JUDICIAL COUNCIL OF CALIFORNIA

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REPORT TO THE JUDICIAL COUNCIL

For business meeting on December 12, 2014

Title
Jury Instructions: New, Revised, Renumbered, and Revoked Civil Jury 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. Martin J. Tangeman, Chair

Agenda Item Type
Action Required

Effective Date
December 12, 2014

Date of Report
November 21, 2014

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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 2015 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 12, 2014, 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 2015 edition of the *Judicial Council of California Civil Jury Instructions*.

A table of contents and the proposed revised, new, and revoked civil jury instructions and verdict forms are attached at pages 47–174.

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 25th release of *CACI.* The council approved *CACI* release 24 at its June 2014 meeting.

Rationale for Recommendation

The committee recommends proposed additions and revisions to, and revocation of, the following 39 instructions and verdict forms: 314−320, 422, 456, 457, VF-406, 1010, VF-1001, 1123, 1124, 1244, VF-1201, VF-1202, 1620, 1621, 1622, 1623, 1803, 2336, 2407, 2431, 2432, 2442, 2443, 2540, 2547, 2730, 2732, 3040, 3041, 3070, 4342, 4510, and 5012. Of these, 29 are proposed to be revised, 7 are newly drafted, 1 is proposed to be revoked (VF-1202), 1 is proposed to be renumbered (1123 renumbered to 1124), and 1 that was temporarily revoked in the last release has been revised and is proposed to be restored (2730).

The Judicial Council's Rules and Projects Committee (RUPRO) has also approved changes to 444 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.

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

[2] At its October 20, 2006, meeting, the Judicial Council delegated to RUPRO the final authority to approve nonsubstantive technical changes 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.

The 444 instructions approved by RUPRO under this delegation include 380 for which verbatim language from statutes, rules of court, and regulations has been deleted from the Sources and Authority. The council approved this project in June. Further, under its delegation of authority from RUPRO, the advisory committee has made other nonsubstantive grammatical, typographical, and technical corrections.

New instructions

CACI has always included an instruction on loss of design immunity (currently CACI No. 1123, *Loss of Design Immunity (Cornette)*), but has not had an instruction on design immunity itself as an affirmative defense to public entity liability. The initial assumption of the CACI task force, as noted in the Directions for Use to No. 1123, was that design immunity would not likely involve an issue of fact for the jury. Recently, however, a superior court judge who was sitting on an appellate court by designation was working on an opinion involving design immunity, in which the jury was given the issue.[3] She suggested that there really should be a CACI instruction on design immunity. In response, the committee proposes new instruction CACI No. 1123, *Affirmative Defense—Design Immunity*. The committee also proposes renumbering current CACI No. 1123 to become CACI No. 1124 so that the exception follows the defense.

A member of the committee from Sacramento noted that cases by government employees against the state under the California Whistleblower Protection Act[4] were becoming common. She recommended that CACI propose instructions under this act. The committee now proposes new CACI No. 2442, *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements,* and CACI No. 2443, *Affirmative Defense—Same Decision,* for use in cases under the act.

Rope v. Auto-Chlor System of Washington, Inc., a recent case on disability discrimination under the Fair Employment and Housing Act (FEHA), addressed a claim for "associational disability discrimination."[5] An employee who was not disabled claimed that he had been discriminated against because of his association with a disabled person. CACI has always recognized that discrimination based on one's association with a person from a protected category was actionable, and numerous FEHA instructions suggest in the Directions for Use that the instruction may be modified for use in an "association" case.[6] The court in *Rope* set forth specific standards for associational discrimination based on disability. The committee proposes new CACI No. 2547, *Disability-Based Associational Discrimination—Essential Factual Elements,* based on the elements and standards from *Rope*.

In the last release, the committee temporarily revoked CACI No. 2730, *Whistleblower Protection—Essential Factual Elements,* in the Labor Code Actions series. Labor Code section 1102.5, on which the instruction was based, was amended by the Legislature, making the instruction no longer complete.[7] The amended statute contained additional matters that the jury had to consider in applying it. The committee has now revised the instruction to conform to the statutory revisions and proposes restoring it as revised.

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[3] See *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364.

[4] Gov. Code, § 8547 et seq.

[5] *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655−660.

[6] See Gov. Code, § 12926(o).

[7] See Sen. Bill 666 (Stats. 2013, ch. 577), § 5; Assem. Bill 263 (Stats. 2013, ch. 732), § 6; and Sen. Bill 496 (Stats. 2013, ch. 781), § 4.1.

A new statute Labor Code section 1019 creates a cause of action for "retaliatory unfair immigration-related practices."[8] The statute provides workers with some protection should their employer contact immigration authorities in retaliation for asserting rights provided by the Labor Code, such as the right to minimum wage and overtime pay. The committee proposes new instruction CACI No. 2732, *Retaliatory Unfair Immigration-Related Practice—Essential Factual Elements* for use in claims under this statute.

The Disabled Persons Act (DPA) provides disabled persons with rights of access to public facilities.[9] However, the Construction-Related Accessibility Standards Act (CRASA) restricts the availability of statutory damages under the DPA with regard to access barriers to a public facility.[10] The committee proposes new instruction CACI No. 3070, *Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act—Essential Factual Elements,* for use in DPA and CRASA cases.

In an unlawful detainer case in which the jury finds a breach of the warranty of habitability, whether the amount of a partial rent reduction is to be decided by the jury or by the court is unclear. As explained in the Directions for Use to CACI No. VF-4301, *Termination Due to Failure to Pay Rent—Affirmative Defense—Breach of Implied Warranty of Habitability*, the controlling statute can be read to support either result.[11] The committee has heard from trial judges who are adamant on each side of the divide. Normally, the committee does not draft instructions for unsettled issues. However, judges who believe that the reduction is a jury question have requested a CACI instruction that gives the jury guidance in determining the reduction. In response, the committee has drafted proposed new instruction 4342, *Reduced Rent for Breach of Habitability*. The Directions for Use make it clear that the instruction is based on an unsettled legal principle.

Revoked verdict form

A trial judge requested that the two tests for product liability design defect (consumer expectation and risk-benefit) be combined into a single verdict form for use in cases in which both tests will be submitted to the jury. Currently, VF-1201 is for use for the consumer-expectation test, and VF-1202 is for use for the risk-benefit test. The Directions for Use to both verdict forms currently say that the two verdict forms should not be combined because it must be made clear to the jury that the two tests are alternative theories of liability and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer-expectation test.

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[8] Added by Assem. Bill 263 (Stats. 2013, ch. 732, § 4), effective January 1, 2014.

[9] Civ. Code, §§ 54, 54.1.

[10] Civ. Code, § 55.56.

[11] See Code Civ. Proc., § 1174.2.

In considering the judge's proposal to combine the two tests into a single verdict form, the committee has concluded that the warning in the Directions for Use is not compelled. To construct a verdict form that presents both tests to the jury without introducing any confusion over the burden-shifting of the risk-benefit test is, in fact, possible. Unlike the instructions, the verdict forms do not include language on the burden of proof. Therefore, the committee proposes modifying and renaming CACI No. VF-1201 as *Strict Products Liability—Design Defect—Affirmative Defense—Misuse or Modification,* for use in cases in which either or both of the tests are at issue. The committee proposes revoking CACI No. VF-1202, *Strict Products Liability—Design Defect—Risk-Benefit Test.*

Contract interpretation: role of jury (CACI Nos. 314−320)

CACI has seven instructions that ask the jury to interpret a contract.[12] Nowhere is it explained when it is appropriate for a jury to interpret a contract. Most of the instructions have no Directions for Use at all.

In fact, interpretation of a contract is often a matter of law for the court.[13] It is a question of fact for the jury only if ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence.[14]

The committee decided to make CACI No. 314, *Interpretation—Disputed Words,* an introductory instruction for use in all cases in which the jury will be asked to interpret the contract. The Directions for Use were expanded to set forth the proper roles of court and jury. The other six instructions then can be given with 314 if they are relevant to the jury's task. Directions for Use to these instructions have been added or revised to cross refer back to No. 314 for the rule as to when contract interpretation is a jury matter.

Product liability: sophisticated user defense (CACI No. 1244)

In the recent case of *Buckner v. Milwaukee Electric Tool Corp.,* the court found that the jury had been inadequately instructed on the affirmative defense of sophisticated user.[15] The jury was given CACI No. 1244, which requires that "[*plaintiff*] because of [his/her] particular position, training, experience, knowledge, or skill, knew or should have known of the [*product*]'s risk, harm, or danger." The court found this language to be inadequately general because it did not define the relevant "risk, harm, or danger." The court held that to prove the sophisticated user defense, the defendant had to show that "[t]he sophisticated user must know or be deemed to know not only the bare hazard posed by the product, but also the severity of the potential

[12] See CACI Nos. 314, *Interpretation—Disputed Words;* 315, *Interpretation—Meaning of Ordinary Words;* 316, *Interpretation—Meaning of Technical Words;* 317, *Interpretation—Construction of Contract as a Whole;* 318, *Interpretation—Construction by Conduct;* 319, *Interpretation—Reasonable Time;* and 320, *Interpretation—Construction Against Drafter*.

[13] *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865.

[14] *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395.

[15] *Buckner v. Milwaukee Electric Tool Corp.* (2013) 222 Cal.App.4th 522.

consequences, and any mitigation techniques of which the manufacturer is aware. All are necessary in order for the potential user to make an informed decision regarding whether and how to use the product."[16]

The committee seriously debated whether *Buckner* compelled an expansion of the language in CACI No. 1244 to state that the plaintiff knew or should have known the particular risk and consequences involved, and all mitigation techniques known to the defendant. Some members were dubious that *Buckner* stated a rule that would be applicable in all cases. But the majority decided that the court's language was mandatory and that CACI No. 1244 needed to be expanded.

On posting for public comment, the committee received comments from the defense bar opposing the proposed changes to CACI No. 1244. Different reasons were given, many of which were that the commentators essentially disagreed with the result in *Buckner*.

However, the comment that caused the committee to rethink its position was the following, submitted by Horvitz and Levy LLP:

> The proposed revisions would require trial courts to make decisions that are properly left to the jury. The trial court would fill in the bracketed material by describing the risks of the product and the severity of potential consequences. In many cases the parties dispute these issues—what risks the product poses (if any), and what the possible consequences of those risks may be (if any). In existing practice, the parties present evidence and argument to the jury on these issues, and the jury then decides what risks the products posed, how severe the consequences might be, and whether the plaintiff was aware of those particular risks.

