CACI No. 408, *Primary Assumption of Risk—Liability of Coparticipant in Sport or Other Recreational Activity.* For an instruction on primary assumption of risk applicable to instructors, trainers, and coaches, see CACI No. 409, *Primary Assumption of Risk—Liability of Instructors, Trainers, or Coaches*.

Sources and Authority

- "[U]nder the primary assumption of risk doctrine, operators, sponsors and instructors in recreational activities posing inherent risks of injury have no duty to eliminate those risks, but do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity." (*Nalwa, supra,* 55 Cal.4th at p. 1162.)

- "Although we recognize the Court of Appeal decisions specifically addressing the point are in conflict, we believe resolving this issue is not a matter of further defining [defendant]'s duty, which would be a question of law for the court. Rather, it requires application of the governing standard of care (the duty not to increase the risks inherent in the sport) to the facts of this particular case—the traditional role of the trier of fact. (See, e.g., *Vine v. Bear Valley Ski Co., supra,* 118 Cal.App.4th at pp. 591–592 [whether defendant's design of snowboard jump increased inherent risks of snowboarding is question for jury]; *Solis v. Kirkwood Resort Co., supra,* 94 Cal.App.4th at p. 365 [whether artificial jumps built by resort increased inherent risk of falling while skiing is question for jury]; *Lowe v. California League of Prof. Baseball* (1997) 56 Cal.App.4th 112, 123 [65 Cal.Rptr.2d 105] [whether distraction caused by activities of minor league baseball team's mascot increased inherent risk of spectator being hit by a foul ball 'is issue of fact to be resolved at trial']; but see *Huff v. Wilkins, supra,* 138 Cal.App.4th at p. 745 ['it is the trial court's province to determine whether defendants breached their duty not to increase the inherent risk of a collision [in the sport of off-roading], and it should hold a hearing for this purpose before impaneling a jury']; *American Golf Corp. v. Superior Court* (2000) 79 Cal.App.4th 30, 37 [93 Cal.Rptr.2d 683] ['[i]t is for the court to decide … whether the defendant has increased the risks of the activity beyond the risks inherent in the sport']; see also *Huffman v. City of Poway* (2000) 84 Cal.App.4th 975, 995, fn. 23 [101 Cal.Rptr.2d 325] [indicating it is for the court to determine whether defendant's conduct increased the risk inherent in participating in a particular sport, but that trial court may receive expert testimony on the customary practices in the sport to make that determination].) [¶] Our conclusion it is for the trier of fact to determine whether [defendant] breached his limited duty not to increase the risks inherent in the sport of volleyball finds solid support in the Supreme Court's most recent sports injury, primary assumption of the risk decision, *Shin v. Ahn, supra,* 42 Cal.4th 482, a case that postdates the appellate court decisions suggesting the issue is one for the court to resolve." (*Luna, supra,* 169 Cal.App.4th at pp. 112–113.)

- "Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. Thus, although a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. The cases establish that the latter type of risk, posed by a ski resort's negligence, clearly is not a risk (inherent in the sport) that is assumed by a participant." (*Knight, supra,* 3 Cal.4th at pp. 315−316.)

- "Under *Knight,* defendants had a duty *not to increase* the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume. As a result, a triable issue of fact remained, namely whether the [defendants]' mascot cavorting in the stands and distracting plaintiff's attention, *while the game was in progress,* constituted a breach of that duty, i.e., constituted negligence in the form of increasing the inherent risk to plaintiff of being struck by a foul ball."

(*Lowe, supra,* 56 Cal.App.4th at p. 114, original italics.)

- "[T]hose responsible for maintaining athletic facilities have a … duty not to increase the inherent risks, albeit in the context of businesses selling recreational opportunities." (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 162 [41 Cal.Rptr.3d 299, 131 P.3d 383], internal citation omitted.)

- "*Knight,* consistently with established case law, simply requires courts in each instance to examine the question of duty in light of the nature of the defendant's activities and the relationship of the parties to that activity." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 482 [63 Cal.Rptr.2d 291, 936 P.2d 70].)

- "Defendants' obligation not to increase the risks inherent in the activity included a duty to provide safe equipment for the trip, such as a safe and sound craft." (*Ferrari v. Grand Canyon Dories* (1995) 32 Cal.App.4th 248, 255 [38 Cal.Rptr.2d 65].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1339, 1340, 1343–1350

Haning et al., California Practice Guide: Personal Injury, Ch. 3-D, *Mitigating Factors In Reduction Of Damages*, ¶¶ 3:234–3:254.30 (The Rutter Group)

1 Levy et al., California Torts, Ch. 4, *Comparative Negligence, Assumption of the Risk, and Related Defenses*, § 4.03 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 273, *Games, Sports, and Athletics,* § 273.31 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* § 165.401 et seq. (Matthew Bender)

~~410~~428. Parental Liability (Nonstatutory)

[*Name of plaintiff***] claims that [he/she] was harmed because of [***name of defendant***]'s negligent supervision of [***name of minor***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] [***insert one or both of the following:***]**

   [observed [*name of minor***]'s dangerous behavior that led to [***name of plaintiff***]'s injury;] [or]**

   [was aware of [*name of minor***]'s habits or tendencies that created an unreasonable risk of harm to other persons;]**

2. **That [***name of defendant***] had the opportunity and ability to control the conduct of [***name of minor***];**

3. **That [***name of defendant***] was negligent because [he/she] failed to [***insert one or both of the following:***]**

   [exercise reasonable care to prevent [*name of minor***]'s conduct;] [or]**

   [take reasonable precautions to prevent harm to others;]

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

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

New September 2003; Renumbered From CACI No. 410 December 2013

Directions for Use

This instruction is not intended for use for claims of statutory liability against parents or guardians based on a minor's willful conduct, e.g., Civil Code section 1714.1 (willful misconduct), section 1714.3 (discharging firearm), or Education Code section 48904(a)(1) (willful misconduct).

Sources and Authority

- "While it is the rule in California ... that there is no vicarious liability on a parent for the torts of a child there is 'another rule of the law relating to the torts of minors, which is somewhat in the nature of an exception, and that is that a parent may become liable for an injury caused by the child where the parent's negligence made it possible for the child to cause the injury complained of, and probable

that it would do so.' " (*Ellis v. D'Angelo* (1953) 116 Cal.App.2d 310, 317 [253 P.2d 675], internal citations omitted.)

- "Parents are responsible for harm caused by their children only when it has been shown that 'the parents as reasonable persons previously became aware of habits or tendencies of the infant which made it likely that the child would misbehave so that they should have restrained him in apposite conduct and actions.' " (*Reida v. Lund* (1971) 18 Cal.App.3d 698, 702 [96 Cal.Rptr. 102], internal citation omitted.)

- "In cases where the parent did not observe the child's conduct which led to the injury, the parent has been held liable where he had been aware of the child's dangerous propensity or habit and negligently failed to exercise proper control or negligently failed to give appropriate warning. In other cases, where the parent did not observe and was not in a position to control the conduct which endangered the plaintiff, recovery was denied on the ground that there was no showing that the parent knew of any dangerous tendency. What is said about 'propensity' or 'habit' in those cases has no applicability where the parent is present and observes the dangerous behavior and has an opportunity to exercise control but neglects to do so." (*Costello v. Hart* (1972) 23 Cal.App.3d 898, 900-901 [100 Cal.Rptr. 554], internal citations omitted.)

- " 'The ability to control the child, rather than the relationship as such, is the basis for a finding of liability on the part of a parent. ... [The] absence of such ability is fatal to a claim of legal responsibility.' The ability to control is inferred from the relationship of parent to minor child, as it is from the relationship of custodian to charge; yet it may be disproved by the circumstances surrounding the particular situation." (*Robertson v. Wentz* (1986) 187 Cal.App.3d 1281, 1290 [232 Cal.Rptr. 634], internal citations omitted.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1227–1234

California Tort Guide (Cont.Ed.Bar 3d ed.) General Principles, § 1.25

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.12; Ch. 8, *Vicarious Liability*, § 8.08 (Matthew Bender)

6 California Forms of Pleading and Practice, Ch. 58, *Assault and Battery*, § 58.16 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 367A, *Minors: Tort Actions*, § 367A.32 (Matthew Bender)
~~32 California Forms of Pleading and Practice, Ch. 364, *Minors* (Matthew Bender)~~

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*§ 380.131 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* § 165.130 (Matthew Bender)

31 California Legal Forms, Ch. 100A, *Personal Affairs of Minors,* § 100A.251 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ §§ 3:32–3:35 (Thomson Reuters)

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. **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.**

New April 2009; Revised December 2009, June 2011, December 2013

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 the sole 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 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, *Affirmative Defense—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,* 22 Cal.3d at p. 56, 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,* 188 Cal.App.4th at pp. 679–680.)

- "[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].)

- "[Defendant]'s alternative contention [plaintiff]'s failure to safely store the Glock 21 was the sole proximate cause of his injuries is not an appropriate ground for granting summary judgment. Product misuse, an affirmative defense, is a superseding cause of injury that absolves a tortfeasor of his or her own wrongful conduct only when the misuse was ' "so highly extraordinary as to be unforeseeable." ' [citing this instruction] 'However, foreseeability is a question for the jury unless undisputed facts leave no room for a reasonable difference of opinion.' " (*Chavez v. Glock, Inc.* (2012) 207 Cal.App.4th 1283, 1308 [144 Cal.Rptr.3d 326], internal citations omitted.)

- "[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)

1621. Negligent Infliction of Emotional Distress—Bystander—Essential Factual Elements

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[*Name of plaintiff***] claims that [he/she] suffered serious emotional distress as a result of perceiving [an injury to/the death of] [***name of ~~injury~~ victim***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] negligently caused [injury to/the death of] [***name of ~~injury~~ victim***];**

2. **That when the [***describe event, e.g., traffic accident***] that caused [injury to/the death of] [***name of victim***] occurred, [***name of plaintiff***] was present at the scene ~~of the injury when it occurred and was aware that [***name of injury victim***] was being injured~~;**

3. **That [***name of plaintiff***] ~~and~~ was then aware that the [***e.g., traffic accident***] was causing [injury to/the death of] [***name of ~~injury~~ victim***] ~~was being injured~~;**

4. **That [***name of plaintiff***] suffered serious emotional distress; and**

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

[*Name of plaintiff***] need not have been then aware that [***name of defendant***] had caused the [***e.g., traffic accident***].**

Emotional distress includes suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame. Serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it.

New September 2003; Revised December 2013

Directions for Use

This instruction is for use in bystander cases, where a plaintiff seeks recovery for damages suffered as a percipient witness of injury to others. If the plaintiff is a direct victim of tortious conduct, use CACI No. 1620, *Negligent Infliction of Emotional Distress—Direct Victim—Essential Factual Elements.*

This instruction should be read in conjunction with ~~either CACI No. 401, *Basic Standard of Care*, or CACI No. 418, *Presumption of Negligence per se*.~~instructions in the Negligence series (see CACI No. 400 et seq.) to further develop element 1.

~~In element 2, the phrase "was being injured" is intended to reflect contemporaneous awareness of injury.~~

Whether the plaintiff had a sufficiently close relationship with the victim should be determined as an

issue of law because it is integral to the determination of whether a duty was owed to the plaintiff.

Sources and Authority

- "California's rule that plaintiff's fear for his own safety is compensable also presents a strong argument for the same rule as to fear for others; otherwise, some plaintiffs will falsely claim to have feared for themselves, and the honest parties unwilling to do so will be penalized. Moreover, it is incongruous and somewhat revolting to sanction recovery for the mother if she suffers shock from fear for her own safety and to deny it for shock from the witnessed death of her own daughter~~A bystander who witnesses the negligent infliction of death or injury of another may recover for resulting emotional trauma even though he or she did not fear imminent physical harm~~." (*Dillon v. Legg* (1968) 68 Cal.2d 728, ~~746–747~~738 [69 Cal.Rptr. 72, 441 P.2d 912].)

- "As an introductory note, we observe that plaintiffs … framed both negligence and negligent infliction of emotional distress causes of action. To be precise, however, 'the [only] tort with which we are concerned is negligence. Negligent infliction of emotional distress is not an independent tort … .' " (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 875–876 [104 Cal.Rptr.3d 352].)

- "In the absence of physical injury or impact to the plaintiff himself, damages for emotional distress should be recoverable only if the plaintiff: (1) is closely related to the injury victim, (2) is present at the scene of the injury-producing event at the time it occurs and is then aware that it is causing injury to the victim and, (3) as a result suffers emotional distress beyond that which would be anticipated in a disinterested witness." (*Thing v. La Chusa* (1989) 48 Cal.3d 644, 647 [257 Cal.Rptr. 865, 771 P.2d 814].)

- "[T]o satisfy the second *Thing* requirement the plaintiff must experience a contemporaneous sensory awareness of the causal connection between the defendant's infliction of harm and the injuries suffered by the close relative." (*Fortman v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830, 836 [151 Cal.Rptr.3d 320].)

- "[A] plaintiff need not contemporaneously understand the defendant's conduct as *negligent,* as opposed to *harmful.* But the court confused awareness of negligence, a legal conclusion, with contemporaneous, understanding awareness of the event as causing harm to the victim." (*Bird v. Saenz* (2002) 28 Cal.4th 910, 920 [123 Cal.Rptr.2d 465, 51 P.3d 324].)

- "*Thing* does not require that the plaintiff have an awareness of what caused the injury-producing event, but the plaintiff must have an understanding perception of the 'event as causing harm to the victim.' " (*Fortman, supra,* 212 Cal.App.4th at p. 841, fn. 4.)

- "[W]e also reject [plaintiff]'s attempt to expand bystander recovery to hold a product manufacturer strictly liable for emotional distress when the plaintiff observes injuries sustained by a close relative arising from an unobservable product failure. To do so would eviscerate the second *Thing* requirement." (*Fortman, supra,* 212 Cal.App.4th at pp. 843−844.)

- "Absent exceptional circumstances, recovery should be limited to relatives residing in the same

household, or parents, siblings, children, and grandparents of the victim." (*Thing, supra,* 48 Cal.3d at p. 668, fn. 10.)

- "[A]n unmarried cohabitant may not recover damages for emotional distress based on such injury.~~The close relationship required between the plaintiff and the injury victim does not include the relationship found between unmarried cohabitants~~." (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 273 [250 Cal.Rptr.254, 758 P.2d 582].)

- "Although a plaintiff may establish presence at the scene through nonvisual sensory perception, 'someone who hears an accident but does not then know it is causing injury to a relative does not have a viable [bystander] claim for [negligent infliction of emotional distress], even if the missing knowledge is acquired moments later.' " (*Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149 [64 Cal.Rptr.3d 539], internal citation omitted.)

- "[I]t is not necessary that a plaintiff bystander actually have witnessed the infliction of injury to her child, provided that the plaintiff was at the scene of the accident and was sensorially aware, in some important way, of the accident and the necessarily inflicted injury to her child." (*Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1271 [3 Cal.Rptr.2d 803].)

- " '[S]erious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case.' " (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 927–928 [167 Cal.Rptr. 831, 616 P.2d 813].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1007–1021

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.04 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress*, § 362.11 (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress*, §§ 153.31 et seq., 153.45 et seq. (Matthew Bender)

1731. Trade Libel—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] harmed [him/her] by making a statement that disparaged [***name of plaintiff***]'s [***specify product***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] made a statement that disparaged the quality of [***name of plaintiff***]'s [***product/service***];**
2. **That the statement was made to a person other than [***name of plaintiff***];**
3. **That the statement was untrue;**
4. **That [***name of defendant***] [knew that the statement was untrue/acted with reckless disregard of the truth or falsity of the statement];**
5. **That [***name of defendant***] knew or should have recognized that someone else might act in reliance on the statement, causing [***name of plaintiff***] financial loss;**
6. **That [***name of plaintiff***] suffered direct financial harm because someone else acted in reliance on the statement;**
7. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New December 2013

Directions for Use

The tort of trade libel is a form of injurious falsehood similar to slander of title. (See *Polygram Records, Inc. v. Superior Court* (1985) 170 Cal.App.3d 543, 548 [216 Cal.Rptr. 252]; *Erlich v. Etner* (1964) 224 Cal.App. 2d 69, 74 [36 Cal.Rptr. 256].) The tort has not often reached the attention of California's appellate courts (see *Polygram, supra*.), perhaps because of the difficulty in proving damages. (See *Erlich*, *supra*.)