The committee agreed that the requirement to specify the particular risk and consequences in the instruction would only be appropriate if those matters are uncontested. But the sophisticated user is an affirmative defense to a claim for failure to warn. As noted in the comment, the risk and consequences may well be the major points in dispute as to whether there was a duty to warn at all. In such a case, the instruction on the affirmative defense cannot specifically identify the risk and consequences. Therefore, the committee has concluded that *Buckner's* seemingly mandatory expansion of No. 1244 cannot be applied in all cases. The committee now proposes stating the rule from *Buckner* in the Directions for Use, noting that it may apply in some cases.

[16] *Id*. at p. 537.

Emotional distress from negligence without physical injury (NIED)[17](CACI Nos. 1620–1623)

A 2010 case, *Wong v. Jing*, holds with little discussion or analysis that serious emotional distress from negligence without other injury (NIED) is the same as "severe" emotional distress for the tort of intentional infliction of emotional distress (IIED).[18] CACI No. 1604 defines "severe emotional distress" for IIED as "so substantial or long lasting that no reasonable person in a civilized society should be expected to bear it."[19] In contrast, CACI instructions say that for distress from NIED, "serious emotional distress exists if an ordinary, reasonable person would be unable to cope with it." This language comes from the California Supreme Court in *Molien v. Kaiser Foundation Hospitals*.[20] While perhaps a linguist would be able to construct an argument that the two descriptions can be reconciled, a jury would likely require more distress to meet the first test than the second.[21]

The committee considered revising NIED instructions CACI Nos. 1620−1623, based on *Wong*, to replace the definition of *serious emotional distress* with the language used for IIED in CACI No. 1604. But ultimately the committee rejected this revision. The committee was not ready to accept *Wong* as the definitive statement of the proper definition. The court in *Wong* did not consider *Molien*, nor did it provide any real analysis of the issue. It simply concluded that the two tests were the same. The committee opted instead to simply point out in the Directions for Use that *Wong* could be read as requiring a different iteration of serious emotional distress.

Comments, Alternatives Considered, and Policy Implications

The proposed additions and revisions to *CACI* circulated for comment from July 21 to August 29, 2014. Comments were received from 15 different commentators. The committee evaluated all comments and revised some of the instructions as a result. A chart with summaries of all comments received and the committee's responses is attached at pages 9–46.

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, 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.

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[17] The committee no longer refers to this doctrine as "negligent infliction of emotional distress." However, the commonly used acronym "NIED" remains a useful tool in discussing it.

[18] *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378.

[19] *Hughes v. Pair* (2009) 46 Cal.4th 1035, 1051.

[20] See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 927−928.

[21] Perhaps a "reasonable person in a civilized society" is the same as an "ordinary, reasonable person." And perhaps not being "expected to bear it" is the same as "unable to cope."

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 2015 edition and pay royalties to the Judicial Council. Other licensing agreements with other publishers provide additional royalties.

The official publisher will also make the revised content available free of charge to all judicial officers in both print and HotDocs document assembly software. With respect to commercial publishers, the Judicial Council 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 Judicial Council provides a broad public license for their noncommercial use and reproduction.

Attachments

1. Charts of comments, at pages 9–46
2. Full text of new and revised *CACI* instructions, at pages 47–174

Instruction	Commentator	Comment	BG Response
314. *Interpretation—Disputed Words*	Consumer Attorneys of California, by Jacqueline Serna, Associate Legislative Counsel	Section 314 revises the CACI instruction for "disputed words." The definition is so complex that we would not attempt to rewrite it in any fashion. CAOC member attorney Stan Peddler suggests that the section starting with "The trial court's determination" is so complicated it would almost need a series of lawyers to explain it to a jury. We recommend that this be simplified or that the committee eliminate it entirely.	The language questioned by attorney Peddler is a verbatim case excerpt, not a part of the instruction. The change that the committee proposes is simply to replace the ambiguous "terms" with the clearer "words." Not all disputed language is about "terms."
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree	No response is necessary.
315-320: Instructions on Contract Interpretation	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree, but we suggest modifying the Directions for Use to make it clear that if this instruction is given CACI No. 314 must also be given.	The Directions for Use say: "This instruction may be given with CACI No. 314." The committee believes that this sentence makes it clear that 314 must also be given.
320. *Interpretation—Construction Against Drafter*	Los Angeles County Superior Court, by Janet Garcia, Court Manager	Change "a term of the contract" to "words in the contract."	The committee agreed and has made this change.
422 and VF-406, *Providing Alcoholic Beverages to Obviously Intoxicated Minors*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree	No response is necessary.
456. *Defendant Estopped From Asserting Statute of*	State Bar of California, Litigation	Agree, but we suggest modifying the second sentence in the Directions for Use to refer to	The committee agreed and has made the suggested revision.

Instruction	Commentator	Comment	BG Response
Limitations Defense, and 457. *Statute of Limitations—Equitable Tolling—Other Prior Proceeding*	Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	"advisory findings" rather than an "advisory jury." We believe that the jury making these findings typically will be the same jury deciding the rest of the case, rather than a jury empanelled solely for advisory findings. We suggest modifying the second sentence in the Directions for Use as follows: "This instruction is for use if the court ~~empanels an advisory jury to make preliminary factual~~ submits the matter to the jury for advisory findings."	
		We also suggest modifying the second bullet point in the Sources and Authority by adding the following quotation from *Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745: " '[A] jury may be used for advisory verdicts as to questions of fact [in equitable actions]'."	The proposed language from *Hopkins* is from a parenthetical to a citation to another case. CACI format for Sources and Authority does not provide for excerpts from parentheticals.
	Los Angeles County Superior Court, by Janet Garcia, Court Manager	In the Direction for Use, add to each of the initial new paragraphs the following sentence and citation: "If the judge empanels an advisory jury, "it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper. (*Hoopes v. Dolan* (2008) 168 Cal. App. 4th 146,156."	The proposed language is not really a Direction for Use as it does not provide any useful information for the drafter. But the committee agreed that an excerpt on this point from *Hoopes* is appropriate for the Sources and Authority and has made this addition..
1010. *Affirmative Defense—Recreation Immunity—Exceptions*	Orange County Bar Association, by Thomas Bienert, Jr., President	The Civil Code § 846 exceptions for recreational use immunity for landowners generally read as proposed by the committee, and therefore are generally correct. By eliminating the current case-law definition of "willful or malicious" failure to guard or warn against a dangerous condition, the instruction	The committee considered this issue at some length before proposing these revisions. Its conclusion was that the definition of "willful or malicious" from *New* raised many unresolved

Instruction	Commentator	Comment	BG Response
		creates more ambiguity. The OCBA recommends that the prior version of option #1 which sets forth the *New vs. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689-690 definition of "willful or malicious" be retained.	questions. The committee concluded that *New* should be noted in the Directions for Use rather than in the language of the instruction.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that the current language in the introductory paragraph "unless [*name of plaintiff*] proves . . ." is clearer than "However, [*name of defendant*] is still responsible for [*name of plaintiff*]'s harm if [*name of plaintiff*] proves . . . ."	The committee believes that the proposed revision is much clearer. The current language creates an awkward run-on sentence that grafts the exceptions together with the defense. The revision first states the defense and then sets up the options for the exceptions.
		We believe that the language "[*Choose one of the following three options*]" should be deleted from the instruction. We believe that the jury should be instructed on all exceptions at issue and should not be limited to only one exception. Moreover, we believe that such directions for use belong in the Directions for Use. We suggest deleting this quoted language and adding a statement to the Directions for Use that only those exceptions that are at issue should be read.	The committee agreed and deleted this language. The three options are not mutually exclusive; more than one of them could apply. The committee also agreed that the proposed addition to the Directions for Use would be helpful and has added it.
VF-1001. *Premises Liability—Affirmative Defense ─Recreation Immunity—Exceptions*	Orange County Bar Association, by Thomas Bienert, Jr., President	Civil Code §846 sets forth three (3) exceptions to the landowner's recreational use immunity, which are each presented in CACI 1010. This proposed revisions to VF-1001 only addresses in a summary manner the first exception and do not define in any manner the statutory terms for "willful or malicious" failure to guard or warn against dangerous conditions, uses, structures, or activities. Without fully addressing the case-law definitions of "willful or malicious"	With regard to not defining "willful or malicious," see above. CACI format for verdict forms is to not include all of the options for elements from the corresponding instruction. One option is included, and then a sentence is included in the Directions for Use noting that the question

Instruction	Commentator	Comment	BG Response
		nor the other two exceptions, this instruction is incomplete and incorrect.	may be replaced by one reflecting the other options; for example: "Question 5 should be modified if either of the other two exceptions to recreational immunity from Civil Code section 846 is at issue. (see CACI No. 1010.)"
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree, but we believe that the words "skip the next three questions and answer question 6" after question 4 should be changed to "skip the next question" in light of the deletion of current questions 6 and 7.	This error has been corrected.
1123. *Affirmative Defense—Design Immunity*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We suggest that the introductory paragraph be modified to state more clearly and directly that defendant is not responsible for harm to plaintiff caused by the plan or design if defendant proves certain facts. We believe that describing this as defendant's "claim" and then stating "In order to prove this claim, . . . " may complicate matters unnecessarily. We also find the language "harm caused to [*name of plaintiff*] based on the plan or design" cumbersome and would prefer to state more directly "harm to [*name of plaintiff*] caused by the plan or design." We note that the words "caused by the plan or design" appear in the statute (Govt. Code, § 830.6). "[*Name of defendant*] ~~claims that it~~ is not responsible for <u>any</u> harm ~~caused~~ to [*name of plaintiff*] ~~based on~~ <u>caused by</u> the plan or design of the [*insert type of property, e.g., "highway"*]~~.~~ ~~In order to prove this claim,~~ <u>if</u> [*name of defendant*] ~~must~~ prove<u>s</u>	The committee agreed that "based on" should be changed to "caused by" and has made this revision. However, the word "elements" is not plain language and is never used in the body of an instruction.

Instruction	Commentator	Comment	BG Response
		both of the following elements:	
		We would add the word "and" before the second element to emphasize that both elements must be proven.	The committee agreed and has added "and."
1124. *Loss of Design Immunity (Cornette)*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	This instruction states an exception to an affirmative defense, which comes into play only if the defendant establishes the affirmative defense. The Directions for Use currently state that the instruction should be given "if the public entity defendant is entitled to design immunity unless the changed–conditions exception can be established." In other words, the current instruction assumes that design immunity is established in the first instance. The introductory paragraph for the revised instruction seems to require plaintiff to prove the three elements stated in order to establish defendant's liability for harm caused by the plan or design, even if defendant fails to establish design immunity, i.e., by failing to prove discretionary approval of the plan or design before construction (element 1 of design immunity). This is appropriate if design immunity is established, as assumed in the current instruction. But plaintiff need not prove the three elements for loss of design immunity if defendant fails to establish design immunity in the first place. We suggest that the introductory paragraph be modified as follows: "Even if [*name of defendant*] proves both of these elements, [~~N~~*name of defendant*] is ~~not~~ responsible for any harm ~~caused~~ to [*name of plaintiff*] ~~based on~~ caused	The committee agreed that changing "not responsible unless" to "is responsible if" is better and has made this change. The committee does not believe that the instruction needs to refer back to CACI No. 1123 re: "both of these elements."

Instruction	Commentator	Comment	BG Response
		by the plan or design of the [*insert type of property, e.g., "highway"*] ~~unless~~ if [*name of plaintiff*] proves the following:"	
		Consistent with the proposed modifications stated above, we suggest that language be added to the Directions for Use stating that this instruction should be given immediately following CACI No. 1123 (because of the reference to "these elements") and should be modified if the elements of design immunity are established and CACI No. 1123 is not given.	The committee has added a paragraph to the Directions for Use suggesting possible modifications if the existence of design immunity in the first instance is disputed and 1123 will be given.
1244. *Affirmative Defense—Sophisticated User*	Association of Southern California Defense Counsel, by Lawrence R. Ramsey	The proposed changes stem directly from one recent appellate decision: *Buckner v. Milwaukee Electric Tool Corp.* (2013) 222 Cal.App.4th 522. In *Buckner* the jury rendered a verdict for the defense, finding no design defect and no failure to warn based on the sophisticated user defense. Plaintiff moved for a new trial and argued a lack of evidence to support the sophisticated user affirmative defense. There was no challenge to CACI 1244 in *Buckner,* and *Buckner* does not discuss the propriety of CACI 1244.	Although it is not explicit in the court's opinion, the committee believes that the only conclusion to be drawn from *Buckner* is that the court finds that CACI No. 1244's mere reference to "risk, harm, or danger" to be insufficient.
		The proposed revision replacing "harm," i.e., "*describe severity of the potential consequences*," unnecessarily complicates and confuses the "harm" requirement. This change improperly injects into the affirmative defense a new element of knowledge on the part of the sophisticated user not previously identified in California law.	The committee believes that *Buckner* compels this revision.
		The third element of the proposed revision, "Any ways to use the [*product*] to reduce or avoid the risks that were known to [*defendant*]," impermissibly requires the defendant to prove the	*Buckner* says that the user should know "any mitigation techniques of which the manufacturer is aware."

Instruction	Commentator	Comment	BG Response
		sophisticated user had the same knowledge of risk reduction and avoidance as the defendant, which is not required under *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56. But the defendant's knowledge of risk reduction and avoidance will probably be much greater than that of an individual sophisticated user in a particular use of the product. Thus, the application of this proposed change would give rise to many issues under Evidence Code section 352, because the defendant will be required to introduce evidence of its knowledge of risk reduction and avoidance that will exceed the scope of the claim, necessitate an undue consumption of time, confuse and mislead the jury, and result in undue prejudice to the defendant.	As expressed by the court in *Buckner*, the defendant does seem to have to prove that the plaintiff knew all of the mitigation techniques that the defendant knew. The committee shares the concern of the comment that this seems to be an unworkable standard. For this and other reasons explained below, the committee has decided not to modify the text of the instruction based on *Buckner* at this time. The possible expansion of the instruction that *Buckner* seems to compel will be presented in the Directions for Use. The committee does believe that a sophisticated user would know how to use the product safely. But it does not seem that the defense should have to prove that if it knows 10 ways to use the product safely, that the user would also have to know all 10; just enough of them to avoid injury.
	Consumer Attorneys of California, by Jacqueline Serna, Associate Legislative Counsel	While the revision pulls some of the buzzwords from the *Johnson* opinion ("should have known"), it then fails to sufficiently narrow the instruction to tie it to the facts of the case—as *Johnson* requires, and as the subsequent cases cited in the Sources and Authority also require. CAOC member attorney David Rosen writes, "*Johnson* is very fact dependent; it wasn't just that the plaintiff was an experienced	It would seem that the proposed changes, requiring inclusion of the specific facts of the case regarding harm and avoidance of risk, would address the concerns of the comment.

Instruction	Commentator	Comment	BG Response
		refrigerator mechanic, or that he took some classes in the field; he was licensed/certified, which meant he was required to take and pass an exam which reflected his personal, actual knowledge of the very health hazards of phosgene exposure upon which he based his failure to warn lawsuit. The language of the instruction should so reflect in a tighter fashion."	
	Gordon & Rees, by Mordecai D. Boone, on behalf of 3M Company	We ask that the Council consider language that more explicitly addresses the sophisticated intermediary or sophisticated employer circumstance, which arises frequently in mass tort litigation; we believe that a sophisticated user instruction should make clear that if a plaintiff's employer is itself a sophisticated user, the defendant manufacturer may properly rely on the employer to impart necessary information to its employees.	This comment does not address the proposed revisions, but instead requests a different change. The committee has in the past considered this argument and found it not to be supported by current California law. The committee does not propose to consider it further unless new authority supports it.
		The proposed revisions eliminate CACI No. 1244's current requirement that the manufacturer demonstrate that the user knew of the product's "risk, harm or danger," replacing it with a requirement that the manufacturer show not only that the user knew of the product's risk, but also the severity of potential consequences and ways to mitigate that risk. We believe that this change is inconsistent with settled California law as expressed in *Johnson (supra)*, and that it imposes unrealistic and virtually impossible burdens of proof on the defendant manufacturer.	While this comment lacks specificity with regard to unrealistic and virtually impossible burdens of proof, the committee has considered more specific comments and has decided not to proceed with the proposed revisions.
		We are concerned about the proposed revisions' requirement that in order for a defendant to prevail on a sophisticated user defense, the defendant must	The committee believes that whether a product is risk-free is wholly separate from whether or not the plaintiff is a

Instruction	Commentator	Comment	BG Response
		demonstrate that the plaintiff knew or should have known of the "risk posed by the product." Some accused products, including 3M's safety equipment, do not themselves pose any risk. A requirement that assumes the existence of a risk is potentially confusing to a jury and inapposite to safety products.	sophisticated user.
		Johnson does not require a defendant to prove all three of these things; indeed, it specifically notes that the user need only be "generally aware of the risk at issue." (*Johnson, supra,* 43 Cal.4th at p. 73.) Importantly, *Johnson* holds that the plaintiff's subjective state of mind (that is, his or her actual appreciation of the severity of the potential consequences, or his or her specific knowledge of particular methods of minimizing the risk) is not a factor to be considered:	The "should have known" language in the instruction present the test as objective rather than subjective.
		In the context of a safety product, the three requirements set out in the proposed revisions to CACI No. 1244 will make it effectively impossible for a manufacturer to prevail on a sophisticated user defense. The "risks" or dangers associated with such a product come not from the product itself but from its possible misuse – for example, providing a respiratory protection product to workers for use as protection against a contaminant or level of contaminant for which the product was not designed or intended. It should be enough for a manufacturer to demonstrate that the user knew or should have known how the product appropriately should be used – not that the user knew or should have known every possible type of misuse that could lead to every possible type of harm; and not that	The committee believes that if a product is safe unless misused, then there is no "risk" that gives rise to a duty to warn, and whether the injured person is or is not a sophisticated user is not relevant. The defendant's affirmative defense is product misuse under CACI No. 1245.

Instruction	Commentator	Comment	BG Response
		the user knew every way in which to use the product safely around every other product in order to mitigate the risk of harm.	
		By requiring a manufacturer to show that the user knew of "[a]ny ways to use the [*product*] to reduce or avoid the risks that were known to [*name of defendant*]," the proposed revisions potentially require the manufacturer to warn of risks of other defendants' products – the saw manufacturer will have to warn of the risks of using the saw to cut insulation – in order to claim the benefit of the sophisticated user defense.	This comment conflates the duty to warn with proof of a sophisticated user. Under *Buckner*, the defense must show that the user knew what the defendant knew about how to use the product safely. What a saw manufacturer might or might not have to warn about is not the question with regard to the sophisticated user defense.
	Horvitz & Levy, by Lisa Perrochet and Curt Cutting	The proposed revisions would require trial courts to make decisions that are properly left to the jury. The trial court would fill in the bracketed material by describing the risks of the product and the severity of potential consequences. In many cases the parties dispute these issues—what risks the product poses (if any), and what the possible consequences of those risks may be (if any). In existing practice, the parties present evidence and argument to the jury on these issues, and the jury then decides what risks the products posed, how severe the consequences might be, and whether the plaintiff was aware of those particular risks.	The committee agreed with this comment and has decided not to propose any revisions to the instruction based on *Buckner*. The proposed new language does address matters that may very well be in dispute and to be resolved by the jury. The stance of the case in *Buckner* did not involve this potential problem. But on different facts, the language proposed by the court in *Buckner* might very well intrude on the role of the jury.
		We also believe the instruction unfairly favors plaintiffs. The proposed revisions unnecessarily turn a simple concept into a multifactor test, thereby increasing the likelihood that jurors will be confused by it and reject it. The current version of the instruction already permits a jury to conclude—and permits counsel to	If the proposed revisions to the instruction favor plaintiffs, it is because that was the result in *Buckner*.

Instruction	Commentator	Comment	BG Response
		argue—that the plaintiff was not aware of all the risks, or of the severity of all those risks, or the ways to avoid the risks. Taking those factors out of counsel's argument and putting them into the instruction is unnecessary, and serves only to tip the balance in favor of plaintiffs.	
	McKenna Long & Aldridge, by Jayme C. Long	Because the proposed revision potentially requires choosing among or, at least, characterizing conflicting theories of a case, it risks pushing the resulting instruction into the realm of impermissible argument by unduly emphasizing particular evidence or theories of liability over others. While jury instructions should be tailored to a particular case, the inclusion of too much evidentiary detail can lead to a finding on appeal that an instruction lends prominence to particular theories or issues, leading the jury to conclude those are entitled to extra weight.	The committee agreed. See response to comment of Horvitz & Levy, above.
		Another practical problem is when a strict liability failure to warn claim is asserted. These cases often hinge on what was "[known/ [or] knowable in light of the [scientific/ [and] medical] knowledge that was generally accepted in the scientific community at the time of [manufacture/distribution/sale]." (CACI 1205) CACI 1244 works with CACI 1205 by allowing the jury to determine whether "at the time of the injury" the plaintiff knew or should have known of the products "risk, harm, or danger." The proposed revision to CACI 1244 usurps this jury function, inserting instead the court's determination as to what risks were known and what the severity of those risks were at the time of sale or distribution.	The committee agreed. See response to comment of Horvitz & Levy, above.