Elements 4 and 5 are supported by section 623A of the Restatement 2d of Torts, which has been accepted in California. (See *Melaleuca, Inc. v. Clark* (1998) 66 Cal.App.4th 1344, 1360−1361 [78 Cal.Rptr.2d 627].) There is some authority, however, for the proposition that no intent or reckless disregard is required (element 4) if the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher. (See *Nichols v. Great Am. Ins. Cos.* (1985) 169 Cal.App.3d 766, 773 [215 Cal.Rptr. 416].)

The privileges of Civil Code section 47 almost certainly apply to actions for trade libel. (See *Albertson v. Raboff* (1956) 46 Cal.2d 375, 378–379 [295 P.2d 405] [slander-of-title case]; *117 Sales Corp. v. Olsen*

(1978), 80 Cal.App.3d 645, 651 [145 Cal.Rptr. 778] [publication by filing small claims suit is absolutely privileged].) The defendant has the burden of proving privilege as an affirmative defense. (See *Smith v. Commonwealth Land Title Ins. Co.* (1986) 177 Cal.App.3d 625, 630–631 [223 Cal.Rptr. 339].) If privilege is claimed, additional instructions will be necessary to state the affirmative defense and frame the privilege. For further discussion, see the Directions for Use to CACI No. 1730, *Slander of Title—Essential Factual Elements*. See also CACI No. 1723, *Qualified Privilege.*

Limitations on liability arising from the First Amendment apply. (*Hofmann Co. v. E. I. du Pont de Nemours & Co.* (1988) 202 Cal.App.3d 390, 397 [248 Cal.Rptr. 384]; see CACI Nos. 1700−1703, instructions on public figures and matters of public concern.) See also CACI No. 1707, *Fact Versus Opinion*.

Sources and Authority

- "Trade libel is the publication of matter disparaging the quality of another's property, which the publisher should recognize is likely to cause pecuniary loss to the owner. [Citation.] The tort encompasses 'all false statements concerning the quality of services or product of a business which are intended to cause that business financial harm and in fact do so.' [Citation.] [¶] To constitute trade libel, a statement must be false." (*City of Costa Mesa v. D'Alessio Investments, LLC* (2013) 214 Cal.App.4th 358, 376 [-- Cal.Rptr.3d --].)

- "The distinction between libel and trade libel is that the former concerns the person or reputation of plaintiff and the latter relates to his goods." (*Shores v. Chip Steak Co.* (1955) 130 Cal.App.2d 627, 630 [279 P.2d 595].)

- "[A]n action for 'slander of title' … is a form of action somewhat related to trade libel … ." (*Erlich, supra,* 224 Cal.App.2d at p. 74.)

- "The protection the common law provides statements which disparage products as opposed to reputations is set forth in the Restatement Second of Torts sections 623A and 626. Section 623A provides: 'One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if [P] (a) he intends for publication of the statement to result in harm to interests of the other having a pecuniary value, or either recognizes or should recognize that it is likely to do so, and [P]*(b) he knows that the statement is false or acts in reckless disregard of its truth or falsity*.' [¶] Section 626 of Restatement Second of Torts in turn states: 'The rules on liability for the publication of an injurious falsehood stated in § 623A apply to the publication of matter disparaging the quality of another's land, chattels or intangible things, that the publisher should recognize as likely to result in pecuniary loss to the other through the conduct of a third person in respect to the other's interests in the property.' " (*Melaleuca, Inc., supra,* 66 Cal.App.4th at pp. 1360−1361, original italics.)

- "The Restatement [2d Torts] view is that, like slander of title, what is commonly called 'trade libel' is a particular form of the tort of injurious falsehood and need not be in writing." (*Polygram Records, Inc., supra,* 170 Cal.App.3d at p. 548.)

- "While … general damages are presumed in a libel of a businessman, this is not so in action for

trade libel. Dean Prosser has discussed the problems in such actions as follows: 'Injurious falsehood, or disparagement, then, may consist of the publication of matter derogatory to the plaintiff's title to his property, or its quality, or to his business in general, . . . The cause of action founded upon it resembles that for defamation, but differs from it materially in the greater burden of proof resting on the plaintiff, and the necessity for special damage in all cases. . . . [The] plaintiff must prove in all cases that the publication has played a material and substantial part in inducing others not to deal with him, and that as a result he has suffered special damages. . . . Usually, . . . the damages claimed have consisted of loss of prospective contracts with the plaintiff's customers. Here the remedy has been so hedged about with limitations that its usefulness to the plaintiff has been seriously impaired. It is nearly always held that it is not enough to show a general decline in his business resulting from the falsehood, even where no other cause for it is apparent, and that it is only the loss of specific sales that can be recovered. This means, in the usual case, that the plaintiff must identify the particular purchasers who have refrained from dealing with him, and specify the transactions of which he claims to have been deprived.' " (*Erlich, supra,* 224 Cal.App. 2d at pp. 73−74.)

- "Because the gravamen of the complaint is the allegation that respondents made false statements of fact that injured appellant's business, the 'limitations that define the First Amendment's zone of protection' are applicable. '[It] is immaterial for First Amendment purposes whether the statement in question relates to the plaintiff himself or merely to his property . . . .' " (*Hofmann Co., supra,* 202 Cal.App.3d at p. 397, internal citation omitted.)

- "If respondents' statements about appellant are opinions, the cause of action for trade libel must of course fail. 'Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.' Statements of fact can be true or false, but an opinion – 'a view, judgment, or appraisal formed in the mind . . . [a] belief stronger than impression and less strong than positive knowledge' -- is the result of a mental process and not capable of proof in terms of truth or falsity." (*Hoffman Co., supra,* 202 Cal.App.3d at p. 397, footnote and internal citation omitted.)

- "[I]t is not absolutely necessary that the disparaging publication be intentionally designed to injure. If the statement was understood in its disparaging sense and if the understanding is a reasonable construction of the language used or the acts done by the publisher, it is not material that the publisher did not intend the disparaging statement to be so understood." (*Nichols, supra,* 169 Cal.App.3d at p. 773.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005), Torts §§ 642-645

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts,* § 40.70 et seq. (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 340, *Libel and Slander*, § 340.103 (Matthew Bender)

1 Matthew Bender Practice Guide: California Unfair Competition and Business Torts, Ch. 9, *Commercial Defamation*, 9.04

1900. Intentional Misrepresentation

[*Name of plaintiff***] claims that [***name of defendant***] made a false representation that harmed [him/her/it]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] represented to [***name of plaintiff***] that a~~n important~~ fact was true;**

2. **That [***name of defendant***]'s representation was false;**

3. **That [***name of defendant***] knew that the representation was false when [he/she] made it, or that [he/she] made the representation recklessly and without regard for its truth;**

4. **That [***name of defendant***] intended that [***name of plaintiff***] rely on the representation;**

5. **That [***name of plaintiff***] reasonably relied on [***name of defendant***]'s representation;**

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

7. **That [***name of plaintiff***]'s reliance on [***name of defendant***]'s representation was a substantial factor in causing [his/her/its] harm.**

New September 2003; Revised December 2012, December 2013

Directions for Use

Give this instruction in a case in which it is alleged that the defendant made an intentional misrepresentation of fact. (See Civ. Code, § 1710(1).) If element 5 is contested, give CACI No. 1907, *Reliance,* and CACI No. 1908, *Reasonable Reliance*. If it is disputed that a representation was made, the jury should be instructed that "a representation may be made orally, in writing, or by nonverbal conduct." (See *Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1567 [54 Cal.Rptr.2d 468].)

The representation must ordinarily be an affirmation of fact, as opposed to an opinion. (See *Cohen v. S&S Construction Co.* (1983) 151 Cal.App.3d 941, 946 [201 Cal.Rptr. 173].) Opinions are addressed in CACI No. 1904, *Opinions as Statements of Fact.*

Sources and Authority

- Civil Code section 1709 provides: "One who willfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers."

- Civil Code section 1710 provides:

  A deceit, within the meaning of [section 1709], is either:

  1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true [intentional misrepresentation of fact];

  2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true [negligent misrepresentation of fact];

  3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact [concealment or suppression of fact]; or,

  4. A promise, made without any intention of performing it [promissory fraud].

- Civil Code section 1572, dealing specifically with fraud in the making of contracts, provides:

  Actual fraud, within the meaning of this chapter, consists in any of the following acts, committed by a party to the contract, or with his connivance, with intent to deceive another party thereto, or to induce him to enter into the contract:

  1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

  2. The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;

  3. The suppression of that which is true, by one having knowledge or belief of the fact;

  4. A promise made without any intention of performing it; or,

  5. Any other act fitted to deceive.

- "The elements of fraud that will give rise to a tort action for deceit are: '(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal quotation marks omitted.)

- "A complaint for fraud must allege the following elements: (1) a knowingly false representation by the defendant; (2) an intent to deceive or induce reliance; (3) justifiable reliance by the plaintiff; and (4) resulting damages." (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1816 [52 Cal.Rptr.2d 650] [combining misrepresentation and scienter as a single element].)

- "Puffing," or sales talk, is generally considered opinion, unless it involves a representation of product

safety. (*Hauter v. Zogarts* (1975) 14 Cal.3d 104, 112 [120 Cal.Rptr. 681, 534 P.2d 377].)

- "Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from actionable negligent misrepresentation and from nonactionable innocent misrepresentation. It is the element of intent which makes fraud actionable, irrespective of any contractual or fiduciary duty one party might owe to the other." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 482 [80 Cal.Rptr.2d 329], internal citations omitted.)

- "[F]raudulent intent is an issue for the trier of fact to decide." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1061 [141 Cal.Rptr.3d 142].)

- "A misrepresentation need not be oral; it may be implied by conduct." (*Thrifty-Tel, Inc., supra,* 46 Cal.App.4th at p. 1567, internal citations omitted.)

- " '[F]alse representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.' " (*Engalla, supra,* 15 Cal.4th at p. 974, quoting *Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 55 [30 Cal.Rptr. 629].)

- ~~"Actual reliance occurs when a misrepresentation is ' "an immediate cause of [a plaintiff's] conduct, which alters his legal relations," ' and when, absent such representation, ' "he would not, in all reasonable probability, have entered into the contract or other transaction." ' 'It is not ... necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. ... It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.' " (*Engalla, supra*, 15 Cal.4th at pp. 976-977, internal citations omitted.)~~

- ~~"Justifiable reliance is an essential element of a claim for fraudulent misrepresentation, and the reasonableness of the reliance is ordinarily a question of fact." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843 [2 Cal.Rptr.2d 437] internal citations omitted.)~~

- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith, supra,* 205 Cal.App.4th at p. 1062.)

- "A 'complete causal relationship' between the fraud or deceit and the plaintiff's damages is required. ... Causation requires proof that the defendant's conduct was a ' "substantial factor" ' in bringing about the harm to the plaintiff." (*Williams v. Wraxall* (1995) 33 Cal.App.4th 120, 132 [39 Cal.Rptr.2d 658], internal citations omitted.)

- "In order to recover for fraud, as in any other tort, the plaintiff must plead and prove the `detriment proximately caused' by the defendant's tortious conduct. Deception without resulting loss is not actionable fraud." (*Service by Medallion, Inc., supra,* 44 Cal.App.4th at p. 1818, internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 243, 767–817, 821, 822, 826

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.02, 40.05 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.19 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.80 et seq. (Matthew Bender)

2 California Civil Practice: Torts § 22:12 (Thomson Reuters ~~West~~)

1902. False Promise

[*Name of plaintiff*] claims [he/she] was harmed because [*name of defendant*] made a false promise. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] made a promise to [*name of plaintiff*];**

~~2. That this promise was important to the transaction;~~

2. **That [*name of defendant*] did not intend to perform this promise when [he/she] made it;**

3. **That [*name of defendant*] intended that [*name of plaintiff*] rely on this promise;**

4. **That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s promise;**

5. **That [*name of defendant*] did not perform the promised act;**

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

7. **That [*name of plaintiff*]'s reliance on [*name of defendant*]'s promise was a substantial factor in causing [his/her/its] harm.**

New September 2003; Revised December 2012, December 2013

Directions for Use

Give this instruction in a case in which it is alleged that the defendant made a promise without any intention of performing it. (See Civ. Code, § 1710(4).) ~~Insert brief description of transaction in elements 2 and 5 if it can be simply stated.~~ If element ~~5~~ 4 is contested, give CACI No. 1907, *Reliance,* and CACI No. 1908, *Reasonable Reliance*.

Sources and Authority

- Civil Code section 1710 provides:

  A deceit, within the meaning of [section 1709], is either:

  1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

  2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;

  3. The suppression of a fact, by one who is bound to disclose it, or who gives

information of other facts which are likely to mislead for want of communication of that fact; or,

4. A promise, made without any intention of performing it.

- " ' "Promissory fraud" is a subspecies of fraud and deceit. A promise to do something necessarily implies the intention to perform; hence, where a promise is made without such intention, there is an implied misrepresentation of fact that may be actionable fraud. [¶] An action for promissory fraud may lie where a defendant fraudulently induces the plaintiff to enter into a contract.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973–974 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal citations omitted.)

- "Under Civil Code section 1709, one is liable for fraudulent deceit if he 'deceives another with intent to induce him to alter his position to his injury or risk … .' Section 1710 of the Civil Code defines deceit for the purposes of Civil Code section 1709 as, inter alia, '[a] promise, made without any intention of performing it.' ' "The elements of fraud, which give rise to the tort action for deceit, are (a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity (or 'scienter'); (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." [Citations.]' Each element must be alleged with particularity." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1059–1060 [141 Cal.Rptr.3d 142], internal citations omitted.)

- "A promise of future conduct is actionable as fraud only if made without a present intent to perform. 'A declaration of intention, although in the nature of a promise, made in good faith, without intention to deceive, and in the honest expectation that it will be fulfilled, even though it is not carried out, does not constitute a fraud.' Moreover, ' "something more than nonperformance is required to prove the defendant's intent not to perform his promise." ... [I]f plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, he will never reach a jury.' " (*Magpali v. Farmers Group, Inc.* (1996) 48 Cal.App.4th 471, 481 [55 Cal.Rptr.2d 225], internal citations omitted.)

- "[I]n a promissory fraud action, to sufficiently allege defendant made a misrepresentation, the complaint must allege (1) the defendant made a representation of intent to perform some future action, i.e., the defendant made a promise, and (2) the defendant did not really have that intent at the time that the promise was made, i.e., the promise was false." (*Beckwith, supra,* 205 Cal.App.4th at p. 1060.)

- "[F]raudulent intent is an issue for the trier of fact to decide." (*Beckwith, supra,* 205 Cal.App.4th at p. 1061.)

- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith, supra,* 205 Cal.App.4th at p. 1062.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 781–786

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[1][a] (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.12 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.30 et seq. (Matthew Bender)

2 California Civil Practice: Torts § 22:20 (Thomson Reuters ~~West~~)

1903. Negligent Misrepresentation

[*Name of plaintiff*] claims [he/she/it] was harmed because [*name of defendant*] negligently misrepresented a~~n important~~ fact. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] represented to [*name of plaintiff*] that a~~n important~~ fact was true;**

2. **That [*name of defendant*]'s representation was not true;**

3. **That [although [*name of defendant*] may have honestly believed that the representation was true,] [[*name of defendant*]/he/she] had no reasonable grounds for believing the representation was true when [he/she] made it;**

4. **That [*name of defendant*] intended that [*name of plaintiff*] rely on this representation;**

5. **That [*name of plaintiff*] reasonably relied on [*name of defendant*]'s representation;**

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

7. **That [*name of plaintiff*]'s reliance on [*name of defendant*]'s representation was a substantial factor in causing [his/her/its] harm.**

New September 2003; Revised December 2009, December 2013

Directions for Use

Give this instruction in a case in which it is alleged that the defendant made certain representations with no reason to believe that they were true. (See Civ. Code, § 1710(2).) If element 5 is contested, give CACI No. 1907, *Reliance,* and CACI No. 1908, *Reasonable Reliance*.

If both negligent misrepresentation and intentional misrepresentation are alleged in the alternative, give both this instruction and CACI No.1900, *Intentional Misrepresentation*. If only negligent misrepresentation is alleged, the bracketed reference to the defendant's honest belief in the truth of the representation in element 3 may be omitted. (See *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370, 407–408 [11 Cal.Rptr.2d 51, 834 P.2d 745].)

Sources and Authority

- Civil Code section 1710 provides:

  A deceit, within the meaning of [section 1709], is either:

  1. The suggestion, as a fact, of that which is not true, by one who does not believe it

to be true [intentional misrepresentation of fact];

2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true [negligent misrepresentation of fact];

3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact [concealment or suppression of fact]; or,

4. A promise, made without any intention of performing it.

- "Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit. 'Where the defendant makes false statements, honestly believing that they are true, but without reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit.' " (*Bily, supra,* 3 Cal.4th at pp. 407, internal citations omitted.)

- "This is not merely a case where the defendants made false representations of matters within their personal knowledge which they had *no reasonable grounds for believing to be true*. Such acts clearly would constitute actual fraud under California law. In such situations the defendant *believes* the representations to be true but is without reasonable grounds for such belief. His liability is based on negligent misrepresentation which has been made a form of actionable deceit. On the contrary, in the instant case, the court found that the defendants *did not believe* in the truth of the statements. Where a person makes statements which he does not believe to be true, in a reckless manner without knowing whether they are true or false, the element of scienter is satisfied and he is liable for intentional misrepresentation." (*Yellow Creek Logging Corp. v. Dare* (1963) 216 Cal.App.2d 50, 57 [30 Cal.Rptr. 629], original italics, internal citations omitted.)

- "The elements of negligent misrepresentation are (1) a misrepresentation of a past or existing material fact, (2) made without reasonable ground for believing it to be true, (3) made with the intent to induce another's reliance on the fact misrepresented, (4) justifiable reliance on the misrepresentation, and (5) resulting damage." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 196 [147 Cal.Rptr.3d 41].)

- " 'To be actionable deceit, the representation need not be made with knowledge of actual falsity, but need only be an "assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true" and made "with intent to induce [the recipient] to alter his position to his injury or his risk. ..." ' The elements of negligent misrepresentation also include justifiable reliance on the representation, and resulting damage." (*B.L.M. v. Sabo & Deitsch* (1997) 55 Cal.App.4th 823, 834 [64 Cal.Rptr.2d 335], internal citations omitted.)

- "As is true of negligence, responsibility for negligent misrepresentation rests upon the existence of a legal duty, imposed by contract, statute or otherwise, owed by a defendant to the injured person. The determination of whether a duty exists is primarily a question of law." (*Eddy v. Sharp* (1988) 199 Cal.App.3d 858, 864 [245 Cal.Rptr. 211], internal citations omitted.)

- " ' "Where the defendant makes false statements, honestly believing that they are true, but without

reasonable ground for such belief, he may be liable for negligent misrepresentation, a form of deceit." ' If defendant's belief 'is both honest and reasonable, the misrepresentation is innocent and there is no tort liability.' " (*Diediker v. Peelle Financial Corp.* (1997) 60 Cal.App.4th 288, 297 [70 Cal.Rptr.2d 442], internal citations omitted.)

- "Parties cannot read something into a neutral statement in order to justify a claim for negligent misrepresentation. The tort requires a 'positive assertion.' 'An "implied" assertion or representation is not enough.' " (*Diediker, supra,* 60 Cal.App.4th at pp. 297-298, internal citations omitted.)

- "Whether a defendant had reasonable ground for believing his or her false statement to be true is ordinarily a question of fact." (*Quality Wash Group V, Ltd. v. Hallak* (1996) 50 Cal.App.4th 1687, 1696 [58 Cal.Rptr.2d 592], internal citations omitted.)

- "[T]here are two causation elements in a fraud cause of action. First, the plaintiff's actual and justifiable reliance on the defendant's misrepresentation must have caused him to take a detrimental course of action. Second, the detrimental action taken by the plaintiff must have caused his alleged damage." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1062 [141 Cal.Rptr.3d 142].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 818–820, 823–826

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-G, *Negligent Misrepresentation*, ¶ 5:591 et seq. (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-D, *Negligent Misrepresentation*, ¶ 11:41 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.10 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.14 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.270 et seq. (Matthew Bender)

2 California Civil Practice: Torts §§ 22:13–22:15 (Thomson Reuters~~ West~~)

1905. Definition of Important Fact/Promise

Revoked December 2013. See CACI No. 1908, *Reasonable Reliance*.

~~**A [fact/promise] is important if it would influence a reasonable person's judgment or conduct. A [fact/promise] is also important if the person who [represents/makes] it knows that the person to whom the [representation/promise] is made is likely to be influenced by it even if a reasonable person would not.**~~

~~*New September 2003*~~

~~Sources and Authority~~

- ~~"According to the Restatement of Torts, '[r]eliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material. ... The matter is material if ... a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question ... .' But materiality is a jury question, and a 'court may [only] withdraw the case from the jury if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Charpentier v. Los Angeles Rams* (1999) 75 Cal.App.4th 301, 312-313 [89 Cal.Rptr.2d 115], internal citations omitted.)~~

- ~~"Viewed in terms of materiality, '[a] false representation which cannot possibly affect the intrinsic merits of a business transaction must necessarily be immaterial because reliance upon it could not produce injury in a legal sense.' " (*Service by Medallion, Inc. v. Clorox Co.* (1996) 44 Cal.App.4th 1807, 1818 [52 Cal.Rptr.2d 650], internal citation omitted.)~~

- ~~"A misrepresentation of fact is material if it induced the plaintiff to alter his position to his detriment. Stated in terms of reliance, materiality means that without the misrepresentation, the plaintiff would not have acted as he did. 'It must be shown that the plaintiff actually relied upon the misrepresentation; i.e., that the representation was "an immediate cause of his conduct which alters his legal relations," and that without such representation, "he would not, in all reasonable probability, have entered into the contract or other transaction." ' " (*Okun v. Morton* (1988) 203 Cal.App.3d 805, 828 [250 Cal.Rptr. 220], internal citations omitted.)~~

~~*Secondary Sources*~~

~~3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.03[4] (Matthew Bender)~~

~~23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit* (Matthew Bender)~~

~~10 California Points and Authorities, Ch. 105, *Fraud and Deceit* (Matthew Bender)~~

~~2 California Civil Practice: Torts (Thomson West) § 22:29~~

1907. Reliance

[*Name of plaintiff***] relied on [***name of defendant***]'s [misrepresentation/concealment/false promise] if:**

1. ~~it~~ **The [misrepresentation/concealment/false promise] substantially influenced~~caused~~ [him/her/it] to [***insert brief description of the action, e.g., "buy the house"~~],~~ "]; and**

2. ~~if~~ **[~~he~~He/~~she~~She/~~it~~It] would probably not have [***e.g., bought the house***]~~done so~~ without ~~such~~ the [misrepresentation/concealment/false promise].**

It is not necessary for a [misrepresentation/concealment/false promise] to be the only reason for [*name of plaintiff***]'s conduct. ~~It is enough if a [misrepresentation/concealment] substantially influenced [***name of plaintiff***]'s choice, even if it was not the only reason for [his/her/its] conduct~~.**

New September 2003; Revised December 2013

Directions for Use

Give this instruction with one of the fraud causes of action (see CACI Nos. 1900-1903), all of which require actual reliance on the statement or omission at issue. Reliance must be both actual and reasonable. Give also CACI No. 1908, *Reasonable Reliance*.

Sources and Authority

- "It is settled that a plaintiff, to state a cause of action for deceit based on a misrepresentation, must plead that he or she actually relied on the misrepresentation." (*Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1088 [23 Cal.Rptr.2d 101, 858 P.2d 568], internal citations omitted.)

- "Actual reliance occurs when a misrepresentation is ' "an immediate cause of [a plaintiff's] conduct, which alters his legal relations," ' and when, absent such representation, ' "he would not, in all reasonable probability, have entered into the contract or other transaction." ' 'It is not ... necessary that [a plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. ... It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 976−977 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal citations omitted~~Reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or other transaction. 'Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether the plaintiff's reliance is reasonable is a question of fact.' " (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1239 [44 Cal.Rptr.2d 352, 900 P.2d 601], internal citations omitted~~.)

- "In establishing the reliance element of a cause of action for fraud, it is settled that the alleged fraud

need not be the sole cause of a party's reliance. Instead, reliance may be established on the basis of circumstantial evidence showing the alleged fraudulent misrepresentation or concealment substantially influenced the party's choice, even though other influences may have operated as well." (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 170 [80 Cal.Rptr.2d 66], internal citations omitted.)

- "[A] presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' and as such, materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Engalla*, *supra*, ~~*v. Permanente Medical Group, Inc.* (1997)~~ 15 Cal.4th at p.~~951,~~ 977 ~~[64 Cal.Rptr.2d 843, 938 P.2d 903]~~.)

- " 'It must be shown that the plaintiff actually relied upon the misrepresentation; i.e., that the representation was "an immediate cause of his conduct which alters his legal relations," and that without such representation, "he would not, in all reasonable probability, have entered into the contract or other transaction." ' " (*Okun v. Morton* (1988) 203 Cal.App.3d 805, 828 [250 Cal.Rptr. 220], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 808–815

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.05–40.06 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit*, § 269.15 et seq. (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit*, § 105.200 et seq. (Matthew Bender)

2 California Civil Practice: Torts ~~(Thomson West)~~ § 22:31 (Thomson Reuters)

1908. Reasonable Reliance

In determining whether [*name of plaintiff*]'s reliance on the [misrepresentation/concealment/false promise] was reasonable, [he/she/it] must first prove that the matter was material. A matter is material if a reasonable person would find it important in determining his or her choice of action.

~~You must~~If you decide that the matter is material, you must then decide whether it was reasonable for [*name of plaintiff*] to rely on the [misrepresentation/concealment/false promise]. In making this decision, take into consideration ~~determine the reasonableness of~~ [*name of plaintiff*]'s ~~reliance by taking into account [his/her] mental capacity,~~ intelligence, knowledge, education, and experience.

However, it is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] that is preposterous. It also is not reasonable for anyone to rely on a [misrepresentation/concealment/false promise] if facts that are within [his/her] observation show that it is obviously false.

New September 2003; Revised October 2004, December 2013

Directions for Use

There would appear to be three considerations in determining reasonable reliance. First, the representation or promise must be material, as judged by a reasonable-person standard. (*Charpentier v. Los Angeles Rams* (1999) 75 Cal.App.4th 301, 312–313 [89 Cal.Rptr.2d 115].) Second, if the matter is material, reasonableness must take into account the plaintiff's own knowledge, education, and experience; the objective reasonable person is irrelevant at this step. Third, some matters are simply too preposterous to be believed by anyone, notwithstanding limited knowledge, education, and experience. (*Blankenheim v. E. F. Hutton, Co., Inc.* (1990) 217 Cal.App.3d 1463, 1474 [266 Cal.Rptr. 593].) ~~This instruction is appropriate for cases in which evidence of the plaintiff's greater or lesser personal knowledge, education, experience, or capacity has been introduced. Trial of class actions may require a different instruction. (See *Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814 n. 9 [94 Cal.Rptr. 796, 484 P.2d 964]; see also *Wilner v. Sunset Life Insurance Co.* (2000) 78 Cal.App.4th 952, 963 [93 Cal.Rptr.2d 413].)~~

See also CACI No. 1907, *Reliance*.

Sources and Authority

- "According to the Restatement of Torts, '[r]eliance upon a fraudulent misrepresentation is not justifiable unless the matter misrepresented is material. ... The matter is material if ... a reasonable [person] would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question ... .' But materiality is a jury question, and a 'court may [only] withdraw the case from the jury if the fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Charpentier*, *supra*, 75 Cal.App.4th at pp. 312–313, internal citations omitted.)

- "[T]he issue is whether the person who claims reliance was justified in believing the representation in the light of his own knowledge and experience." (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 503 [198 Cal.Rptr. 551, 674 P.2d 253], internal citations omitted.)

- "[N]or is a plaintiff held to the standard of precaution or of minimum knowledge of a hypothetical, reasonable man. Exceptionally gullible or ignorant people have been permitted to recover from defendants who took advantage of them in circumstances where persons of normal intelligence would not have been misled. 'No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool.' If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, however, he will be denied a recovery. 'He may not put faith in representations which are preposterous, or which are shown by facts within his observation to be so patently and obviously false that he must have closed his eyes to avoid discovery of the truth.' " (*Blankenheim, supra, ~~v. E.F. Hutton, Co., Inc.~~ (1990)* 217 Cal.App.3d at p.~~1463,~~ 1474 ~~[266 Cal.Rptr. 593])~~, internal citations omitted.)

- "Except in the rare case where the undisputed facts leave no room for a reasonable difference of opinion, the question of whether a plaintiff's reliance is reasonable is a question of fact." (*Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039, 1067 [141 Cal.Rptr.3d 142].)

- "~~:~~ 'What would constitute fraud in a given instance might not be fraudulent when exercised toward another person. The test of the representation is its actual effect on the particular mind ... .' " (*Blankenheim, supra,* 217 Cal.App.3d at p. 1475, internal citation omitted.)

- "[Plaintiff]'s deposition testimony on which appellants rely also reveals that she is a practicing attorney and uses releases in her practice. In essence, she is asking this court to rule that a practicing attorney can rely on the advice of an equestrian instructor as to the validity of a written release of liability that she executed without reading. In determining whether one can reasonably or justifiably rely on an alleged misrepresentation, the knowledge, education and experience of the person claiming reliance must be considered. Under these circumstances, we conclude as a matter of law that any such reliance was not reasonable." (*Guido v. Koopman* (1991) 1 Cal.App.4th 837, 843–844 [2 Cal.Rptr.2d 437], internal citations omitted.)

- "[I]t is inherently unreasonable for any person to rely on a prediction of future IRS enactment, enforcement, or non-enforcement of the law by someone unaffiliated with the federal government. As such, the reasonable reliance element of any fraud claim based on these predictions fails as a matter of law." (*Brakke v. Economic Concepts, Inc.* (2013) 213 Cal.App.4th 761, 769 [153 Cal.Rptr.3d 1].)