Instruction	Commentator	Comment	BG Response
	Polsinelli Law Firm, by J. Alan Warfield, on behalf of CertainTeed Corporation, Dana Companies LLC, and Union Carbide Corporation	The current version of CACI 1244 is drawn from the California Supreme Court's decision in *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 71. The proposed changes add requirements that are not imposed by *Johnson* and thus are without the Supreme Court's imprimatur.	Supreme Court authority is not required to support a CACI instruction. Appellate authority is sufficient.
		It would be particularly inappropriate to adopt changes to CACI 1244 given that there are two cases now pending before the California Supreme Court (*Webb v. Special Electric Co , Inc.* (S209927) and *Ramos v. Brenntag Specialties, Inc.* (S218176)) in which the court's decisions could well implicate these issues.	It is not likely that these two cases will have an impact on the sophisticated user doctrine. *Ramos* is a primarily a component parts case. *Webb* could affect 1244, but most likely will not affect the *Buckner* issues.
		The proposed changes do not fairly capture the central legal principle underlying the decision in *Buckner, supra,* on which they are purportedly based.	The comment does not explain what the "central legal principle" underlying *Buckner* is.
		Even if *Buckner*'s analysis of the sophisticated user defense could be considered authoritative for all cases in California, the fill-in-the-blank nature of the proposed instruction is problematic. It is misleading, because it takes what is essentially a specially drafted instruction and labels it an "approved" instruction. Litigants are given free rein to fill in the blanks with whatever they choose, tempered only by opposing counsel's objections. Asking litigants to "describe the risk" and "describe the severity," without providing any instruction or limitation, will simply increase litigation and nullify the purpose of having an approved instruction.-	There is nothing *per se* inappropriate about pattern instructions requiring the user to fill in the blanks with facts from the case at issue. Nearly every CACI instruction has blanks for the user to complete. However, per the response to Horvitz & Levy, above, the committee has concluded that the blanks to be filled in under *Buckner* may invade the province of the jury in some cases and are not appropriate for a pattern instruction.
	State Bar of California, Litigation Section, Jury Instructions	We suggest that the introductory paragraph be modified to state more clearly and directly that defendant is not responsible for harm to plaintiff caused by a failure	As the committee has proposed no changes to the opening paragraph, it is beyond the scope of this proposal. However,

Instruction	Commentator	Comment	BG Response
	Committee, by Reuben A. Ginsberg, Chair	to warn in certain circumstances. We believe that describing this as defendant's "claim" and then stating "In order to prove this claim, . . . " may complicate matters unnecessarily. We suggest that the Advisory Committee consider two alternative modifications of the introductory paragraph. The first eschews use of the term "sophisticated user" in favor of simply stating the elements of the affirmative defense without introducing to the jury a term that is familiar only to lawyers and that may add nothing to jurors' understanding of this instruction. The second retains the term "sophisticated user" as a short-hand reference that may be useful.	this paragraph is in the standard CACI format to present an affirmative defense. Therefore, the committee does not propose to consider this comment in the future.
		We suggest that the third element be modified as follows for greater clarity: "~~Any ways~~ How to use the [*product*] in a way that ~~to~~ reduces or avoids the [*product*]'s risks, if ~~that were known to~~ [*name of defendant*] knew that information."	The comment is moot as the committee no longer proposes additions to the instruction text.
VF-1201. *Strict Products Liability—Design Defect—Affirmative Defense—Misuse or Modification*	Los Angeles County Superior Court, by Janet Garcia, Court Manager	Change the transitional language after Question 6 to state: "If your answer to either Question 5 or Question 6 is yes, answer Question 7. *If you answered no to Question 6 and did not answer yes to Question 5*, stop here, answer no further questions, and have the presiding juror sign and date this form."	This comment addresses what to do if only one test is at issue. This point is better handled in the Directions for Use than in the transitional language between questions.
	Orange County Bar Association, by Thomas Bienert, Jr., President	The addition of question number 4 is confusing and does not match the jury instruction for which the Verdict Form should correspond, CACI 1203, *Strict Liability – Design Defect – Consumer Expectation Test—Essential Factual Elements*. CACI 1203 does not list as an element "is the [product] one about which an	The committee considered adding this point as an optional element to 1203. However, the Directions for Use to 1203 say to add the element if the court decides that the applicability of the test is for the jury. The

Instruction	Commentator	Comment	BG Response
		ordinary consumer can form reasonable minimum safety expectations."	committee decided that was sufficient.
VF-1201 and VF-1202. *Strict Products Liability—Design Defect—Risk-Benefit Test* (to be revoked)	Orange County Bar Association, by Thomas Bienert, Jr., President	Verdict Forms 1201 and 1202 should not be combined. Combining them is contrary to the Directions for Use currently in place for these Verdict Forms, which should remain in place. The consumer expectations test requires no expert whereas the risk benefit test requires use of an expert. Combining these tests at this stage creates far too much risk for confusion. Having separate verdict forms with separate titles will help the jury understand the distinction.	The committee concluded that the Directions for Use have needlessly cautioned against combining the two tests into a single verdict form. If both tests are to go to the jury, the fact that risk-benefit involves burden-shifting is irrelevant as burden of proof is not built into verdict forms. Trial judges have requested that the two tests be combined. The need for experts is irrelevant as far as the verdict form questions are concerned.
1305. *Battery by Peace Officer*	Consumer Attorneys of California, by Jacqueline Serna, Associate Legislative Counsel	Although there has been no change in the law or other reason to depart from the well established instruction, this revision would eliminate language that is very helpful in clarifying for the jury what sorts of factors it should consider when deciding whether force is reasonable. Most jurors have no common sense experience in evaluating excessive force factors, and I do not see how eliminating these guideposts benefit anyone.	The committee agreed. See the response below to the comment of the State Bar.
		CACI 1305 only makes sense when the victim of force is under arrest (or perhaps detention) while the officer is performing a lawful arrest or detention.	This comment does not present any issues based on the proposed revisions to the instruction. It may be considered in the release cycle.
	State Bar of California, Litigation Section, Jury	We disagree with the proposed deletion of language from this instruction. *Hernandez v. City of Pomona* (2009) 46 Cal.4th 501,	The committee agreed with the comment. *Hernandez* expressly says that instructing the

Instruction	Commentator	Comment	BG Response
	Instructions Committee, by Reuben Ginsberg, Chair	514, held that the same three factors should be considered in determining whether force was reasonable for purposes of a negligence action (wrongful death). *Hernandez* cited CACI No. 1305 with approval and stated that the three factors should be considered "in determining whether police officers used unreasonable force for purposes of tort liability." (*Id.* at p. 514.) We would retain the three factors and cite *Hernandez* in the Sources and Authority.	jury on the three factors is correct under California law. This proposed deletions have been withdrawn from the release. An excerpt from *Hernandez* has been added to the Sources and Authority as proposed by the comment.
1621. *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements*	Consumer Attorneys of California, by Jacqueline Serna, Associate Legislative Counsel	CAOC member and attorney Patrik Griego writes, "I just finished a jury trial and the jurors were confused by CACI 1621. The first question asks whether defendant negligently "caused" the injury. The 6th question asks whether the conduct was a "substantial factor" in causing the serious emotional distress. The term "caused" in the first question means "substantial factor" but it does not say that and is therefore confusing to jurors. Why use the term "substantial factor" in the sixth question and not in the first question? Jurors in my case thought that the term "caused" in the first question must mean "sole cause"; otherwise, why not use the term "substantial factor", as was done in the sixth question." We recommend that this section 1621 be clarified to avoid confusion.	The comment addresses a point not raised by the proposed changes posted for public comment. However, the committee does not perceive the problem. This instruction is about the recovery of damages for emotional distress by a bystander. So element 1 refers to the defendant causing the injury to the physical victim. Element 6 requires that the defendant's conduct be a substantial factor in causing emotional distress to the bystander. In a bystander case, the committee believes that it is highly unlikely that element 1 will be contested. If it is, there will be instructions on the underlying event, which will present causation as "substantial factor."
1620-1623, Instructions on Negligent Infliction of Emotional Distress	State Bar of California, Litigation Section, Jury Instructions	Agree	No response is necessary.

Instruction	Commentator	Comment	BG Response
	Committee, by Reuben Ginsberg, Chair		
1623. *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements*	Orange County Bar Association, by Thomas Bienert, Jr., President	The proposed change to the Direction for Use should read: "[t]he explanation in the second to last paragraph…."	The committee has corrected this error.
1803. *Appropriation of Name or Likeness—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree. In addition, we suggest that a new instruction be created on the affirmative defense that requires balancing the plaintiff's right of privacy against the public interest in the dissemination of news and information.	The committee will consider this suggestion in the next cycle.
2336. *Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements*	Orange County Bar Association, by Thomas Bienert, Jr., President	We suggest leaving the deleted language in the Directions for Use pertaining to excess insurance. Since the court determines if the claim is potentially covered by the policy, the court will determine if the claim falls within the excess limits. However, deleting the paragraph concerning excess insurance will not guide the revision of the instruction such that the jury is aware that there is a difference between excess and primary insurers.	There is no explanation given nor authority provided, either in the Directions for Use or in the comment, as to how the instruction should be modified if there is an issue of excess insurance coverage. Without some guidance, the sentence is not helpful. The committee considers it a collateral point, which need not be addressed in the Directions for Use.
		The excerpt from *Shade Foods* in the Sources and Authority is the same as what was previously below But the citation is now incomplete. While the paragraph could be moved higher in the analysis, the full citation for the case needs to be set forth.	The full citation format for *Shade Foods* has been included.
	State Bar of	We believe that the Directions for	The court will decide

Instruction	Commentator	Comment	BG Response
	California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Use should state more clearly (1) that the court decides whether the claim was potentially covered by the policy and (2) that this instruction should be given only if the court decides that there was potential coverage. We suggest that the beginning of the second paragraph in the Directions for Use be modified as follows: "Whether the claim was potentially covered by the policy is an issue for the court to decide. Give this instruction only if the court decides that the claim was potentially covered. The court will decide the issue of whether the claim was potentially covered by the policy."	that there was no potential coverage only if there are no disputed facts, in which case the case will be resolved on summary judgment. If there are disputed facts, there is a duty to defend. The issue for the jury is element 4, whether the insurer's decision to deny coverage and a defense was unreasonable and without proper cause.
2407. *Affirmative Defense—Employee's Duty to Mitigate Damages*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We believe that failure to mitigate damages is an affirmative defense and therefore suggest that the title of this instruction, and other instructions on the duty to mitigate, be changed to "Affirmative Defense—Failure to Mitigate Damages."	The committee agreed, and has revised the title.
		We believe that the "see also" citation to *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98, added to the first excerpt in the Sources and Authority adds nothing substantial to the California Supreme Court authority already cited, *Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182. The point was conceded in *Rabago*. We would delete the citation to *Rabago*.	The committee believes that the "see also" to *Rabago-Alvarez* sets up the "but see" to *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432, which is the real reason for the additions to the *Parker* excerpt. The court in *Villacorta* relies heavily on *Rabago-Alvarez*. But the committee believes that this reliance is misplaced.
		We believe that the citation to *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432, added to the excerpt point belongs in a separate bullet point. The parenthetical description of the	The committee does not believe that *Villacorta* can be harmonized with *Parker*, and thus must be presented as a "but see."