- "[A] presumption, or at least an inference, of reliance arises wherever there is a showing that a misrepresentation was material. A misrepresentation is judged to be 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question' and as such, materiality is generally a question of fact unless the 'fact misrepresented is so obviously unimportant that the jury could not reasonably find that a reasonable man would have been influenced by it.' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 977 [64 Cal.Rptr.2d 843, 938 P.2d 903], internal citations omitted.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 812–815

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.06 (Matthew Bender)

23 California Forms of Pleading and Practice, Ch. 269, *Fraud and Deceit,* § 269.19 (Matthew Bender)

10 California Points and Authorities, Ch. 105, *Fraud and Deceit,* § 105.229 (Matthew Bender)

2 California Civil Practice: Torts § 22:32 (Thomson Reuters ~~West~~)

2201. Intentional Interference With Contractual Relations—Essential Factual Elements

[*Name of plaintiff*] claims that [*name of defendant*] intentionally interfered with the contract between [him/her/it] and [*name of third party*]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That there was a contract between [*name of plaintiff*] and [*name of third party*];**

2. **That [*name of defendant*] knew of the contract;**

4**3.** **That [*name of defendant*]'s conduct prevented performance or made performance more expensive or difficult;**

3**4.** **That [*name of defendant*] [intended to disrupt the performance of this contract/ [or] knew that disruption of performance was certain or substantially certain to occur];**

~~4. That [*name of defendant*]'s conduct prevented performance or made performance more expensive or difficult;~~

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

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

New September 2003; Revised June 2012, December 2013

Directions for Use

This tort is sometimes called intentional interference with performance of a contract. (See *Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280, 291 [136 Cal.Rptr.3d 97].) If the validity of a contract is an issue, see the series of contracts instructions (CACI No. 300 et seq.).

Sources and Authority

- "The elements which a plaintiff must plead to state the cause of action for intentional interference with contractual relations are (1) a valid contract between plaintiff and a third party; (2) defendant's knowledge of this contract; (3) defendant's intentional acts designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damage." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1, 791 P.2d 587], internal citations omitted.)

- "[A] cause of action for intentional interference with contract requires an underlying enforceable contract. Where there is no existing, enforceable contract, only a claim for interference with prospective advantage may be pleaded." (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 601 [52 Cal.Rptr.2d 877].)

- "Because interference with an existing contract receives greater solicitude than does interference with prospective economic advantage, it is not necessary that the defendant's conduct be wrongful apart from the interference with the contract itself." (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 55 [77 Cal.Rptr.2d 709, 960 P.2d 513], internal citations omitted.)

- "The question is whether a plaintiff must plead and prove that the defendant engaged in wrongful acts *with the specific intent* of interfering with the plaintiff's business expectancy. We conclude that specific intent is not a required element of the tort of interference with prospective economic advantage. While a plaintiff may satisfy the intent requirement by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiff's prospective economic advantage, a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1154 [131 Cal.Rptr.2d 29, 63 P.3d 937], original italics~~It is not enough that the actor intended to perform the acts which caused the result–he or she must have intended to cause the result itself." (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 261 [45 Cal.Rptr.2d 90]~~.)

- "We caution that although we find the intent requirement to be the same for the torts of intentional interference with contract and intentional interference with prospective economic advantage, these torts remain distinct." (*Korea Supply Co.*, *supra*, 29 Cal.4th at p. 1157.)

- Restatement Second of Torts, section 766A provides: "One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the pecuniary loss resulting to him."

- "Plaintiff need not allege an actual or inevitable breach of contract in order to state a claim for disruption of contractual relations. We have recognized that interference with the plaintiff's performance may give rise to a claim for interference with contractual relations if plaintiff's performance is made more costly or more burdensome. Other cases have pointed out that while the tort of inducing breach of contract requires proof of a breach, the cause of action for interference with contractual relations is distinct and requires only proof of interference." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1129, internal citations omitted.)

- "[I]nterference with an at-will contract is actionable interference with the contractual relationship, on the theory that a contract 'at the will of the parties, respectively, does not make it one at the will of others.' " (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1127, internal citations and quotations omitted.)

- "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1137.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 741, 742, 759

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-E, *Intentional Interference With Contract Or Prospective Economic Advantage,* ¶ 5:461 et seq. (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.110–40.117 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition,* § 565.133 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference,* § 122.20 et seq. (Matthew Bender)

2202. Intentional Interference With Prospective Economic Relations—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with an economic relationship between [him/her/it] and [***name of third party***] that probably would have resulted in an economic benefit to [***name of plaintiff***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] and [***name of third party***] were in an economic relationship that probably would have resulted in an economic benefit to [***name of plaintiff***];**

2. **That [***name of defendant***] knew of the relationship;**

3. **That [***name of defendant***] engaged in [***specify conduct determined by the court to be wrongful***];**

4. **That by engaging in this conduct, [***name of defendant***] [intended to disrupt the relationship/ [or] knew that disruption of the relationship was certain or substantially certain to occur];**

5. **That the relationship was disrupted;**

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 June 2013, December 2013

Directions for Use

Regarding element 43, the interfering conduct must be wrongful by some legal measure other than the fact of the interference itself. (*Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393 [45 Cal.Rptr.2d 436, 902 P.2d 740].) This conduct must fall outside the privilege of fair competition. (*PMC, Inc. v. Saban Entertainment, Inc.* (1996) 45 Cal.App.4th 579, 603 [52 Cal.Rptr.2d 877], disapproved on other grounds in *Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1134, 1159 fn. 11 [131 Cal.Rptr.2d 29, 63 P.3d 937].) Whether the conduct alleged qualifies as wrongful if proven or falls within the privilege of fair competition is resolved by the court as a matter of law. If the court lets the case go to trial, the jury's role is not to determine wrongfulness, but simply to find whether or not the defendant engaged in the conduct. If the conduct is tortious, the judge should instruct on the elements of the tort.

Sources and Authority

- "The tort of intentional or negligent interference with prospective economic advantage imposes liability for improper methods of disrupting or diverting the business relationship of another which

fall outside the boundaries of fair competition." (*Settimo Associates v. Environ Systems, Inc.* (1993) 14 Cal.App.4th 842, 845 [17 Cal.Rptr.2d 757], internal citation omitted.)

- "The tort of interference with prospective economic advantage protects the same interest in stable economic relationships as does the tort of interference with contract, though interference with prospective advantage does not require proof of a legally binding contract. The chief practical distinction between interference with contract and interference with prospective economic advantage is that a broader range of privilege to interfere is recognized when the relationship or economic advantage interfered with is only prospective." (*Pacific Gas & Electric Co. v. Bear Stearns & Co.* (1990) 50 Cal.3d 1118, 1126 [270 Cal.Rptr. 1, 791 P.2d 587], internal citations omitted.)

- "The five elements for intentional interference with prospective economic advantage are: (1) [a]n economic relationship between the plaintiff and some third party, with the probability of future economic benefit to the plaintiff; (2) the defendant's knowledge of the relationship; (3) intentional acts on the part of the defendant designed to disrupt the relationship; (4) actual disruption of the relationship; and (5) economic harm to the plaintiff proximately caused by the acts of the defendant." (*Youst v. Longo* (1987) 43 Cal.3d 64, 71, fn. 6 [233 Cal.Rptr. 294, 729 P.2d 728].)

- "The question is whether a plaintiff must plead and prove that the defendant engaged in wrongful acts *with the specific intent* of interfering with the plaintiff's business expectancy. We conclude that specific intent is not a required element of the tort of interference with prospective economic advantage. While a plaintiff may satisfy the intent requirement by pleading specific intent, i.e., that the defendant desired to interfere with the plaintiff's prospective economic advantage, a plaintiff may alternately plead that the defendant knew that the interference was certain or substantially certain to occur as a result of its action." (*Korea Supply Co., supra*, 29 Cal.4th at p. 1154, original italics.)

- "With respect to the third element, a plaintiff must show that the defendant engaged in an independently wrongful act. It is not necessary to prove that the defendant acted with the specific intent, or purpose, of disrupting the plaintiff's prospective economic advantage. Instead, 'it is sufficient for the plaintiff to plead that the defendant "[knew] that the interference is certain or substantially certain to occur as a result of his action." ' '[A]n act is independently wrongful if it is unlawful, that is, if it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard.' '[A]n act must be wrongful by some legal measure, rather than merely a product of an improper, but lawful, purpose or motive.' " (*San Jose Construction, Inc. v. S.B.C.C., Inc.* (2007) 155 Cal.App.4th 1528, 1544–1545 [67 Cal.Rptr.3d 54], internal citations omitted.)

- "[A]n essential element of the tort of intentional interference with prospective business advantage is the existence of a business relationship with which the tortfeasor interfered. Although this need not be a contractual relationship, an existing relationship is required." (*Roth v. Rhodes* (1994) 25 Cal.App.4th 530, 546 [30 Cal.Rptr.2d 706], internal citations omitted.)

- "If a party has no liability in tort for refusing to perform an existing contract, no matter what the reason, he or she certainly should not have to bear a burden in tort for refusing to *enter into* a contract where he or she has no obligation to do so. If that same party cannot conspire with a third party to breach or interfere with his or her own contract then certainly the result should be no different where

the 'conspiracy' is to disrupt a relationship which has not even risen to the dignity of an existing contract and the party to that relationship was entirely free to 'disrupt' it on his or her own without legal restraint or penalty." (*Kasparian v. County of Los Angeles* (1995) 38 Cal.App.4th 242, 266 [45 Cal.Rptr.2d 90], original italics.)

- "Although varying language has been used to express this threshold requirement, the cases generally agree it must be reasonably probable that the prospective economic advantage would have been realized but for defendant's interference." (*Youst, supra,* 43 Cal.3d at p. 71, internal citations omitted.)

- "[A] plaintiff seeking to recover for an alleged interference with prospective contractual or economic relations must plead and prove as part of its case-in-chief that the defendant not only knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself." (*Della Penna, supra,* 11 Cal.4th at p. 393.)

- "*Della Penna* did not specify what sort of conduct would qualify as 'wrongful' apart from the interference itself." (*Limandri v. Judkins* (1997) 52 Cal.App.4th 326, 340 [60 Cal.Rptr.2d 539].)

- "Justice Mosk's concurring opinion in *Della Penna* advocates that proscribed conduct be limited to means that are independently tortious or a restraint of trade. The Oregon Supreme Court suggests that conduct may be wrongful if it violates 'a statute or other regulation, or a recognized rule of common law, or perhaps an established standard of a trade or profession.' ... Our Supreme Court may later have occasion to clarify the meaning of 'wrongful conduct' or 'wrongfulness,' or it may be that a precise definition proves impossible." (*Arntz Contracting Co. v. St. Paul Fire and Marine Insurance Co.* (1996) 47 Cal.App.4th 464, 477–478 [54 Cal.Rptr.2d 888], internal citations omitted.)

- "Commonly included among improper means are actions which are independently actionable, violations of federal or state law or unethical business practices, e.g., violence, misrepresentation, unfounded litigation, defamation, trade libel or trade mark infringement." (*PMC, Inc., supra,* 45 Cal.App.4th at p. 603, internal citation omitted.)

- "It is insufficient to allege the defendant engaged in tortious conduct distinct from or only tangentially related to the conduct constituting the actual interference." (*Limandri, supra,* 52 Cal.App.4th at p. 342.)

- "[O]ur focus for determining the wrongfulness of those intentional acts should be on the defendant's objective conduct, and evidence of motive or other subjective states of mind is relevant only to illuminating the nature of that conduct." (*Arntz Contracting Co., supra,* 47 Cal.App.4th at p. 477.)

- "Since the crux of the competition privilege is that one can interfere with a competitor's prospective contractual relationship with a third party as long as the interfering conduct is not independently wrongful (i.e., wrongful apart from the fact of the interference itself), *Della Penna*'s requirement that a plaintiff plead and prove such wrongful conduct in order to recover for intentional interference with prospective economic advantage has resulted in a shift of burden of proof. It is now the plaintiff's burden to prove, as an element of the cause of action itself, that the defendant's conduct was independently wrongful and, therefore, was not privileged rather than the defendant's burden to

prove, as an affirmative defense, that it's [*sic*] conduct was not independently wrongful and therefore was privileged." (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 881 [60 Cal.Rptr.2d 830].)

- "[I]n the absence of other evidence, timing alone *may be sufficient* to prove causation … . Thus, … the real issue is whether, in the circumstances of the case, the proximity of the alleged cause and effect tends to demonstrate some relevant connection. If it does, then the issue is one for the fact finder to decide." (*Overhill Farms, Inc. v. Lopez* (2010) 190 Cal.App.4th 1248, 1267 [119 Cal.Rptr.3d 127], original italics.)

- "There are three formulations of the manager's privilege: (1) absolute, (2) mixed motive, and (3) predominant motive.~~There are other privileges that a defendant could assert in appropriate cases, such as the "manager's privilege~~." (~~See~~ *Halvorsen v. Aramark Uniform Services, Inc.* (1998) 65 Cal.App.4th 1383, 1391-1392 [77 Cal.Rptr.2d 383].)

- "We conclude that a plaintiff seeking to state a claim for intentional interference with contract or prospective economic advantage because defendant induced another to undertake litigation, must allege that the litigation was brought without probable cause and that the litigation concluded in plaintiff's favor." (*Pacific Gas & Electric Co., supra,* 50 Cal.3d at p. 1137.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 741–754, 759

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-E, *Intentional Interference With Contract Or Prospective Economic Advantage*, ¶¶ 5:463, 5:470 (The Rutter Group)

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 11-G, *Intentional Interference With Contract Or Economic Advantage*, ¶ 11:138.5 (The Rutter Group)

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, §§ 40.100–40.105 (Matthew Bender)

49 California Forms of Pleading and Practice, Ch. 565, *Unfair Competition*, § 565.133 (Matthew Bender)

12 California Points and Authorities, Ch. 122, *Interference*, §§ 122.23, 122.32 (Matthew Bender)

2203. Intent

Revoked December 2013

In deciding whether [*name of defendant*] acted intentionally, you may consider whether [he/she/it] knew that a [breach/disruption] was substantially certain to result from [his/her/its] conduct.

New September 2003

Sources and Authority

- "In this case, the jury was instructed that '[a] defendant is deemed to have acted intentionally if it knew that disruption or interference with an advantageous relationship was substantially certain to result from its conduct.' [¶] Intent, of course, may be established by inference as well as by direct proof. Thus, the trial court could properly have instructed the jury that it might infer culpable intent from conduct 'substantially certain' to interfere with the contract. Here, though, the jury was instructed that culpable intent was 'deemed' to exist if Standard knew that its conduct would interfere with the contract. Under the principles outlined above, this instruction was clearly in error." (*Seaman's Direct Buying Service, Inc. v. Standard Oil Co.* (1984) 36 Cal.3d 752, 767 [206 Cal.Rptr. 354, 686 P.2d 1158], overruled on other grounds in *Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 98 [44 Cal.Rptr.2d 420, 900 P.2d 669]; disapproved on other grounds in *Della Penna v. Toyota Motor Sales, U.S.A., Inc.* (1995) 11 Cal.4th 376, 393, fn. 5 [45 Cal.Rptr.2d 436, 902 P.2d 740].)

- The *Della Penna* court observed that intentional interference torts are only remotely related to, and have a "superficial kinship" with, other intentional torts, such as battery or false imprisonment. (*Della Penna, supra,* 11 Cal.4th at p. 383.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 743

3 Levy et al., California Torts, Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.104 (Matthew Bender)

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

12 California Points and Authorities, Ch. 122, *Interference* (Matthew Bender)

VF-2201. Intentional Interference With Contractual Relations

We answer the questions submitted to us as follows:

1. Was there a contract between [*name of plaintiff***] and [***name of third party***]?**
____ 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 of the contract?**
____ 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***]'s conduct prevent performance or make performance more expensive or difficult?**
____ Yes ____ No

~~**3. Did [***name of defendant***] intend to disrupt the performance of this contract?**~~
~~**____ 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***] [intend to disrupt the performance of this contract/ [or] know that disruption of performance was certain or substantially certain to occur]?**
____ Yes ____ No

~~**4. Did [***name of defendant***]'s conduct prevent performance or make performance more expensive or difficult?**~~
~~**____ 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 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, December 2013

Directions for Use

This verdict form is based on CACI No. 2201, *Intentional Interference With Contractual Relations.*

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. 2201, *Intentional Interference With Contractual Relations.*~~

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*.