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		case is actually a quotation. Moreover, *Villacorta* is consistent with the quoted language from *Parker*, so "but see" is not appropriate. We suggest that the new bullet point should precede the current third bullet point, which makes the same point, and should read: " 'Wages actually earned from an inferior job may not be used to mitigate damages . . . .' (*Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432.)"	
	Wilson Turner Kosmo, by Michael S. Kalt	Add: "However, minor differences in salary, benefits, or the availability of a merit-based system does not render a job inferior (*Id.* at p. 255.)" to the second paragraph of the Directions for Use. This instruction is generally correct; however, *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250-255 rejected plaintiff's contention that any minor difference in salary and benefits or the availability of a merit-based system renders a job inferior. Adding the language above is appropriate to avoid any misconception and maintains the instruction's neutrality.	The comment proposes treatise-like discussion. That is not generally the purpose of the Directions for Use, which is to present information relevant to the use and drafting of the instruction.
		Delete both *Rabago* and *Villacorta* from *Parker* excerpt in Sources and Authority. Including these citations in this jury instruction conflates the issue of actual damages (and what earnings may be used to determine Plaintiff's lost wages) with the affirmative defense of failure to mitigate damages. The affirmative defense is used if the plaintiff failed to make reasonable efforts to seek or obtain alternative employment, not in cases where the plaintiff	The committee believes that the *Parker-Rabago-Villacorta* issue is what wages can be deducted in mitigation, not what earnings may be used to determine plaintiff's lost wages (although they may functionally be the same thing). The proposed excerpt from *California School Employees* is an appellate case saying

Instruction	Commentator	Comment	BG Response
		actually obtained alternative employment. The citations suggested by the revised CACI instructions do not address this affirmative defense, but instead address what measure of damages an employee may use in calculating her lost wages. Alternatively, if the Judicial Council insists on including these citations, we suggest changing the *Robago-Alvarez* citation to *California School Employees Assn. v. Personnel Commission, supra,* 30 Cal.App.3d at p. 255 with the quote "The general rule is that the obligation to reimburse a wrongfully discharged employee may be mitigated by deducting earnings actually received from other employment." The quote cited in *Rabago-Alvarez* does not address the court's ruling or holding, but instead only addresses what the plaintiff conceded, making it not citable for this proposition. On the other hand, *California School Employees Assn.* stated the general rule on this issue. In addition, including *California School Employees Assn* together with *Villacorta* recognizes the split in authority and provides a neutral reference.	the same thing as *Parker*, a Supreme Court case.
2431. *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree that this instruction should plainly state, rather than only imply, that the conduct that plaintiff allegedly was required to engage in would violate public policy. But we believe that the proposed new sentence in the introductory paragraph inappropriately combines the public policy with defendant's requiring the plaintiff to violate it (which is addressed in element 2). For example, price fixing is a violation of public policy, and	The language in question is partially within an example of how the instruction could be completed. The committee has moved the "require": language from the instruction text to the example to address any possible lack of clarity as postulated by the comment. This change was made to CACI Nos. 2430 and 2432 also.

Instruction	Commentator	Comment	BG Response
		requiring an employee to engage in price fixing is a tort if it results in a constructive discharge. Rather than state that it is a violation of public policy to require an employee to engage in price fixing, we believe that the new sentence should state that price fixing is a violation of public policy and leave it to element 2 to state that defendant is liable only if defendant required plaintiff to engage in such conduct. Accordingly, we would modify the new sentence as follows: "[*Specify conduct alleged to violate public policy, e.g., price fixing*] ~~It~~ is a violation of public policy ~~for an employer to require that an employee [specify claim in case, e.g., engage in price fixing].~~"	
	Wilson Turner Kosmo, by Michael S. Kalt	Revise last paragraph of Directions for Use to read: "The judge should determine ~~whether the purported reason for plaintiff's resignation would amount to a violation of public policy~~ whether the action allegedly required by the employer violated a fundamental public policy." See *Stevenson v. Superior Court* (1997) 16 Cal. 4th 880, 889-890 [outlining four part test as to whether a policy is sufficient to support a tortious discharge claim]; *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090, overruled on other grounds by *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66, 71 ["The difficulty, of course, lies in determining where and how to draw the line between claims that genuinely involve matters of public policy, and those that concern merely ordinary disputes between employer and employee."]. If the judge does not conclude this, the claim should be dismissed prior to	The committee has added a citation to *Gantt* to support this paragraph. The citation has been added to CACI Nos. 2430 and 2432 also. The proposed additional discussion is not appropriate for Directions for Use.

Instruction	Commentator	Comment	BG Response
		submission to the jury. The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved."	
2432. *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions That Violate Public Policy*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	The essence of this claim is that plaintiff was subjected to intolerable working conditions that violated public policy and was forced to resign. We believe that the first sentence in the Directions for Use says it well: "This instruction should be given if plaintiff claims that his or her constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy." But the instruction itself does not convey this so clearly, and the example in the proposed new sentence does not correspond with the example in element 2. We believe that the two examples should be the same. And the example given seems to combine two separate Labor Code violations, failure to pay overtime and failure to pay minimum wage, into one. We suggest that the introductory paragraph be modified as follows for greater clarity and consistency: "[*Name of plaintiff*] claims that [*name of defendant*] forced [him/her] to resign ~~for reasons~~ by subjecting [him/her] to working conditions that violated public policy. It is a violation of public policy for an employer to ~~require an employee to~~ [*specify claim in case, e.g., require an employee to work ~~more than forty hours a week~~ for less than minimum wage*]. To establish this claim, [*name of plaintiff*] must prove all of the following:"	The committee agreed that the examples in the introductory paragraph and in element 2 should be the same. The committee is not concerned that the example includes two Labor Code violations as overtime and minimum wage violations often go hand in hand.
		We suggest that the title be modified to "Constructive Discharge in Violation of Public	The committee agreed with the comment and has removed "for

Instruction	Commentator	Comment	BG Response
		Policy—Plaintiff Required to Endure Intolerable Conditions ~~for Improper Purpose~~ That Violatesd Public Policy."	Improper Purpose" from the title.
	Wilson Turner Kosmo, by Michael S. Kalt	The proposed addition to the introductory paragraph is vague and does not make sense in the context for which this instruction is designed to address, i.e. the employee resigns because of intolerable working conditions created by the employer allegedly due to the employer's violation of a fundamental public policy. The judge should determine as a matter of law whether the employer's alleged actions violated a fundamental public policy. By adding the proposed sentence it invites the juror to make this determination. As such, our recommendation is to not include this sentence at all	The committee does not believe that instructing the jury that particular acts, if proved, constitute a violation of public policy invites the jury to make this determination. The committee believes the opposite; that this language is essential to ensure that the jury does *not* consider whether a public policy has been violated.
		The instruction should also be clarified as to what constitutes "intolerable working conditions." "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal. 4th 1238, 1254, abrogated on other grounds by *Romano v. Rockwell Int'l, Inc.* (1996) 14 Cal.4th 479.) The employee's resignation must be employer-coerced, not caused by the voluntary action of the employee or by conditions or matters beyond the employer's reasonable control. (*Turner, supra,* 7 Cal.4th at p. 1248.) "In order to amount to a constructive discharge, adverse working conditions must be unusually 'aggravated' or amount to a 'continuous pattern' before the situation will be deemed intolerable." (*Id.* at 1246-1247.) "Single, trivial, or isolated acts of [misconduct] are insufficient to	The committee agrees that the inclusion of an explanation of "intolerable working conditions" in the last paragraph may be insufficient for reasons noted in the comment. However, the comment is beyond the scope of matters posted for public comment. It will be addressed in the next cycle.

Instruction	Commentator	Comment	BG Response
		support a constructive discharge claim." (*Id.* [internal citations omitted].) So revise last paragraph to read: To be intolerable, the adverse working conditions must be unusually aggravated ~~or repeatedly offensive~~ to a reasonable person in [name of plaintiff]'s position or must amount to a continuous pattern over a prolonged period of time.	
2442. *Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements*	Hon. David Abbott, Judge of the Superior Court of Sacramento County	The proposed addition of CACI No. 2442 will certainly be helpful in whistleblower employment cases. I am currently in such a trial, with jury instructions in draft at present. This proposed instruction and use notes will assist me in drafting final instructions and in addressing requests from counsel for "pinpoint" instructions. I'll provide comments and feedback as I deal with the final version in my case.	The committee looks forward to getting Judge Abbott's feedback on this instruction.
	California Employment Lawyers Association, by David deRobertis	The instruction's focus on "discharge" ignores the unique statutory definition of adverse action in this context as including "acts of reprisal, retaliation, threats, coercion or similar acts."	The committee has considered the question of how to present adverse actions short of discharge in a series entitled Wrongful Termination. The committee's decision is to limit the actual instruction text to discharge, and then explain in the Directions for Use how to modify the instruction for other adverse employment actions.
		We understand that the second paragraph of the Directions for Use tries to address this issue. However, it does so in a confusing manner, which will create a risk that trial courts will simply use CACI 2509	The committee does not believe that the second paragraph of the Directions for Use is confusing. It says to replace "discharge" with

Instruction	Commentator	Comment	BG Response
		(*Adverse Employment Action-Explained*) to fill the gap in this instruction when it is used for adverse actions shy of termination. To avoid this result, the statutory language - "engages in acts of reprisal, retaliation, threats, coercion, or similar acts" - should either be found in the text of the instruction or, alternatively, at the very least, directly included in the "Directions for Use." Doing so will ensure that courts are well-tuned into the idea that this statute contains its own unique adverse action language that differentiates it from other statutes (such a the FEHA) for which instruction 2509 is well-suited.	whatever the adverse action was in the case. The committee does not see a likelihood that the court would just give 2509. 2509 is for use if the jury is to decide whether an action was adverse or not. If that is an issue, then 2509 should be given; if not, then the user just inserts "demotion" or whatever adverse action is at issue in the case in place of "termination." The list of prohibited acts is in the first paragraph of the Directions for Use.
	Joshua C. Irwin, Deputy Attorney General, State of California	As written, proposed CACI No. 2442 is somewhat confusing. The title suggests that it addresses only the "protected disclosure" aspect of the Whistleblower Protection Act (see Gov. Code, § 8547.2(e).) However, the body more generally addresses at least some of the elements of a cause of action for retaliation under the WPA. (See Gov. Code § 8547.8(c) and (e)). To be clearer for a jury, CACI 2442 should state only the elements of a cause of action for WPA retaliation and be given a title that reflects this content. The definition of "protected disclosure" (see elements 1 through 3 of proposed CACI 2442) is better understood and considered if it is addressed as a stand-alone instruction. See proposed new CACI 2442.5.	The committee prefers a single instruction rather than the proposed division into separate instructions, which would move the meaning of "protected activity" from 2442 into a separate definitional instruction (the proposed 2442.5) The second part of the proposed 2442.5 sets forth the very complex statutory definition of "improper governmental activity." The committee does not believe that it is necessary to give all of this language to the jury. As noted in the Directions for Use, whatever governmental activity is at issue in the case can be included if necessary.