VF-2202. Intentional Interference With Prospective Economic Relations

We answer the questions submitted to us as follows:

1. **Did [***name of plaintiff***] and [***name of third party***] have an economic relationship that probably would have resulted in an economic benefit to [***name of plaintiff***]?**
   ____ 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 of the relationship?**
   ____ 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***] engage in [***specify conduct determined by the court to be wrongful if proved***]?**
   ____ 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. **By engaging in this conduct, did [***name of defendant***] [intend to disrupt the relationship/ [or] know that disruption of the relationship was certain or substantially certain to occur]?**
   ____ 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 relationship disrupted?**
   ____ 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 conduct 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 2013, December 2013

Directions for Use

This verdict form is based on CACI No. 2202, *Intentional Interference With Prospective Economic Relations.*

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.

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

2440. False Claims Act: Whistleblower Protection—Essential Factual Elements (Gov. Code, § 12653)

[*Name of plaintiff***] claims that [***name of defendant***] discharged [him/her] because [he/she] acted [in furtherance of a false claims action/ to stop a false claim by [***name of false claimant***]]. A false claims action is a lawsuit against a person or entity that is alleged to have submitted a false claim to a government agency for payment or approval. A false claim is a claim for payment with the intent to defraud the government. In order to establish [his/her] unlawful discharge claim, [***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 false claimant***] was alleged to have defrauded the government of money, property, or services by submitting a false or fraudulent claim to the government for payment or approval;**

3. **That [***name of plaintiff***] [***specify acts done in furthering the false claims action or to stop a false claim***];**

4. **That [***name of plaintiff***] acted [in furtherance of a false claims action/to stop a false claim];**

5. **That [***name of defendant***] discharged [***name of plaintiff***];**

6. **That [***name of plaintiff***]'s acts [in furtherance of a false claims action/to stop a false claim] were a substantial motivating reason for [***name of defendant***]'s decision to discharge [him/her];**

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

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

[An act is "in furtherance of" a false claims action if

[[*name of plaintiff***] actually filed a false claims action [himself/herself].]**

[*or***]**

[someone else filed a false claims action but [*name of plaintiff***] [***specify acts in support of action, e.g., gave a deposition in the action***], which resulted in the retaliatory acts.]**

[*or***]**

[no false claims action was ever actually filed, but [*name of plaintiff***] had reasonable suspicions of a false claim, and it was reasonably possible for [***name of plaintiff***]'s conduct to lead to a false claims action.]**

The potential false claims action need not have turned out to be meritorious. [*Name of plaintiff*] need only show a genuine and reasonable concern that the government was being defrauded.]

New December 2012; Revoked June 2013; Restored and Revised December 2013

Directions for Use

The whistle-blower protection statute of the False Claims Act (Gov. Code, § 12653) prohibits adverse employment actions against an employee who either (1) takes steps in furtherance of a false claims action or (2) makes efforts to stop a false claim violation. (See Gov. Code, § 12653(a).)

The second sentence of the opening paragraph defines a false claims action in its most common form: a lawsuit against someone who has submitted a false claim for payment. (See Gov. Code, § 12651(a)(1).) This sentence and element 2 may be modified if a different prohibited act is involved. (See Gov. Code, § 12651(a)(2)–(8).)

In element 3, specify the steps that the plaintiff took that are alleged to have led to the adverse action.

The statute reaches a broad range of adverse employment actions short of actual discharge. (See Gov. Code, § 12653(a).) Elements 5 and 6 may be modified to allege constructive discharge or adverse acts other than actual discharge. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions under the Fair Employment and Housing Act that may be adapted for use with this instruction.

Element 6 uses the term "substantial motivating reason" to express both intent and causation between the employee's actions and the discharge. "Substantial motivating reason" has been held to be the appropriate standard under the Fair Employment and Housing Act to address the possibility of both discriminatory and nondiscriminatory motives. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; CACI No. 2507, *"Substantial Motivating Reason" Explained*.) Whether the FEHA standard applies to cases under the False Claims Act has not been addressed by the courts.

Give the last part of the instruction if the claim is that the plaintiff was discharged for acting in furtherance of a false claims action.

Sources and Authority

- Government Code section 12653 provides:

  (a) Any employee, contractor, or agent shall be entitled to all relief necessary to make that employee, contractor, or agent whole, if that employee, contractor, or agent is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of his or her employment because of lawful acts done by the employee, contractor, agent, or associated others in furtherance of an action under this section or other efforts to stop one or more violations of this article.

(b) Relief under this section shall include reinstatement with the same seniority status that the employee, contractor, or agent would have had but for the discrimination, two times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, and where appropriate, punitive damages. The defendant shall also be required to pay litigation costs and reasonable attorneys' fees. An action under this section may be brought in the appropriate superior court of the state.

(c) A civil action under this section shall not be brought more than three years after the date when the retaliation occurred.

- "The False Claims Act prohibits a 'person' from defrauding the government of money, property, or services by submitting to the government a 'false or fraudulent claim' for payment." (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1273 [134 Cal.Rptr.3d 883].)

- "To establish a prima facie case, a plaintiff alleging retaliation under the CFCA must show: '(1) that he or she engaged in activity protected under the statute; (2) that the employer knew the plaintiff engaged in protected activity; and (3) that the employer discriminated against the plaintiff because he or she engaged in protected activity.' " (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 455 [152 Cal.Rptr.3d 595].)

- " 'As a statute obviously designed to prevent fraud on the public treasury, [Government Code] section 12653 plainly should be given the broadest possible construction consistent with that purpose.' " (*McVeigh, supra,* 213 Cal.App.4th at p. 456.)

- "The False Claims Act bans retaliatory discharge in section 12653, which speaks not of a 'person' being liable for defrauding the government, but of an 'employer' who retaliates against an employee who assists in the investigation or pursuit of a false claim. Section 12653 has been 'characterized as the whistleblower protection provision of the [False Claims Act and] is construed broadly.' " (*Cordero-Sacks, supra,* 200 Cal.App.4th at p. 1274.)

- "[T]he act's retaliation provision applies not only to qui tam actions but to false claims in general. Section 12653 makes it unlawful for an employer to retaliate against an employee who is engaged 'in furthering a false claims action, including investigation for, initiation of, testimony for, or assistance in, an action filed or to be filed under Section 12652.' " (*Cordero-Sacks, supra,* 200 Cal.App.4th at p. 1276.)

- "Generally, to constitute protected activity under the CFCA, the employee's conduct must be in furtherance of a false claims action. The employee does not have to file a false claims action or show a false claim was actually made; however, the employee must have reasonably based suspicions of a false claim and it must be reasonably possible for the employee's conduct to lead to a false claims action." (*Kaye v. Board of Trustees of San Diego County Public Law Library* (2009) 179 Cal.App.4th 48, 60 [101 Cal.Rptr.3d 456], internal citation omitted.)

- "We do not construe *Kaye's* requirement that it be 'reasonably possible for [the employee's

conduct] to lead to a false claims action' to mean that a plaintiff is not protected under the CFCA unless he or she has discovered grounds for a *meritorious* false claim action. … [T]he plaintiff need only show a genuine and reasonable concern that the government was possibly being defrauded in order to establish that he or she engaged in protected conduct. Any more limiting construction or significant burden would deny whistleblowers the broad protection the CFCA was intended to provide." (*McVeigh, supra,* 213 Cal.App.4th at pp. 457−458, original italics.)

- "There is a dearth of California authority discussing what constitutes protected activity under the CFCA. However, because the CFCA is patterned on a similar federal statute (31 U.S.C. § 3729 et seq.), we may rely on cases interpreting the federal statute for guidance in interpreting the CFCA. (*Kaye, supra,* 179 Cal.App.4th at pp. 59–60.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 288

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 767

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03 (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 468, *Public Entities and Officers: False Claims Actions*, § 468.25 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.61 (Matthew Bender)

2512. Limitation on Remedies—Same Decision

[*Name of plaintiff***] claims that [he/she] was [discharged/[***other adverse employment action***]] because of [his/her] [***protected status or action, e.g., race, gender, or age***], which is an unlawful [discriminatory/retaliatory] reason. [***Name of defendant***] claims that [***name of plaintiff***] [was discharged/[***other adverse employment action***]] because of [***specify reason, e.g., plaintiff's poor job performance***], which is a lawful reason.**

If you find that [discrimination/retaliation] was a substantial motivating reason for [*name of plaintiff***]'s [discharge/[***other adverse employment action***]], you must then consider [***name of defendant***]'s stated reason for the [discharge/[***other adverse employment action***]].**

If you find that [*e.g., plaintiff's poor job performance***] was also a substantial motivating reason, then you must determine whether the defendant has proven that [he/she/it] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway based on [***e.g., plaintiff's poor job performance***] even if [he/she/it] had not also been substantially motivated by [discrimination/retaliation].**

In determining whether [*e.g., plaintiff's poor job performance***] was a substantial motivating reason, determine what actually motivated [***name of defendant***], not what [he/she/it] might have been justified in doing.**

If you find that [*name of defendant***] [discharged/[***other adverse employment action***]] [***name of plaintiff***] only for a [discriminatory/retaliatory] reason, you will be asked to determine the amount of damages that [he/she] is entitled to recover. If, however, you find that [***name of defendant***] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway for [***specify defendant's nondiscriminatory/nonretaliatory reason***], then [***name of plaintiff***] will not be entitled to reinstatement, back pay, or damages.**

New December 2013

Directions for Use

Give this instruction along with CACI No. 2507, "*Substantial Motivating Reason" Explained*, if the employee has presented sufficient evidence for the jury to find that the employer took adverse action against him or her for a prohibited reason, but the employer has presented sufficient evidence for the jury to find that it had a legitimate reason for the action. In such a "mixed-motive" case, the employer is relieved from an award of damages, but may still be liable for attorney fees and costs and injunctive relief. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 211 [152 Cal.Rptr.3d 392, 294 P.3d 49].)

Mixed-motive must be distinguished from pretext though both require evaluation of the same evidence, i.e., the employer's purported legitimate reason for the adverse action. In a pretext case, the only actual motive is the discriminatory one and the purported legitimate reasons are fabricated in order to disguise

the true motive. (See *City and County of San Francisco v. Fair Employment and Housing Com.* (1987) 191 Cal.App.3d 976, 985 [236 Cal.Rptr. 716].) The employee has the burden of proving pretext. (*Harris, supra,* 56 Cal.4th at pp. 214−215.) If the employee proves discrimination or retaliation and also pretext, the employer is liable for all potential remedies including damages. But if the employee proves discrimination or retaliation but fails to prove pretext, then a mixed-motive case is presented. To avoid an award of damages, the employer then has the burden of proving that it would have made the same decision anyway solely for the legitimate reason, even though it may have also discriminated or retaliated.

Sources and Authority

- Government Code section 12940.5(c) provides: "Once an individual proves a claim of discrimination or retaliation under this article, if an employer pleads and proves that it would have made the same employment action or decision at the same time without considering the protected characteristic or activity, the remedies available to the employee shall be limited to the remedies provided in paragraph (2) of subdivision (b) of Section 12965."

- Government Code section 12965(b)(2) provides: "In a civil action brought pursuant to this subdivision, if, under subdivision (c) of Section 12940.5, an individual proves a claim of discrimination or retaliation under this article, but an employer pleads and proves that it would have made the same employment action or decision at the same time without considering the protected characteristic or activity, the employee shall not be entitled to reinstatement, back pay, compensatory damages, or declaratory relief. The employee may recover injunctive relief and attorney's fees and costs, including expert witness fees, pursuant to subdivision (d). The court shall also grant a statutory penalty of up to twenty-five thousand dollars ($25,000) to be awarded directly to the employee. This paragraph shall not affect the rights and remedies provided under this section if an employer fails to plead and prove that it would have made the same employment action or decision at the same time without considering the protected characteristic or activity."

- [U]nder the FEHA, when a jury finds that unlawful discrimination was a substantial factor motivating a termination of employment, and when the employer proves it would have made the same decision absent such discrimination, a court may not award damages, backpay, or an order of reinstatement. But the employer does not escape liability. In light of the FEHA's express purpose of not only redressing but also preventing and deterring unlawful discrimination in the workplace, the plaintiff in this circumstance could still be awarded, where appropriate, declaratory relief or injunctive relief to stop discriminatory practices. In addition, the plaintiff may be eligible for reasonable attorney's fees and costs." (*Harris, supra,* 56 Cal.4th at p. 211.)

- "Because employment discrimination litigation does not resemble the kind of cases in which we have applied the clear and convincing standard, we hold that preponderance of the evidence is the standard of proof applicable to an employer's same-decision showing" (*Harris, supra,* 53 Cal.4th at p. 239.)

- "[W]hen we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision at the time it made its actual decision." (*Harris, supra,* 56 Cal.4th at p. 224.)

- "In light of today's decision, a jury in a mixed-motive case alleging unlawful termination should be instructed that it must find the employer's action was substantially motivated by discrimination before the burden shifts to the employer to make a same-decision showing, and that a same-decision showing precludes an award of reinstatement, backpay, or damages." (*Harris, supra,* 56 Cal.4th at p. 241.)

- "We do not suggest that discrimination must be alone sufficient to bring about an employment decision in order to constitute a substantial motivating factor. But it is important to recognize that discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause." (*Harris, supra,* 56 Cal.4th at p. 229.)

- "[A] plaintiff has the initial burden to make a prima facie case of discrimination by showing that it is more likely than not that the employer has taken an adverse employment action based on a prohibited criterion. A prima facie case establishes a presumption of discrimination. The employer may rebut the presumption by producing evidence that its action was taken for a legitimate, nondiscriminatory reason. If the employer discharges this burden, the presumption of discrimination disappears. The plaintiff must then show that the employer's proffered nondiscriminatory reason was actually a pretext for discrimination, and the plaintiff may offer any other evidence of discriminatory motive. The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff." (*Harris, supra,* 56 Cal.4th at pp. 214−215.)

- "As a preliminary matter, we reject [defendant]'s claim that the jury could have found no liability on the part of [defendant] had it been properly instructed on the mixed-motive defense at trial. As discussed, the Supreme Court in *Harris* held that the mixed-motive defense is available under the FEHA, but only as a limitation on remedies and not as a complete defense to liability. Consequently, when the plaintiff proves by a preponderance of the evidence that discrimination was a substantial motivating factor in the adverse employment decision, the employer is liable under the FEHA. When the employer proves by a preponderance of the evidence that it would have made the same decision even in the absence of such discrimination, the employer is still liable under the FEHA, but the plaintiff's remedies are then limited to declaratory or injunctive relief, and where appropriate, attorney's fees and costs. As presently drafted, BAJI No. 12.26 does not accurately set forth the parameters of the defense as articulated by the Supreme Court, but rather states that, in a mixed-motive case, 'the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision.' By providing that the mixed-motive defense, if proven, is a complete defense to liability, [defendant]'s requested instruction directly conflicts with the holding in *Harris*. (*Alamo v. Practice Management Information Corp.* (2013) – Cal.App.4th --, -- [-- Cal.Rptr.3d --], internal citations omitted.)2013 Cal. App. LEXIS 711

- "Pretext may … be inferred from the timing of the company's termination decision, by the identity of the person making the decision, and by the terminated employee's job performance before termination." (*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 272 [100 Cal.Rptr.3d 296].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005), Constitutional Law §§ 928, 950

7 Witkin, California Procedure (5th ed. 2008), Judgment § 217

3 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws,* § 41.11 (Matthew Bender)

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

2513. Business Judgment

In California, employment is presumed to be "at will." That means that an employer may [discharge/[*other adverse action*]] an employee for no reason, or for a good, bad, mistaken, unwise, or even unfair reason, as long as its action is not for a [discriminatory/retaliatory] reason.

New December 2013

Directions for Use

Give this instruction to advise the jury that the employer's adverse action is not illegal just because it is ill-advised. It has been held to be error not to give this instruction. (See *Veronese v. Lucasfilm Ltd.* (2012) 212 Cal.App.4th 1, 20−24 [151 Cal.Rptr.3d 141].)