Instruction	Commentator	Comment	BG Response
		2442 needs an element stating that the defendant was aware of the protected disclosure. While there is no reported WPA case law on this point, cases dealing with retaliation causes of action under the Fair Employment and Housing Act and Labor Code section 1102.5 state that an employer or actor must be aware of the protected activity. (See *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 614-615 ["Essential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity"]; *Morgan v. Regents of University of Cal.* (2000) 88 Cal.App.4th 52, 69-70, 73.) If there is more than one defendant, plaintiff must establish that each defendant was aware of the protected disclosure(s).	Awareness is subsumed within Element 5, which says that the protected disclosure was a contributing factor in the adverse action. If the defendant was not aware of the disclosure, it could not be a contributing factor.
		The instruction should specify that the discharge was after the protected disclosure. Government Code section 8547.8(c) prohibits "acts of reprisal, retaliation, threats, coercion, or similar acts" against plaintiff. If those acts do not occur after the protected disclosure, they cannot be taken because of that disclosure.	This point is also subsumed within "contributing factor."
		2442 should have an element that reflects the language in section 8547.8(c) that there is a cause of action against a person who *intentionally* engages in retaliation. See *Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 860-861, dealing with the analogous the Education Code provisions extending WPA to community college employees.	Intent is also subsumed within "contributing factor."
	State Bar of California, Litigation Section, Jury	Agree	No response is necessary

Instruction	Commentator	Comment	BG Response
	Instructions Committee, by Reuben Ginsberg, Chair		
	Wilson Turner Kosmo, by Michael S. Kalt	Change "contributing factor" to "substantial motivating factor." They don't say why. I assume they believe that *Harris v. City of Santa Monica* applies to this statute.	This statute uses "contributing factor" and then creates a specific affirmative defense based on that language. The committee believes that because "contributing factor" is addressed in the statute, the instruction should use that language.
2443. *Affirmative Defense—Same Decision*	California Employment Lawyers Association, by David deRobertis	The "same-decision" defense instruction must include the concept that the employer would have taken the same action *at the same time* based on wholly legitimate reasons.	The committee agreed with the comment and has added language clarifying that the defendant must have considered the valid reason at the time when the adverse action was taken.
	Joshua C. Irwin, Deputy Attorney General, State of California	The proposed CACI No. 2443 appears to be a correct statement of the law. However, it should add the term "protected" before the first appearance of the word "disclosure."	The committee agreed with the comment and has added "protected."
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree with this proposed new instruction, but find it cumbersome. The instruction is a single sentence with three ifs, which could be confusing. We believe that the initial clause ("If [*name of plaintiff*] proves that [his/her] disclosure was a contributing factor to [his/her] discharge") is unnecessary because the jury need not decide whether plaintiff has proven his or her case to find that the affirmative defense applies. We would delete this initial clause.	This instruction is contingent on first finding that there was prohibited retaliation. Without the initial clause, the jury could lose sight of this limitation.
	Wilson Turner Kosmo, by Michael S. Kalt	Change "contributing factor" to "substantial motivating factor." They don't say why. I assume they	This statute uses "contributing factor" and then creates this

Instruction	Commentator	Comment	BG Response
		believe that *Harris v. City of Santa Monica* applies to this statute.	specific affirmative defense based on that language. The instruction must reflect this statutory language.
		Add "anyways" after "would have discharged plaintiff."	The committee agreed with the comment, but prefers "anyway" to "anyways."
		Delete: "even if [*name of plaintiff*] had not made protected disclosures [or refused an illegal order]" at the end of the instruction.	The committee agreed that that deletion of most of this language improves clarity. The language of the instruction has been revised, but reference to "refusing an illegal order" has been retained.
2540. *Disability Discrimination—Disparate Treatment—Essential Factual Elements*	California Employment Lawyers Association, by David deRobertis	Elimination of the standard, Judicial Council-approved language covering the "perceived as" prong of the statutory definition of protected disabilities will leave litigants and trial court without guidance on how to properly define this type of claim in jury instructions. CELA acknowledges that it appears that the intent of the proposed change is to retain Instruction 2540 to cover "perceived as" disability claims given the comment in the "Directions for Use" about modifying elements 3 and 6 in a "perceived as" case. But CELA is troubled by the removal of the standard, Judicial Council-approved language from the instruction itself for a "perceived as" claim.	The proposed revisions to this instruction conform it to a decision made previously to simplify several FEHA cause-of-action instructions by reducing the options. Rather than trying to build perception and association discrimination into the instructions themselves, the Directions for Use now note the possible modification of the instruction for use in these cases.
		If, nonetheless, the "perceived as" language is going to be removed from the text of the instruction, it should be incorporated in abbreviated form into the Directions for Use. This could be done, for example, as follows with the bolded text being our suggested	The committee agreed with the comment and has revised the Directions for Use along the lines suggested in the comment.

Instruction	Commentator	Comment	BG Response
		addition "Modify elements 3 and 6 if plaintiff was not actually disabled or had a history of a disability, but alleges discrimination because he or she was perceived to be disabled. (See Gov. Code,§ 12926(o); see also Gov. Code,§ 12926G)(4)(m)(4) [mental and physical disability include being regarded or treated as disabled by the employer.]. **This can be done with language in element 3 that the employer "treated [name of plaintiff] as if [he/she] ... " and with language in element 6 "That [name of employer's] belief that ... "**	
	Orange County Bar Association, by Thomas Bienert, Jr., President	In the Sources and Authority, the added authority set forth in the first two full bulleted excerpts from *Rope v. Auto-Chlor System of Washington, Inc.* (2014) 220 Cal.App.4th 635should be deleted in that they are not relevant to this instruction.	The committee agreed with the comment and has removed these excerpts on associational discrimination. Proposed new CACI No. 2547, to which this instruction cross refers, addresses associational discrimination. Thus, these excerpts are not needed here.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree	No response is necessary.
	Wilson Turner Kosmo, by Michael S. Kalt	Agree	No response is necessary.
2547. *Disability-Based Associational Discrimination—Essential Factual Elements*	California Employment Lawyers Association, by David	The proposed language for the first and third options of element 4 misstates the law because it does not properly account for an adverse employment action based on the	The committee believes that the comment makes an interesting argument that may very well prove to be correct some

Instruction	Commentator	Comment	BG Response
	deRobertis	employer's mistaken, stereotypical beliefs. It requires proof of the underlying asserted facts rather than permitting the employee to rely on proof of the employer's mistaken belief as to the underlying asserted facts as an alternative. Thus, for example, the plaintiff must actually prove that the association with the individual with a disability "was costly" to the employer or that the employee "was somewhat inattentive at work." In some cases, these underlying facts may be reality. The employee may actually have been "somewhat inattentive at work"; but, in other cases, the employer may mistakenly assume based on stereotypical thought processes that the employee will be inattentive or unreliable. In this latter scenario, the plaintiff will not need to prove these underlying facts because they are not reality but rather they are incorrectly assumed or mistaken facts by the employer.	day. But the argument relies on federal cases under the Americans with Disabilities Act. CACI instructions cannot rely on federal cases construing different statutes. *Rope, supra,* on which this instruction is based, also relies on ADA cases, but the court did not expressly adopt this position. In fact, in footnote 13, the court says that Rope *cannot* rely on the "distraction" category because he pled that he was not distracted. If the commentator is right, Rope should have been able to claim to be a victim of "distraction" associational discrimination based on the employer's misperception that he was likely to be distracted.
		The suggested language "is likely" in the second option of element 4 overstates the requirement and should be replaced with "may."	The committee agreed with the comment and has made this replacement.
	Wilson Turner Kosmo, by Michael S. Kalt	In the first option to element 4, change "costly" to "an unduly burdensome expense."	*Rope* says "costly." The instruction should use the court's language, particularly when it is better plain English.
		In the third option for element 4, change "but not so inattentive that to perform to [*name of defendant*]'s satisfaction [*name of plaintiff*] would need an accommodation;" to "but [*name of plaintiff*] did not [himself/herself] require an accommodation to perform their job duties;	The comment does not indicate why this change should be made. There is no connection in the proposed language between the inattentiveness and the question of an accommodation.

Instruction	Commentator	Comment	BG Response
2730. *Whistleblower Protection—Essential Factual Elements*	California Employment Lawyers Association, by David deRobertis	The bracketed phrase "acting on behalf of' in the first element is confusing. It appears that this language is intended to cover the concept that Labor Code section 1102.5' s prohibitions apply not just to the employer but also to "any person acting on behalf of the employer .... " (Lab. Code §1102.5(a), (b), and (c).) However, nothing in the Directions for Use or otherwise makes this clear. Thus, we submit that if this bracket is intended to be used only for individual defendants to ensure that their conduct was done "on behalf of the employer," then the "Directions for Use" should make this clear. Otherwise, there is a risk that courts will include this bracket when the only party being sued is the employer entity itself.	The committee agreed with the comment and has deleted “acting on behalf of.”
		Because a disclosure may be about something “unwise, wasteful" gross misconduct, or the like,” but that is also a legal violation, the word “merely” needs to be added.	The committee agreed with the comment. “Merely” has been added.
		Delete: "A report of publicly known facts is not a protected disclosure." This statement is not an accurate statement of California law under Labor Code section 1102.5 or, at the very least, it is such a unsettled proposition that it does not belong in a standard, CACI instruction. A new case, *Hager v. County of Los Angeles* (2014) 228 Cal. App. 4th 1538, 1548-1553, directly disagreed with *Mize-Kurzman's* assertion that a report of already known facts cannot be a protected disclosure. Apart from *Hagar,* CELA argues at length that *Mize-Kurzman* was wrongly decided on this point.	The committee agreed that *Hager* casts serious doubt on *Mize-Kurzman* on this point. But a petition for review has been filed in *Hager*, which means that the case will not be final in time to make the 2015 edition. Nevertheless, the committee has deleted the last sentence on publicly known facts, while noting the holding of *Mize-Kurzman* in the Directions for Use.
	State Bar of California, Litigation	Rather than include the bracketed language “[acting on behalf of]” in element 1, we would delete that	The committee agreed with the comment and has deleted “acting on

Instruction	Commentator	Comment	BG Response
	Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	language and state in the Directions for Use that the instruction should be modified if the claim is based on the conduct of a person acting on behalf of the employer. We believe that the defendant in most cases will be the employer, rather than a person acting on behalf of the employer. If the defendant is not the employer, other references in the instruction to the defendant may need to be changed to be consistent with the statute. For example, Labor Code section 1102.5(b) states that "[a]n *employer, or any person acting on behalf of the employer*, shall not retaliate" (Italics added). If the defendant is the employer, then "[*name of defendant*]" is appropriate the first time it appears in element 2. But if the defendant is a person acting on behalf of the employer, it may be appropriate to name the employer rather than the defendant in element 2. The reference to "[*name of defendant*]'s policies" in the first bracketed sentence after element 7 also may need to be changed if the defendant is not the employer.	behalf of."
		Element 1 of the previous version of this instruction stated, "That [*name of plaintiff*] was an employee of [*name of defendant*]." We find this language clearer and more direct than the proposed new language and would use this language in element 1.	The committee sees no significant difference between the previous and current language.
	Wilson Turner Kosmo, by Michael S. Kalt	Change the third option for element 3 to "<u>That [*name of plaintiff*]'s refusal to</u> [specify activity <u>in which plaintiff refused to participate</u>] would result in [a violation of a [state/federal statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];".	The first proposed change is not correct. It is not the refusal that would result in a violation; it is the participation. The committee has revised the option to make that clear. The second proposed

Instruction	Commentator	Comment	BG Response
			change is unnecessary because "in which the plaintiff refused to participate" is stated in element 2. It does not need to be repeated in element 3.
		Delete: "[A disclosure is protected even though disclosing the information may be part of [*name of plaintiff*]'s job duties.]. This can be a special jury instruction if at all applicable.	The committee believes that it is an appropriate optional element.
2732. *Retaliatory Unfair Immigration-Related Practice—Essential Factual Elements*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Labor Code section 1019(a) refers to an alleged violation of "this code or local ordinance." Element 1 in this instruction refers instead to defendant's violation of "a legal obligation." We believe that the language "violation of law" accurately conveys the meaning of section 1019 and is more familiar language to lay jurors than "violation of a legal obligation." Also, rephrase the first option to the active voice.	The committee concluded that both "violation of a legal obligation" and "violation of law" were too broad as the statute requires a violation of the Labor Code or local ordinance. The instruction was restructured to require the user to insert the particular violation alleged.
		Labor Code section 1019(b)(1)(C) was amended in June 2014, effective January 1, 2015. The amendment adds the words "or a false report or complaint with any state or federal agency." Accordingly, we suggest that the language "[filed or threatened to file a false police report[;/.]]"	The committee is grateful for this information and has revised the instruction as suggested.
	Wilson Turner Kosmo, by Michael S. Kalt	In element 1, delete the open "specify other" option or reword it to read: "[*specify other plaintiff conduct in violation of the Labor Code or local ordinance alleged to have caused retaliation*]." This can be a special jury instruction if at all applicable.	If the plaintiff's conduct was something other than one of those specified in the statute, the instruction has to set forth the acts.
		In element 3, add "legal" thus: That [*name of defendant*]'s conduct was for the purpose of, or with the intent of, retaliating against [*name*	The committee has added "legally protected."

Instruction	Commentator	Comment	BG Response
		of plaintiff] for exercising [his/her] legal rights;	
		Add to the end of the instruction as a new paragraph (Lab. Code § 1019(b)(2)): "Unfair immigration-related practice" does not include conduct undertaken at the express and specific direction or request of the federal government."	The committee does not believe that this limitation from the statute would ever be a jury issue.
		Delete the paragraph from the Directions for Use about the option to specify other conduct in element 1.	The committee believes that it is important to alert the user to the "includes but is not limited to" language from the statute.
3040. *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Substantial Risk of Serious Harm*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We agree with the revisions to the instruction, but we would delete the excerpt from *Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240, in the Sources and Authority. The quotation provides no clear guidance and appears to provide no solid authority.	Element 4 requires that there be no reasonable justification. The excerpt from *Grenning* addresses this element.
3041. *Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	We disagree with the proposed revisions that are based on *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, a 6-5 en banc opinion. The holding in *Peralta* is by no means settled law binding on California courts. It is not unlikely that other federal courts will reach the opposite conclusion. We believe that until more solid authority can be cited, the bracketed final paragraph in the instruction and the citations to *Peralta* in the Directions for Use and Sources and Authority should be deleted.	The committee believes that the comment raises a legitimate point, but one that the committee expressly considered. The conclusion was that *Peralta* merited an optional paragraph in the instruction. However, the Directions for Use have been revised to make it clear that *Peralta* is not binding on a California court and that the optional paragraph is provided should the court decide that it agrees with *Peralta*.
3070. *Disability Discrimination—Access Barriers to Public*	James S. Link, Attorney at Law, Pasadena	This jury instruction should not be limited to the Disabled Persons Act, of which section 54.3 is a part.	The committee agreed that the Directions for Use should note that the

Instruction	Commentator	Comment	BG Response
Facility—Construction-Related Accessibility Standards Act—Essential Factual Elements		Rather, it should also be extended to the Unruh Civil Rights Act, of which Civil Code § 52 is a part. This proposed extension follows from the provisions of Civil Code section 55.56, which provides: (a) Statutory damages under either **subdivision (a) of Section 52** or subdivision (a) of Section 54.3 may be recovered in a construction-related accessibility claim against a place of public accommodation only if a violation or violations of one or more construction-related accessibility standards denied the plaintiff full and equal access to the place of public accommodation on a particular occasion.	CRASA also applies to claims under the Unruh Act.
		I have previously sent letters to the CACI committee respecting the damage instructions regarding the Unruh Civil Rights Act. In those letters, I noted the Committee does not address section 55.56 in CACI Nos. 3060 and 3067 and VF 3030 where it is stated damages may be presumed on an Unruh violation. Section 55.56 precludes the assertion that damage is "presumed." The Committee does not even cite section 55.56 in the notes to CACI Nos. 3060 and 3067 and VF 3030. Civil Code § 52 has required for a very long time proof of actual harm or damage. The law on which the Committee relies is out of date, dicta or not applicable as set out in my prior correspondence.	The commentator has made, and the committee has rejected, this argument several times previously. The Unruh Act applies to many kinds of discrimination in public accommodations, not just to accessibility barrier claims. CACI Nos. 3060 and 3067 are correct for all Unruh Act claims except CRASA claims. With this new CRASA instruction that mentions that it applies under the Unruh Act, the committee has addressed any possible confusion created by not building CRASA limitations into the CACI Unruh instructions.
	State Bar of California, Litigation Section, Jury	Civil Code section 54.3(a) authorizes an award of actual or statutory damages, and section 55.56 states the requirements for an	The committee agreed with the comment and has added references to statutory damages to the

Instruction	Commentator	Comment	BG Response
	Instructions Committee, by Reuben Ginsberg, Chair	award of statutory damages based on a construction-related accessibility claim. This new instruction includes the elements required to recover statutory damages on such a claim, as distinguished from the elements required for an award of actual damages. We suggest that the following sentence be added at the beginning of the Directions for Use: "Use this instruction if a plaintiff seeks statutory damages based on a construction-related accessibility claim."	Directions for Use along the lines suggested.
		We suggest that the title be modified to "Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act—Statutory Damages—Essential Factual Elements (Civ. Code, §§ 54.3, 55.56)"	The committee believes that the addition to the Directions for Use is sufficient. A title change would just make the title even longer.
		We suggest that the final paragraph in the Directions for Use be modified as follows: "This instruction can be modified for use if actual damages are sought by deleting element 2 and all that follows and adding a new element 2 stating that the defendant's conduct was a substantial factor in causing the plaintiff's harm. If actual damages are sought, CACI No. 3067, Unruh Civil Rights Act—Damages, may be given.	The committee agreed that the final paragraph could be improved, but did not agree with the revision proposed in the comment. Rather than suggest what would be essentially an entirely new instruction, it would be better to say that because the CRASA only applies to the recovery of statutory damages, the instruction should not be given if actual damages are sought.
4342. *Reduced Rent for Breach of Habitability*	California Judges Association	Because the law is unsettled, it seems it would be best not have this instruction at all.	While CACI instructions are usually not provided for unsettled points of law, the committee has received multiple requests for this

Instruction	Commentator	Comment	BG Response
			instruction from judges who believe that the reduction of rent is a jury issue. The Directions for Use make it clear that the instruction rests on an unresolved point.
		For a substantial breach of the warranty of habitability, the rent is reduced on a periodic basis (usually monthly, because usually the rent is paid monthly) by the percentage that the premises is uninhabitable. This instruction gives an option of making a simple dollar amount reduction, and using the dollar amount is too vague to accurately reflect the percentage of uninhabitability.	The committee does not see any vagueness. If rent is $1000 a month and the jury finds that rent should be reduced by half because of uninhabitability, it can either say $500 or 50 percent.
		The instruction assumes that the reduction is consistent for whatever period the jury determines. The reduction for habitability can vary from month to month. For example, if the breach were for the breakdown of a furnace starting April 1, the reduction could be 50 percent for April, 40 percent for May, 30 percent for June, 10 percent for July, and 0 percent for August. The instruction does not address the very definite possibility of a variance of the substantial breach over time.	The committee agreed with the comment and has added an optional sentence to the instruction and a paragraph to the Directions for Use.
	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree	No response is necessary.
4510. *Breach of Implied Covenant to Perform Work in a Good and Competent Manner—Essential*	State Bar of California, Litigation Section, Jury Instructions	We suggest that the proposed new paragraph in the Directions for Use be modified for greater clarity and consistency. Also, *Gilbert Financial Corp. v. Steelform*	The committee agreed that the current language could use some greater clarity and revised it somewhat.