Sources and Authority

- Labor Code section 2922 provides: "An employment, having no specified term, may be terminated at the will of either party on notice to the other. Employment for a specified term means an employment for a period greater than one month."

- "[A] plaintiff in a discrimination case must show discrimination, not just that the employer's decision was wrong, mistaken, or unwise. … ' "The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason. … 'While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is … whether the given reason was a pretext for illegal discrimination. The employer's stated legitimate reason … does not have to be a reason that the judge or jurors would act on or approve.' " ' " (*Veronese, supra,* 212 Cal.App.4th at p. 21, internal citation omitted.)

- "[I]f nondiscriminatory, [defendant]'s true reasons need not necessarily have been wise or correct. While the objective soundness of an employer's proffered reasons supports their credibility … , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, 'legitimate' reasons in this context are reasons that are facially unrelated to prohibited bias, and which, if true, would thus preclude a finding of discrimination." (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 358 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)

- "[U]nder the law [defendant] was entitled to exercise her business judgment, without second guessing. But [the court] refused to tell the jury that. That was error." (*Veronese, supra,* 212 Cal.App.4th at p. 24.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency, § 231 et seq.

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

Chin et al., California Practice Guide: Employment Litigation, Ch. 4-A, *Employment Presumed At Will*, ¶ 4:25 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 7-A, *Title VII And The California Fair Employment And Housing Act*, ¶¶ 7:194, 7:200–7:201, 7:356, 7:391–7:392, 7:530, 7:531, 7:535 (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline,* § 60.01 et seq. (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.11 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and Discipline*, § 100.23 (Matthew Bender)

2543. Disability Discrimination—"Essential Job Duties" Explained (Gov. Code, §§ 12926(f), 12940(a)(1))

In deciding whether a job duty is essential, you may consider, among other factors, the following:

a. Whether the reason the job exists is to perform that duty;

b. Whether there is a limited number of employees available who can perform that duty;

c. Whether the job duty is highly specialized so that the person currently holding the position was hired for his or her expertise or ability to perform the particular duty.

Evidence of whether a particular duty is essential includes, but is not limited to, the following:

a. [*Name of defendant*]**'s judgment as to which functions are essential;**

b. Written job descriptions prepared before advertising or interviewing applicants for the job;

c. The amount of time spent on the job performing the duty;

d. The consequences of not requiring the person currently holding the position to perform the duty;

e. The terms of a collective bargaining agreement;

f. The work experiences of past persons holding the job;

g. The current work experience of persons holding similar jobs;

h. Reference to the importance of the job in prior performance reviews.

"Essential job duties" do not include the marginal duties of the position. "Marginal duties" are those that, if not performed would not eliminate the need for the job, or those that could be readily performed by another employee, or those that could be performed in another way.

New September 2003; Revoked June 2013; Restored and Revised December 2013

Directions for Use

Give this instruction with CACI No. 2540, *Disability Discrimination—Disparate Treatment—Essential Factual Elements,* or CACI No. 2541, *Disability Discrimination—Reasonable Accommodation—Essential Factual Elements,* or both, if it is necessary to explain what is an "essential job duty." (See

Gov. Code, §§ 12940(a)(1), 12926(f); see also *Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 743−744 [151 Cal.Rptr.3d 292].) While the employee has the burden to prove that he or she can perform essential job duties, with or without reasonable accommodation, it is unresolved which party has the burden of proving that a job duty is essential. (See *Lui v. City and County of San Francisco* (2012) 211 Cal.App.4th 962, 972−973 [150 Cal.Rptr.3d 385].)

Sources and Authority

- Government Code section 12940(a)(1) provides that the FEHA "does not prohibit an employer from refusing to hire or discharging an employee with a physical or mental disability, or subject an employer to any legal liability resulting from the refusal to employ or the discharge of an employee with a physical or mental disability, where the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations."

- Government Code section 12926(f) provides:

  "Essential functions" means the fundamental job duties of the employment position the individual with a disability holds or desires. 'Essential functions' does not include the marginal functions of the position.

  (1) A job function may be considered essential for any of several reasons, including, but not limited to, any one or more of the following:

  (A) The function may be essential because the reason the position exists is to perform that function.

  (B) The function may be essential because of the limited number of employees available among whom the performance of that job function can be distributed.

  (C) The function may be highly specialized, so that the incumbent in the position is hired for his or her expertise or ability to perform the particular function.

  (2) Evidence of whether a particular function is essential includes, but is not limited to, the following:

  (A) The employer's judgment as to which functions are essential.

  (B) Written job descriptions prepared before advertising or interviewing applicants for the job.

  (C) The amount of time spent on the job performing the function.

  (D) The consequences of not requiring the incumbent to perform the function.

(E) The terms of a collective bargaining agreement.

(F) The work experiences of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

- 2 California Code of Regulations section 7293.6(e)(2) provides: "Evidence of whether a particular function is essential includes, but is not limited to, the following:

(A) The employer's or other covered entity's judgment as to which functions are essential.

(B) Accurate, current written job descriptions.

(C) The amount of time spent on the job performing the function.

(D) The legitimate business consequences of not requiring the incumbent to perform the function.

(E) Job descriptions or job functions contained in a collective bargaining agreement.

(F) The work experience of past incumbents in the job.

(G) The current work experience of incumbents in similar jobs.

(H) Reference to the importance of the performance of the job function in prior performance reviews.

- 2 California Code of Regulations section 7293.6(e)(3) provides: " 'Essential functions' do not include the marginal functions of the position. 'Marginal functions' of an employment position are those that, if not performed, would not eliminate the need for the job or that could be readily performed by another employee or that could be performed in an alternative way."

- "The identification of essential job functions is a 'highly fact-specific inquiry.' " (*Lui, supra,* 211 Cal.App.4th at p. 971.)

- "It is clear that plaintiff bore the burden of proving 'that he or she is a qualified individual under the FEHA (i.e., that he or she can perform the essential functions of the job with or without reasonable accommodation).' It is less clear whether that burden included the burden of proving what the essential functions of the position are, rather than just plaintiff's ability to perform the essential functions. Under the ADA, a number of federal decisions have held that '[a]lthough the plaintiff bears the ultimate burden of persuading the fact finder that he can perform the job's essential functions, … "an employer who disputes the plaintiff's claim that he can perform the essential functions must put forth evidence establishing those functions." [Citation.]' … Arguably, plaintiff's burden of proving he is a qualified individual includes the burden of proving which duties are essential functions of the

positions he seeks. Ultimately, we need not and do not decide in the present case which party bore the burden of proof on the issue at trial … .” (*Lui, supra,* 211 Cal.App.4th at pp. 972−973.)

- “The trial court's essential functions finding is also supported by the evidence presented by defendant corresponding to the seven categories of evidence listed in [Government Code] section 12926(f)(2). ‘Usually no one listed factor will be dispositive … .’ ” (*Lui, supra,* 211 Cal.App.4th at p. 977, internal citations omitted.)

Secondary Sources

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

Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 8:744, 9:2298, 9:2402–9:2403, 9:2405, 9:2420

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

2 Wilcox, California Employment Law, Ch. 41, *Substantive Requirements Under Equal Employment Opportunity Laws*, § 41.97[1] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §§ 115.22, 115.54, 115.104 (Matthew Bender)

California Civil Practice: Employment Litigation § 2:86 (Thomson Reuters)

VF-2515. Limitation on Remedies—Same Decision

We answer the questions submitted to us as follows:

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

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

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

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

3. **Did [***name of defendant***] [discharge/refuse to hire/[***other adverse employment action***]] [***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. **Was [***name of plaintiff***]'s [***protected status or activity***] a substantial motivating reason for [***name of defendant***]'s [discharge of/refusal to hire/[***other adverse employment action***]] [***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. **Was [***specify employer's stated legitimate reason, e.g., plaintiff's poor job performance***] also a substantial motivating reason for [***name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]]?**
____ Yes ____ No

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

6. **Would [***name of defendant***] have [discharged/refused to hire/[***other adverse employment***]**

action]] [*name of plaintiff*] **anyway based on [***e.g., plaintiff's poor job performance***] had [***name of defendant***] not also been substantially motivated by [discrimination\/retaliation]?**
____ Yes ____ No

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

7. Was [*name of defendant***]'s [discharge/refusal to hire/[***other adverse employment action***]] a substantial factor in causing harm to [***name of plaintiff***]?**
____ Yes ____ No

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

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

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

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

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

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

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

After [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 2013

Directions for Use

This verdict form is based on CACI No. 2512, *Limitation of Damages—Same Decision.* It incorporates questions from VF-2500, *Disparate Treatment,* and VF-2504, *Retaliation,* to guide the jury through the evaluation of the employer's purported legitimate reason for the adverse employment action.

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.

Question 5 asks the jury to determine whether the employer's stated legitimate reason actually was a motivating reason for the adverse action. In this way, the jury evaluates the employer's reason once. If it finds that it was an actual motivating reason, it then proceeds to question 6 to consider whether the employer has proved "same decision," that is, that it would have taken the adverse employment action anyway for the legitimate reason, even though it may have also had a discriminatory or retaliatory motivation. If the jury answers "no" to question 5 it then proceeds to consider substantial-factor causation of harm and damages in questions 7 and 8.

Relationships other than employer/employee can be substituted in question 2, as in element 2 in CACI No. 2500.

Modify question 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(n).)

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

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

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

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

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

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

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

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

New September 2003; Revised December 2005, December 2013

Directions for Use

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

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

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

Sources and Authority

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

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

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

quit, in which case the employee is entitled to his or her wages at the time of quitting."

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

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

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

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

- Labor Code section 220 provides:

  (a) Sections 201.3, 201.5, 201.7, 203.1, 203.5, 204, 204a, 204b, 204c, 204.1, 205, and 205.5 do not apply to the payment of wages of employees directly employed by the State of California. Except as provided in subdivision (b), all other employment is subject to these provisions.

  (b) Sections 200 to 211, inclusive, and Sections 215 to 219, inclusive, do not apply to the payment of wages of employees directly employed by any county, incorporated city, or town or other municipal corporation. All other employments are subject to these provisions.

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

- Labor Code section 206.5 provides, in part: "An employer shall not require the execution of a release of a claim or right on account of wages due, or to become due, or made as an advance on wages to be earned, unless payment of those wages has been made."

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

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

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, §§ 398, 399

~~Chin et al., California Practice Guide: Employment Litigation (The Rutter Group) ¶¶ 1:22, 5:173, 11:121, 11:456, 11:470, 11:470.1, 11:499, 11:513, 11:545, 11:547, 11:955.2, 11:1459~~
Chin et al., California Practice Guide: Employment Litigation, Ch.1-A, *Background*, ¶ 1:22 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 11-B, *Coverage And Exemptions—In General*, ¶ 11:121 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.11-D, *Payment Of Wages*, ¶¶ 11:456, 11:470, 11:470.1, 11:512−11.514 (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch.11-J, *Enforcing California Laws Regulating Employee Compensation*, ¶ 11:1459 (The Rutter Group)

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

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

California Civil Practice: Employment Litigation ~~(Thomson West)~~ §§ 4:67, 4:75 (Thomson Reuters)

2730. Whistleblower Protection—Essential Factual Elements (Lab. Code, § 1102.5)

[*Name of plaintiff***] claims that [***name of defendant***] [discharged/[***other adverse employment action***]] [him/her] in retaliation for [his/her] [disclosure of information of/refusal to participate in] an unlawful act. In order to establish this claim, [***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 plaintiff***] disclosed to a [government/law enforcement] agency that [***specify information disclosed***];]**

   [*or***]**

   [That [*name of plaintiff***] refused to [***specify activity in which plaintiff refused to participate***];]**

3. **[That [***name of plaintiff***] had reasonable cause to believe that the information disclosed [***name of defendant***]'s [violation of/noncompliance with] a [state/federal] rule or regulation;]**

   [*or***]**

   [That [*specify activity***] would result in [a violation of/noncompliance with] a [state/federal] rule or regulation;]**

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

5. **That [***name of plaintiff***]'s [disclosure of information/refusal to [***specify***]] was a contributing factor in [***name of defendant***]'s decision to [discharge/[***other adverse employment action***]] [***name of plaintiff***];**

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.**

[The disclosure of policies that an employee believes to be unwise, wasteful, gross misconduct, or the like, is not protected. Instead, [*name of plaintiff***] must have reasonably believed that [***name of defendant***]'s policies violated federal or state statutes, rules, or regulations.]**

[It is not [*name of plaintiff***]'s motivation for [his/her] disclosure, but only the content of that disclosure, that determines whether the disclosure is protected.]**

[A report made by an employee of a government agency to his or her employer may be a protected disclosure.]

[A report of publicly known facts is not a protected disclosure.]

New December 2012; Revised June 2013, December 2013

Directions for Use

The whistle-blower protection statute of the Labor Code prohibits retaliation against an employee who discloses or refuses to participate in illegal activity. (Lab. Code, § 1102.5(b), (c).) Select the first option for elements 2 and 3 for disclosure of information; select the second options for refusal to participate. Also select any of the optional paragraphs explaining what disclosures are and are not protected as appropriate to the facts of the case.

"Adverse employment action" is viewed the same as it is under the Fair Employment and Housing Act. (*Patten v. Grant Joint Union High School Dist.* (2005) 134 Cal.App.4th 1378, 1387 [37 Cal.Rptr.3d 113]; see CACI No. 2505, *Retaliation—Essential Factual Elements*.) Element 4 may be modified to allege constructive discharge or adverse acts that might not be obviously prejudicial. See CACI No. 2509, *"Adverse Employment Action" Explained,* and CACI No. 2510, *"Constructive Discharge" Explained,* for instructions that may be adapted for use with this instruction.

The employee must demonstrate by a preponderance of evidence that a protected activity was a contributing factor in the adverse action against the employee. The employer may then attempt to prove by clear and convincing evidence that the action would have been taken anyway for legitimate, independent reasons even if the employee had not engaged in the protected activities. (See Lab. Code, § 1102.6; CACI No. 2731, *Affirmative Defense—Same Decision*.)

Sources and Authority

- Labor Code section 1102.5 provides:

  (a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

  (b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

  (c) An employer may not retaliate against an employee for refusing to participate in an activity that would result in a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.

  (d) An employer may not retaliate against an employee for having exercised his or her rights under subdivision (a), (b), or (c) in any former employment.

(e) A report made by an employee of a government agency to his or her employer is a disclosure of information to a government or law enforcement agency pursuant to subdivisions (a) and (b).

(f) In addition to other penalties, an employer that is a corporation or limited liability company is liable for a civil penalty not exceeding ten thousand dollars ($10,000) for each violation of this section.

(g) This section does not apply to rules, regulations, or policies which implement, or to actions by employers against employees who violate, the confidentiality of the lawyer-client privilege of Article 3 (commencing with Section 950), the physician-patient privilege of Article 6 (commencing with Section 990) of Chapter 4 of Division 8 of the Evidence Code, or trade secret information.

- Labor Code section 1102.6 provides: "In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in the activities protected by Section 1102.5."

- "The elements of a section 1102.5(b) retaliation cause of action require that (1) the plaintiff establish a prima facie case of retaliation, (2) the defendant provide a legitimate, nonretaliatory explanation for its acts, and (3) the plaintiff show this explanation is merely a pretext for the retaliation. [¶] We are concerned here with the first element of a section 1102.5(b) retaliation claim, establishing a prima facie case of retaliation. To do that, a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two." (*Patten, supra,* 134 Cal.App.4th at p. 1384, internal citations omitted.)

- "In 1984, our Legislature provided 'whistle-blower' protection in section 1102.5, subdivision (b), stating that an employer may not retaliate against an employee for disclosing a violation of state or federal regulation to a governmental or law enforcement agency. This provision reflects the broad public policy interest in encouraging workplace whistle-blowers to report unlawful acts without fearing retaliation. Section 1102.5, subdivision (b), concerns employees who report to public agencies. It does not protect plaintiff, who reported his suspicions directly to his employer. Nonetheless, it does show the Legislature's interest in encouraging employees to report workplace activity that may violate important public policies that the Legislature has stated. The state's whistle-blower statute includes administrative regulations as a policy source for reporting an employer's wrongful acts and grants employees protection against retaliatory termination. Thus, our Legislature believes that fundamental public policies embodied in regulations are sufficiently important to justify encouraging employees to challenge employers who ignore those policies." (*Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 76–77 [78 Cal.Rptr.2d 16, 960 P.2d 1046].)

- "As a general proposition, we conclude the court could properly craft instructions in conformity with law developed in federal cases interpreting the federal whistleblower statute. As the court

acknowledged, it was not bound by such federal interpretations. Nevertheless, the court could properly conclude that the jury required guidance as to what did and did not constitute 'disclosing information' or a 'protected disclosure' under the California statutes." (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 847 [136 Cal.Rptr.3d 259].)

- "The court erred in failing to distinguish between the disclosure of policies that plaintiff believed to be unwise, wasteful, gross misconduct or the like, which are subject to the [debatable differences of opinion concerning policy matters] limitation, and the disclosure of policies that plaintiff reasonably believed violated federal or state statutes, rules, or regulations, which are not subject to this limitation, even if these policies were also claimed to be unwise, wasteful or to constitute gross misconduct." (*Mize-Kurzman, supra,* 202 Cal.App.4th at pp. 852–853.)

- "[I]t is not the *motive* of the asserted whistleblower, but the nature of the communication that determines whether it is covered." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 852, original italics.)

- "[I]f we interpret section 1102.5 to require an employee to go to a different public agency or directly to a law enforcement agency before he or she can be assured of protection from retaliation, we would be encouraging public employees who suspected wrongdoing to do nothing at all. Under the scenario envisioned by the [defendant], if the employee reports his or her suspicions to the agency, … , he or she will *have to suffer any retaliatory* conduct with no legal recourse. If the employee reports suspicions to an outside agency or law enforcement personnel, he or she risks subjecting the agency to negative publicity and loss of public support which could ensue without regard to whether the charges prove to be true. At the same time, a serious rift in the employment relationship will have occurred because the employee did not go through official channels within the agency which was prepared to investigate the charges. We see no reason to interpret the statute to create such anomalous results." (*Gardenhire v. Housing Authority* (2000) 85 Cal.App.4th 236, 243 [101 Cal.Rptr.2d 893].)

- "Labor Code section 1102.5, subdivision (b) protects employee reports of unlawful activity by third parties such as contractors and employees, as well unlawful activity by an employer. In support of our conclusion, we note that an employer may have a financial motive to suppress reports of illegal conduct by employees and contractors that reflect poorly on that employer." (*McVeigh v. Recology San Francisco* (2013) 213 Cal.App.4th 443, 471 [152 Cal.Rptr.3d 595], internal citation omitted.)

- "We are persuaded that [instructing the jury that reporting publicly known facts is not a protected disclosure] was a proper limitation on what constitutes disclosure protected by California law." (*Mize-Kurzman, supra,* 202 Cal.App.4th at p. 858.)

- "Matters such as transferring employees, writing up employees, and counseling employees are personnel matters. 'To exalt these exclusively internal personnel disclosures with whistleblower status would create all sorts of mischief. Most damagingly, it would thrust the judiciary into micromanaging employment practices and create a legion of undeserving protected 'whistleblowers' arising from the routine workings and communications of the job site. … ' " (*Mueller v. County of Los Angeles* (2009) 176 Cal.App.4th 809, 822 [98 Cal.Rptr.3d 281].)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment § 349

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Employment Torts And Related Claims: Other Statutory Claims*, ¶ 5:894 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.03[2][c] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 250.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Public Entities and Officers: False Claims Actions*, § 100.42 et seq. (Matthew Bender)

2731. Affirmative Defense—Same Decision (Lab. Code, § 1102.6)

If [*name of plaintiff***] proves that [his/her] [disclosure of information of/refusal to participate in] an unlawful act was a contributing factor to [his/her] [discharge/[***other adverse employment action***]], [***name of defendant***] is not liable if [he/she/it] proves by clear and convincing evidence that [he/she/it] would have [discharged/[***other adverse employment action***]] [***name of plaintiff***] anyway for legitimate, independent reasons.**

New December 2013

Directions for Use

Give this instruction in a so-called mixed-motive case under the whistleblower protection statute of the Labor Code. (See Lab. Code, § 1102.5; CACI No. 2730, *Whistleblower Protection—Disclosure of Legal Violation—Essential Factual Elements*.) A mixed-motive case is one in which there is evidence of both a retaliatory and a legitimate reason for the adverse action. Even if the jury finds that the retaliatory reason was a contributing factor, the employer may avoid liability if it can prove by clear and convincing evidence that it would have made the same decision anyway for a legitimate reason. (Lab. Code, § 1102.6.)

Sources and Authority

- Labor Code section 1102.6 provides: "In a civil action or administrative proceeding brought pursuant to Section 1102.5, once it has been demonstrated by a preponderance of evidence that an activity proscribed by Section 1102.5 was a contributing factor in the alleged prohibited action against the employee, the employer shall have the burden of proof to demonstrate by clear and convincing evidence that the alleged action would have occurred for legitimate, independent reasons even if the employee had not engaged in the activities protected by Section 1102.5."

- "[Plaintiff] points to Labor Code section 1102.6, which requires the employer to prove a same-decision defense by clear and convincing evidence when a plaintiff has proven by a preponderance of the evidence that the employer's violation of the whistleblower statute was a 'contributing factor' to the contested employment decision. Yet the inclusion of the clear and convincing evidence language in one statute does not suggest that the Legislature intended the same standard to apply to other statutes implicating the same-decision defense." (*Harris v. City of Santa Monica* (2013) 56 Cal. 4th 203, 239 [152 Cal.Rptr.3d 392, 294 P.3d 49]; internal citation omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment § 349

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-L, *Employment Torts And Related Claims: Other Statutory Claims*, ¶ 5:894 et seq. (The Rutter Group)

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline,* § 60.03 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, § 249.12 (Matthew Bender)

3027. Affirmative Defense─Emergency

[*Name of defendant*] claims that a search warrant was not required. To succeed on this defense, [*name of defendant*] must prove that a peace officer, under the circumstances, would have reasonably believed that violence was imminent and that there was an immediate need to protect [[himself/herself]/ [or] another person] from serious harm.

New December 2013

Directions for Use

The emergency defense is similar to the exigent circumstances defense. (See CACI No. 3026, *Affirmative Defense─Exigent Circumstances*.) Emergency required imminent violence and a need to protect from harm. In contrast, exigent circumstances is broader, reaching such things as a need to prevent escape or the destruction of evidence. (See *Sims v. Stanton* (9th Cir. 2013) 706 F.3d 954, 960.)

Sources and Authority

- "When the warrantless search is to home or curtilage, we recognize two exceptions to the warrant requirement: exigency and emergency. 'These exceptions are narrow and their boundaries are rigorously guarded to prevent any expansion that would unduly interfere with the sanctity of the home.' The exigency exception assists officers in the performance of their law enforcement function. It permits police to commit a warrantless entry where 'necessary to prevent . . . the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts.' The emergency exception, in contrast, seeks to ensure that officers can carry out their duties safely while at the same time ensuring the safety of members of the public. It applies when officers 'have an objectively reasonable basis for concluding that there is an immediate need to protect others or themselves from serious harm.' " (*Sims, supra,* 706 F.3d at p. 960, internal citations omitted.)

- "In sum, reasonable police officers in petitioners' position could have come to the conclusion that the Fourth Amendment permitted them to enter the … residence if there was an objectively reasonable basis for fearing that violence was imminent." (*Ryburn v. Huff* (2012) – U.S. --, -- [132 S.Ct. 987, 992, 181 L.Ed.2d 966].)

- "[Defendant] asserts that he pursued [suspect] into [plaintiff]'s curtilage because he feared for his own safety. To establish that the circumstances gave rise to an emergency situation, [defendant] must show an 'objectively reasonable basis for fearing that violence was imminent.' As in the case of an exigency exception, an 'officer['s] assertion of a potential threat to [his] safety must be viewed in the context of the underlying offense.' Where the threat is to the officer's safety, we observe that '[o]ne suspected of committing a minor offense would not likely resort to desperate measures to avoid arrest and prosecution.' " (*Sims, supra,* 706 F.3d at p. 962, internal citations omitted.)

Secondary Sources

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

3 Civil Rights Actions, Ch. 10, *Deprivation of Rights Under Color of State Law—Law Enforcement and Prosecution*, ¶ 10.04 (Matthew Bender)

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

3517. Comparable Sales (Evid. Code, § 816)

To assist you in determining the fair market value of the property, you have heard evidence of comparable sales. It is up to you to decide the importance of this evidence in determining the fair market value.

New December 2013

Directions for Use

Use this instruction if the court has allowed evidence of comparable sales to be presented to the jury.

Sources and Authority

- Evidence Code section 816 provides:

  When relevant to the determination of the value of property, a witness may take into account as a basis for his opinion the price and other terms and circumstances of any sale or contract to sell and purchase comparable property if the sale or contract was freely made in good faith within a reasonable time before or after the date of valuation. In order to be considered comparable, the sale or contract must have been made sufficiently near in time to the date of valuation, and the property sold must be located sufficiently near the property being valued, and must be sufficiently alike in respect to character, size, situation, useability, and improvements, to make it clear that the property sold and the property being valued are comparable in value and that the price realized for the property sold may be fairly considered as shedding light on the value of the property being valued.

- "[T]he essence of comparability is recent and local sales '*sufficiently* alike in respect to character, size, situation, usability, and improvements' so that the price 'may fairly be considered as *shedding light*' on the value of the condemned property. … After the trial court resolves this preliminary legal question, it is then ultimately for the jury to determine the extent to which the other property is in fact comparable." (*County of Glenn v. Foley* (2012) 212 Cal.App.4th 393, 401 [151 Cal.Rptr.3d 8], original italics, internal citations omitted.)

- "This whole 'shedding light on value' standard is nothing more than a restatement of the general rule for the introduction of circumstantial evidence, which is admissible if relevant, 'i.e., if it can provide any rational inference in support of the issue.' " (*County of Glenn, supra,* 212 Cal.App.4th at p. 402, footnote omitted.)

- "[No] general rule can be laid down regarding the degree of similarity that must exist to make [comparable sales] evidence admissible. It must necessarily vary with the circumstances of each particular case. Whether the properties are sufficiently similar to have some bearing on the value under consideration, and to be of any aid to the jury, must necessarily rest largely in the sound discretion of the trial court, which will not be interfered with unless abused." (*Merced Irrigation Dist. v. Woolstenhulme* (1971) 4 Cal.3d 478, 500 [93 Cal.Rptr. 833, 483 P.2d 1].)

- "The trial judge's prima facie determination that a sale is sufficiently 'comparable' to be admitted into evidence has never been thought to foreclose the question of 'comparability' altogether. '[If] at the discretion of the court, such [sales] are admissible on the grounds of comparability, the degree of comparability is a question of fact for the jury.' " (*County of San Luis Obispo v. Bailey* (1971) 4 Cal.3d 518, 525 [93 Cal.Rptr. 859, 483 P.2d 27].)

- "We have never declared properties noncomparable per se merely because they differ in size or shape. On the contrary, the trial court's obligation, pursuant to section 816, is to determine whether the sale price of one property could *shed light* upon the value of the condemned property, notwithstanding any differences that might exist between them. If it resolves that question affirmatively, it can admit the evidence. The jury then, on the basis of all the evidence, determines the extent to which any differences between the condemned property and the comparable property affect their relative values." (*Los Angeles v. Retlaw Enterprises, Inc.* (1976) 16 Cal.3d 473, 482 [128 Cal.Rptr. 436, 546 P.2d 1380], original italics.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005), Constitutional Law §§ 1234, 1246

Witkin, California Evidence (4th ed. 2000) Opinion Evidence, § 107

14 California Real Estate Law and Practice, Ch. 508, *Evidence: General*, § 508.11 (Matthew Bender)

Cotchett, California Courtroom Evidence, Ch. 17, *Nonexpert and Expert Opinion*, 17.14 (Matthew Bender)

20 California Forms of Pleading and Practice, Ch. 247, *Eminent Domain and Inverse Condemnation*, § 247.147 (Matthew Bender)

4109. Duty of Disclosure by Seller's Real Estate Broker to Buyer

A real estate broker for the seller of property must disclose to the buyer all facts known to the broker regarding the property or relating to the transaction that materially affect the value or desirability of the property. A broker must disclose these facts if he or she knows or should know that the buyer is not aware of them and cannot reasonably be expected to discover them through diligent attention and observation. The broker does not, however, have to disclose facts that the buyer already knows or could have learned with diligent attention and observation.

New December 2013

Directions for Use

This instruction should be read after CACI No. 400, *Negligence—Essential Factual Elements,* if a seller's real estate broker's breach of duty of disclosure to the buyer is at issue. A broker's failure to disclose known material facts to the buyer may constitute a breach of duty for purposes of a claim for negligence. Causation and damages must still be proved. This instruction may also be used with instructions in the Fraud and Deceit series (CACI No. 1900 et seq.) for a cause of action for misrepresentation or concealment. (See *Holmes v. Summer* (2010) 188 Cal.App.4th 1510, 1528 [116 Cal.Rptr.3d 419].)

For an instruction on the fiduciary duty of a real estate broker to his or her own client, see CACI No. 4107, *Duty of Disclosure of Real Estate Broker to Client*. For an instruction on the duty of the seller's real estate broker under Civil Code section 2079 to conduct a visual inspection of the property and disclose to the buyer all facts materially affecting the value or desirability of the property that an investigation would reveal, see CACI No. 4108, *Failure of Seller's Real Estate Broker to Conduct Reasonable Inspection—Essential Factual Elements*.

Sources and Authority

- " '[W]here the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer. [Citations.]' When the seller's real estate agent or broker is also aware of such facts, 'he [or she] is under the same duty of disclosure.' A real estate agent or broker may be liable 'for mere nondisclosure since his [or her] conduct in the transaction *amounts to a representation of the nonexistence of the facts which he has failed to disclose* [citation].' " (*Holmes, supra,* 188 Cal.App.4th at pp. 1518–1519, original italics, internal citations omitted.)

- "The real estate agent or broker representing the seller is a party to the business transaction. In most instances he has a personal interest in it and derives a profit from it. Where such agent or broker possesses, along with the seller, the requisite knowledge … , whether he acquires it from, or independently of, his principal, he is under the same duty of disclosure. He is a party connected with the fraud and if no disclosure is made at all to the buyer by the other parties to the transaction, such agent or broker becomes jointly and severally liable with the seller for the full amount of the damages." (*Lingsch v. Savage* (1963) 213 Cal.App.2d 729, 736 [29 Cal.Rptr. 201], footnote omitted.)

- "A breach of the duty to disclose gives rise to a cause of action for rescission or damages." (*Alfaro v. Community Housing Improvement System & Planning Assn., Inc.* (2009) 171 Cal.App.4th 1356, 1383 [89 Cal.Rptr.3d 659].)

- "The 'elements of a simple negligence action [are] whether [the defendant] owed a legal duty to [the plaintiff] to use due care, whether this legal duty was breached, and finally whether the breach was a proximate cause of [the plaintiff's] injury. [Citations.]' We have already stated that the buyers alleged facts sufficient to impose a legal duty on the brokers. Furthermore, they have alleged facts sufficient to show a breach of that duty. Finally, the buyers alleged that the breach caused them harm. In short, the buyers stated facts sufficient to constitute a cause of action on a negligence theory. Our cursory analysis of this one theory is enough to demonstrate that the trial court erred in sustaining the brokers' demurrer without leave to amend, but is not meant to preclude the buyers' pursuit of their other [fraud] theories." (*Holmes, supra,* 188 Cal.App.4th at p. 1528, internal citation omitted.)

- "Despite the absence of privity of contract, a real estate agent is clearly under a duty to exercise reasonable care to protect those persons whom the agent is attempting to induce into entering a real estate transaction for the purpose of earning a commission." (*Holmes, supra,* 188 Cal.App.4th at p. 1519.)

- "[W]hen a real estate agent or broker is aware that the amount of existing monetary liens and encumbrances exceeds the sales price of a residential property, so as to require either the cooperation of the lender in a short sale or the ability of the seller to put a substantial amount of cash into the escrow in order to obtain the release of the monetary liens and encumbrances affecting title, the agent or broker has a duty to disclose this state of affairs to the buyer, so that the buyer can inquire further and evaluate whether to risk entering into a transaction with a substantial risk of failure." (*Holmes, supra,* 188 Cal.App.4th at pp. 1522–1523.)

- "[W]e do not convert the seller's fiduciary into the buyer's fiduciary. The seller's agent under a listing agreement owes the seller '[a] fiduciary duty of utmost care, integrity, honesty, and loyalty … .' Although the seller's agent does not generally owe a fiduciary duty to the buyer, he or she nonetheless owes the buyer the affirmative duties of care, honesty, good faith, fair dealing and disclosure, as reflected in Civil Code section 2079.16, as well as such other nonfiduciary duties as are otherwise imposed by law." (*Holmes, supra,* 188 Cal.App.4th at p. 1528, internal citation omitted.)

- "Real estate brokers are subject to two sets of duties: those imposed by regulatory statutes, and those arising from the general law of agency." (*Coldwell Banker Residential Brokerage Co. v. Superior Court* (2004) 117 Cal.App.4th 158, 164 [11 Cal.Rptr.3d 564].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 794

12 Witkin, Summary of California Law (10th ed. 2005) Real Property § 473

Greenwald & Asimow, California Practice Guide: Real Property Transactions, Ch. 2-C, *Broker's*

Relationship And Obligations To Principal And Third Parties, ¶¶ 2:164, 2:172 (The Rutter Group)

California Real Property Sales Transactions (Cont.Ed.Bar 4th ed.) §§ 2.132–2.136

3 California Real Estate Law and Practice, Ch. 63, *Duties and Liabilities of Brokers*, §§ 63.20–63.22 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 103, *Brokers*, § 103.31 (Matthew Bender)

UNLAWFUL DETAINER

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

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

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

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

3. **That under the [lease/rental agreement/sublease], [***name of defendant***] was required to pay rent in the amount of $[***specify amount***] per [***specify period, e.g., month***];**

4. **That [***name of plaintiff***] properly gave [***name of defendant***] three days' written notice to pay the rent or vacate the property;**

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, December 2011, December 2013

Directions for Use

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).)

Defective service may be waived if defendant admits receipt of notice. (See *Valov v. Tank* (1985) 168 Cal.App.3d 867, 876 [214 Cal.Rptr. 546].) However, if the fact of service is contested,

compliance with the statutory requirements must be shown. (*Palm Property Investments, LLC v. Yadegar* (2011) 194 Cal.App.4th 1419, 1425 [123 Cal.Rptr.3d 816].) Therefore, this instruction does not provide an option for the jury to determine whether or not defective service was waived if there was actual receipt.

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.)

- "In the cases discussed … , a finding of proper service turned on a party's acknowledgment or admission the notice in question was in fact received. In the present case, defendant denied, in his answer and at trial, that he had ever received the three-day notice. Because there was no admission of receipt in this case, service by certified mail did not establish or amount to personal delivery. Further, there was no evidence of compliance with any of the three methods of service of a three-day notice to pay rent or quit provided in [Code of Civil Procedure] section 1162. Therefore, the judgment must be reversed." (*Liebovich, supra,* 56 Cal.App.4th at p. 518.)

- "[Code of Civil Procedure section 1162 specifies] three ways in which service of the three-day notice may be effected on a residential tenant: … . As explained in *Liebovich, supra,* … , '[w]hen the fact of service is contested, compliance with one of these methods must be shown or the judgment must be reversed.' " (*Palm Property Investments, LLC, supra,* 194 Cal.App.4th at p. 1425.)

- "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~~2005) 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, Ch. 19, *Landlord-Tenant*, § 19:200 (Thomson Reuters ~~West~~)

VF-4300. Termination Due to Failure to Pay Rent

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] fail to make at least one rental payment to [***name of plaintiff***] as required by the [lease/rental agreement/sublease]?**
   ____ 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***] properly give [***name of defendant***] a written notice to pay the rent or vacate the property at least three days before [***date on which action was filed***]?**
   ____ 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 amount due stated in the notice no more than the amount that [***name of defendant***] actually owed?**
   ____ 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***] pay [or attempt to pay] the amount stated in the notice within three days after service or receipt of the notice?**
   ____ Yes ____ No

   If your answer to question 4 is no, then answer questions 5 and 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What is the amount of unpaid rent owed to [***name of plaintiff***]?**
   Include all amounts owed and unpaid from [*due date of first missed payment***] through [***date***], the date of expiration of the three-day notice.**
   Total Unpaid Rent: $ _____]

6. **What are [***name of plaintiff***]'s damages?**
   Determine the reasonable rental value of the property from [*date***], the date of expiration of the three-day notice, through [***date of verdict***].**
   Total Damages: $ _____]

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 2007; Revised December 2010, June 2013, December 2013

Directions for Use

This verdict form is based on CACI No. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*. See also the Directions for Use for that instruction. Questions 2 and 3 incorporate the notice requirements set forth in CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*.

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.

In question 4, include "or attempt to pay" if the tenant alleges that the landlord refused to accept the rent when tendered. (See CACI No. 4327, *Affirmative Defense—Landlord's Refusal of Rent*.)

If the day of receipt is at issue and three days after the alleged date of receipt falls on a Saturday, Sunday, or holiday, modify question ~~2~~ 4 to allow the tenant until the next day that is not a Saturday, Sunday, or holiday to cure the default.

VF-4301. Termination Due to Failure to Pay Rent—Affirmative Defense—Breach of Implied Warranty of Habitability

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] fail to make at least one rental payment to [***name of plaintiff***] as required by the [lease/rental agreement/sublease]?**
____ 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***] properly give [***name of defendant***] a written notice to pay the rent or vacate the property at least three days before [***date on which action was filed***]?**
____ 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 amount due stated in the notice no more than the amount that [***name of defendant***] owed under the [lease/rental agreement/sublease]?**
____ 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***] pay [or attempt to pay] the amount stated in the notice within three days after service or receipt of the notice?**
____ Yes ____ No

If your answer to question 4 is no, then answer questions 5 and 6. If you answered yes, stop here, answer no further questions, and have the presiding juror sign and date this form.

5. **What is the amount of unpaid rent that [***name of defendant***] would owe to [***name of plaintiff***] if the property was in a habitable condition?**
Include all amounts owed and unpaid from [*due date of first missed payment***] through [***date***], the date of expiration of the three-day notice.**
Total Unpaid Rent: $ _____]

~~5~~6. **~~When~~ Did the [***name of plaintiff***] fail to provide substantially habitable premises during the time period for which [***name of defendant***] failed to pay the rent that was due~~, was the property in a habitable condition~~?**

____ Yes ____ No

If your answer to question 6 is yes, then answer question 7. If you answered no, answer question 8.

7. Did [*name of defendant*] contribute substantially to the uninhabitable conditions or interfere substantially with [*name of plaintiff*]'s ability to make necessary repairs?
____ Yes ____ No

If your answer to question 7 is yes, then answer question 8. If you answered no, [stop here, answer no further questions, and have the presiding juror sign and date this form. The court will determine the amount by which the rent due found in question 5 should be reduced because of uninhabitable conditions/skip question 8 and answer question 9].

8. What are [*name of plaintiff*]'s damages?
Determine the reasonable rental value of the property from [*date*], the date of expiration of the three-day notice, through [*date of verdict*].
Total Damages: $ _____

[9. What is the amount of reduced monthly rent that represents the reasonable rental value of the property in its uninhabitable condition?
$ _____]

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 2007; Revised December 2010, June 2013, December 2013

Directions for Use

This verdict form is based on CACI No. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*, and CACI No. 4320, *Affirmative Defense—Implied Warranty of Habitability*. See also the Directions for Use for those instructions.

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.

If the existence of a landlord-tenant relationship is at issue, additional preliminary questions will be needed based on elements 1 and 2 of CACI No. 4302. Questions 2 and 3 incorporate the notice

requirements set forth in CACI No. 4303, *Sufficiency and Service of Notice of Termination for Failure to Pay Rent*.

In question 4, include "or attempt to pay" if there is evidence that the landlord refused to accept the rent when tendered. (See CACI No. 4327, *Affirmative Defense—Landlord's Refusal of Rent*.)

If the day of receipt is at issue and three days after the alleged date of receipt falls on a Saturday, Sunday, or holiday, modify question 4 to allow the tenant until the next day that is not a Saturday, Sunday, or holiday to cure the default.

Code of Civil Procedure section 1174.2(a) provides that the court is to determine the reasonable rental value of the premises in its untenantable state to the date of trial. But whether this determination is to be made by the court or the jury is unsettled. Section 1174.2(d) provides that nothing in this section is intended to deny the tenant the right to a trial by jury. Subsection (d) could be interpreted to mean that in a jury trial, wherever the statute says "the court," it should be read as "the jury." But the statute also provides that the court may order the landlord to make repairs and correct the conditions of uninhabitability, which would not be a jury function. If the court decides to present this issue to the jury, select "skip question 8 and answer question 9" in the transitional language following question 7, and include question 9.

As noted above, i~~I~~f a breach of habitability is found, the court may order the landlord to make repairs and correct the conditions that constitute a breach. (Code Civ. Proc., § 1174.2(a).) The court might include a special interrogatory asking the jury to identify those conditions that it found to create uninhabitability and the dates on which the conditions existed.

4552. Affirmative Defense—Work Completed and Accepted—Patent Defect

[*Name of plaintiff***] claims that [his/her] harm was caused by a defect in the [design/specifications/surveying/planning/supervision/ [or] observation] of [a construction project/a survey of real property/[***specify project, e.g., the roof replacement***]]. [***Name of defendant***] contends that [he/she/it] is not responsible for the defect because the project was completed and the work was accepted by [***name of owner***]. To succeed on this defense, [***name of defendant***] must prove all of the following:**

1. **That [***name of defendant***] completed all of [his/her/its] work on the project;**

2. **That [***name of owner***] accepted [***name of defendant***]'s work; and**

3. **That an average person during the course of a reasonable inspection would have discovered the defect.**

New December 2013

Directions for Use

Give this instruction to present the affirmative defense of "completed and accepted." Under this defense a party under contract for a construction project is not liable in negligence for injury caused by a patent construction defect once the project has been completed and the owner has accepted the project. See also CACI No. 4550, *Affirmative Defense—Statute of Limitations—Patent Construction Defect*.

The defense applies if the work on the project component that caused the injury has been completed and accepted, even if the contractor continues to work on other components of the project. (See *Jones v. P.S. Development Co., Inc.* (2008) 166 Cal.App.4th 707, 717 [82 Cal.Rptr.3d 882], disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 113 Cal. Rptr. 3d 327, 235 P.3d 988].) Modify element 1 if necessary to reflect this situation.

Sources and Authority

- " '[W]hen a contractor completes work that is accepted by the owner, the contractor is not liable to third parties injured as a result of the condition of the work, even if the contractor was negligent in performing the contract, unless the defect in the work was latent or concealed. [Citation.] The rationale for this doctrine is that an owner has a duty to inspect the work and ascertain its safety, and thus the owner's acceptance of the work shifts liability for its safety to the owner, provided that a reasonable inspection would disclose the defect. [Citation.]' Stated another way, 'when the owner has accepted a structure from the contractor, the owner's failure to attempt to remedy an obviously dangerous defect is an intervening cause for which the contractor is not liable.' The doctrine applies to patent defects, but not latent defects. 'If an owner, fulfilling the duty of inspection, cannot discover the defect, then the owner cannot effectively represent to the world that the construction is sufficient; he lacks adequate information to do so.' " (*Neiman v. Leo A. Daly Co.* (2012) 210 Cal.App.4th 962, 969 [148 Cal.Rptr.3d 818], footnote and internal citations

omitted.)

- " 'Parties for whom work contracted for is undertaken, must see to it before acceptance, that the work, as to strength and durability, and all other particulars necessary to the safety of the property and persons of third parties, is subjected to proper tests, and that it is sufficient. By acceptance and subsequent use, the owners assume to the world the responsibility of its sufficiency, and to third parties, the liability of the contractors has ceased, and their own commenced.' In other words, having a duty to inspect the work and ascertain its safety before accepting it, the owner's acceptance represents it to be safe and the owner becomes liable for its safety." (*Sanchez v. Swinerton & Walberg Co.* (1996) 47 Cal.App.4th 1461, 1466 [55 Cal.Rptr.2d 415], internal citation omitted.)

- "The fact the project did not comply with the plans and specifications or [defendant] may not have fulfilled all of its duties to [owner] under the agreement, does not mean the project was not completed." (*Neiman, supra,* 210 Cal.App.4th at p. 970.)

- "As there is no evidence that respondents retained control over the machine [that caused injury], we conclude that they are not liable for [plaintiff]'s injuries." (*Jones, supra,* 166 Cal.App.4th at p. 718.)

- "[A] patent defect is one that can be discovered by the kind of inspection made in the exercise of ordinary care and prudence. In contrast, a latent defect is hidden, and would not be discovered by a reasonably careful inspection." (*The Luckman Partnership, Inc. v. Superior Court* (2010) 184 Cal.App.4th 30, 35 [108 Cal.Rptr.3d 606].)

- "The test to determine whether a construction defect is patent is an objective test that asks 'whether the average consumer, during the course of a reasonable inspection, would discover the defect. The test assumes that an inspection takes place.' This test generally presents a question of fact, unless the defect is obvious in the context of common experience; then a determination of patent defect may be made as a matter of law (including on summary judgment)." (*Creekridge Townhome Owners Assn., Inc. v. C. Scott Whitten, Inc.* (2009) 177 Cal.App.4th 251, 256 [99 Cal.Rptr.3d 258], internal citations omitted.)

Secondary Sources

Witkin, Summary of California Law (10th ed. 2005) Torts, § 1160

3 Witkin, California Procedure (5th ed. 2008) Actions, § 606

12 California Real Estate Law and Practice, Ch. 441, *Consumers' Remedies*, § 441.01 (Matthew Bender)

10 California Forms of Pleading and Practice, Ch. 104, *Building Contracts*, § 104.41 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.94 (Matthew Bender)

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 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.

[If you violate any of these prohibitions on communications and research, including prohibitions on electronic communications and research, you may be held in contempt of court or face other sanctions. That means that you may have to serve time in jail, pay a fine, or face other punishment for that violation.]

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, December 2013

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.)

- Code of Civil Procedure section 1209(a) provides in part:

  (a) The following acts or omissions in respect to a court of justice, or proceedings therein, are contempts of the authority of the court:

  (1)–(5) omitted

  (6) Willful disobedience by a juror of a court admonishment related to the prohibition on any form of communication or research about the case, including all forms of electronic or wireless communication or research.

  (7)–(12) omitted

- 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].)

- "[T]he jury was charged that (1) no undue emphasis was intended by repetition of any rule, direction or idea; (2) instructions on the measure of damages should not be interpreted to mean that liability must be found; and (3) the judge did not intend to intimate how any issue should be decided and if any juror believed such intimation was present such should be disregarded. Of course such admonitions will not salvage an inherently one-sided charge although the giving of such instructions should be considered in weighing the net effect of the charge." (~~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 (5th ed. 2008) Trial, § 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.