Instruction	Commentator	Comment	BG Response
Factual Elements	Committee, by Reuben Ginsberg, Chair	*Contracting Co.* (1978) 82 Cal.App.3d 65, 69-70 held that an owner could maintain a cause of action against a subcontractor for breach of the implied warranty of quality and fitness if the owner was an intended beneficiary of the contract between the general contractor and the subcontractor. We believe that this deserves mention as well. We suggest that the proposed new paragraph be modified as follows: "This instruction may be adapted for use ~~with a claim by a homeowner who purchased the property from the developer-owner against the contractor for construction defects~~ if an owner claims to be a third party beneficiary of a construction contract between the developer and a contractor or between a general contractor and a subcontractor. ~~That claim would be based on the proposition that the homeowner is a third-party beneficiary of the builder-developer contract.~~ (See *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, 1422-1423; *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 69-70.)"	But the comment's proposed rewrite elevates the third-party beneficiary point to be the basis of the claim rather than it just being the underlying legal reason for liability. *Gilbert* has been added to the citation as a "see also" to point out the applicability to subcontractors.
5012. *Introduction to Special Verdict Form*	State Bar of California, Litigation Section, Jury Instructions Committee, by Reuben Ginsberg, Chair	Agree. We believe that the proposed new language clarifies an important point regarding the requirement that all jurors deliberate on each question, and we enthusiastically support the revision.	The committee appreciates the comment.

Instruction	Commentator	Comment	BG Response
All except as noted above	Orange County Bar Association, by Thomas Bienert, Jr., President	Agree	No response is necessary.

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314. Interpretation—Disputed WordsTerm

[*Name of plaintiff***] and [***name of defendant***] dispute the meaning of the following wordsterm contained in their contract: [***insert text of termdisputed language***].**

[*Name of plaintiff***] claims that the wordsterm means [***insert plaintiff's interpretation of the term***].**
[*Name of defendant***] claims that the words term means [***insert defendant's interpretation of the term***].**
[*Name of plaintiff***] must prove that [his/her/its] interpretation of the term is correct.**

In deciding what the wordsterms of a contract mean, you must decide what the parties intended at the time the contract was created. You may consider the usual and ordinary meaning of the language used in the contract as well as the circumstances surrounding the making of the contract.

[The following instructions may also help you interpret the wordsterms of the contract:]

New September 2003; Revised December 2014

Directions for Use

Give this instruction if there is conflicting extrinsic evidence as to what the parties intended the language of their contract to mean. While interpretation of a contract can be a matter of law for the court (*Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 865 [44 Cal.Rptr. 767, 402 P.2d 839]), it is a question of fact for the jury if ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence. (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Read any of the following instructions (as appropriate) on tools for interpretation (CACI Nos. 315 through 320) after reading the last bracketed sentence.

Sources and Authority

- Section 200 of the Restatement Second of Contracts provides: "Interpretation of a promise or agreement or a term thereof is the ascertainment of its meaning."

- Contract Interpretation: Intent. Civil Code section 1636. provides: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

- Contracts Explained by Circumstances. Civil Code section 1647. provides: "A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

- "Juries are not prohibited from interpreting contracts. Interpretation of a written instrument becomes solely a judicial function only when it is based on the words of the instrument alone, when there is no

conflict in the extrinsic evidence, or a determination was made based on incompetent evidence. But when, as here, ascertaining the intent of the parties at the time the contract was executed depends on the credibility of extrinsic evidence, that credibility determination and the interpretation of the contract are questions of fact that may properly be resolved by the jury." (*City of Hope National Medical Center*, *supra*, ~~*v. Genentech, Inc.* (2008)~~ 43 Cal.4th at p.~~375,~~ 395 ~~[75 Cal.Rptr.3d 333, 181 P.3d 142]~~, footnote and internal citations omitted.)

- "This rule—that the jury may interpret an agreement when construction turns on the credibility of extrinsic evidence—is well established in our case law. California's jury instructions reflect this (Judicial Council of Cal. Civ. Jury Instns. (2008) CACI No. 314) … , as do authoritative secondary sources." (*City of Hope National Medical Center*, *supra*, 43 Cal.4th at pp. 395−396.)

- "The trial court's determination of whether an ambiguity exists is a question of law, subject to independent review on appeal. The trial court's resolution of an ambiguity is also a question of law if no parol evidence is admitted or if the parol evidence is not in conflict. However, where the parol evidence is in conflict, the trial court's resolution of that conflict is a question of fact and must be upheld if supported by substantial evidence. Furthermore, '[w]hen two equally plausible interpretations of the language of a contract may be made . . . parol evidence is admissible to aid in interpreting the agreement, thereby presenting a question of fact which precludes summary judgment if the evidence is contradictory.' " (*WYDA Associates v. Merner* (1996) 42 Cal.App.4th 1702, 1710 [50 Cal.Rptr.2d 323].)

- ~~California courts apply an objective test to determine the intent of the parties:~~ "In interpreting a contract, the objective intent, as evidenced by the words of the contract is controlling. We interpret the intent and scope of the agreement by focusing on the usual and ordinary meaning of the language used and the circumstances under which the agreement was made." (*Lloyd's Underwriters v. Craig & Rush, Inc.* (1994) 26 Cal.App.4th 1194, 1197-1198 [32 Cal.Rptr.2d 144], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 741–743

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.04[2][b], 21.14[2]

315. Interpretation—Meaning of Ordinary Words

You should assume that the parties intended the words in their contract to have their usual and ordinary meaning unless you decide that the parties intended the words to have a special meaning.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words.* See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Words to Be Understood in Usual Sense. Civil Code section 1644. ~~provides: "The words of a contract are to be understood in their ordinary and popular sense, rather than according to their strict legal meaning; unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed."~~

- ~~"Under statutory rules of contract interpretation, the mutual intention of the parties at the time the contract is formed governs interpretation. Such intent is to be inferred, if possible, solely from the written provisions of the contract. The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage,' controls judicial interpretation. Thus, if the meaning a layperson would ascribe to contract language is not ambiguous, we apply that meaning." (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 608 71 Cal.Rptr.2d 830, 951 P.2d 399], internal citations omitted.)~~

- "Generally speaking, words in a contract are to be construed according to their plain, ordinary, popular or legal meaning, as the case may be. However, particular expressions may, by trade usage, acquire a different meaning in reference to the subject matter of a contract. If both parties are engaged in that trade, the parties to the contract are deemed to have used them according to their different and peculiar sense as shown by such trade usage and parol evidence is admissible to establish the trade usage even though the words in their ordinary or legal meaning are entirely unambiguous. [Citation.]" (*Hayter Trucking Inc. v. Shell Western E & P, Inc.* (1993) 18 Cal.App.4th 1, 15 [22 Cal.Rptr.2d 229].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 745

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

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

75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.20

316. Interpretation—Meaning of Technical Words

You should assume that the parties intended technical words used in the contract to have the meaning that is usually given to them by people who work in that technical field, unless you decide that the parties clearly used the words in a different sense.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words.* See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Technical Words. Civil Code section 1645 ~~provides: "Technical words are to be interpreted as usually understood by persons in the profession or business to which they relate, unless clearly used in a different sense.".~~

- "The 'clear and explicit' meaning of these provisions, interpreted in their 'ordinary and popular sense,' unless 'used by the parties in a technical sense or a special meaning is given to them by usage' [citation], controls judicial interpretation."~~A court will look beyond the terms of the writing where it appears that the parties intended to ascribe a technical meaning to the terms used.~~ (*Cooper Companies, Inc. v. Transcontinental Insurance Co.* (1995) 31 Cal.App.4th 1094, 1101 [37 Cal.Rptr.2d 508].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 745

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.22

317. Interpretation—Construction of Contract as a Whole

In deciding what the words of a contract meant to the parties, you should consider the whole contract, not just isolated parts. You should use each part to help you interpret the others, so that all the parts make sense when taken together.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words.* See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Effect to Be Given to Every Part of Contract. Civil Code section 1641. ~~provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."~~

- "[T]he contract must be construed as a whole and the intention of the parties must be ascertained from the consideration of the entire contract, not some isolated portion." (*County of Marin v. Assessment Appeals Bd. of Marin County* (1976) 64 Cal.App.3d 319, 324-325 [134 Cal.Rptr. 349].)

- "Any contract must be construed as a whole, with the various individual provisions interpreted together so as to give effect to all, if reasonably possible or practicable." (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 473 [80 Cal.Rptr.2d 329].)

- ~~Contracts should be construed as a whole, with each clause lending meaning to the others.~~ "[W]e should interpret contractual language in a manner which ~~Contractual language should be interpreted in a manner that~~ gives force and effect to every clause rather than to one ~~that~~ which renders clauses nugatory.~~", inoperative, or meaningless. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith* (1998) 68 Cal.App.4th 445, 473 [80 Cal.Rptr.2d 329];~~ (*Titan Corp. v. Aetna Casualty and Surety Co.* (1994) 22 Cal.App.4th 457, 473-474 [27 Cal.Rptr.2d 476].)

- "Nor are we persuaded by [defendant]'s related claim that it was improper for [plaintiff]'s counsel to tell the jurors, during closing argument, that in resolving witness credibility issues they should consider the 'big picture' and not get lost in the minutiae of the contractual language." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 394 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 746–747

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.19

318. Interpretation—Construction by Conduct

In deciding what the words in a contract meant to the parties, you may consider how the parties acted after the contract was created but before any disagreement between the parties arose.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words.* See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- "In construing contract terms, the construction given the contract by the acts and conduct of the parties with knowledge of its terms, and before any controversy arises as to its meaning, is relevant on the issue of the parties' intent." (*Southern Pacific Transportation Co. v. Santa Fe Pacific Pipelines, Inc.* (1999) 74 Cal.App.4th 1232, 1242 [88 Cal.Rptr.2d 777].)

- ~~This instruction covers the "rule of practical construction." "~~This rule of practical construction ~~"~~is predicated on the common sense concept that 'actions speak louder than words.' Words are frequently but an imperfect medium to convey thought and intention. When the parties to a contract perform under it and demonstrate by their conduct that they knew what they were talking about the courts should enforce that intent." (*Crestview Cemetery Assn. v. Dieden* (1960) 54 Cal.2d 744, 754 [8 Cal.Rptr. 427, 356 P.2d 171].)

- "The conduct of the parties after execution of the contract and before any controversy has arisen as to its effect affords the most reliable evidence of the parties' intentions." (*Kennecott Corp. v. Union Oil Co. of California* (1987) 196 Cal.App.3d 1179, 1189 [242 Cal.Rptr. 403].)

- "[T]his rule is not limited to the joint conduct of the parties in the course of performance of the contract. As stated in Corbin on Contracts, 'The practical interpretation of the contract by one party, evidenced by his words or acts, can be used against him on behalf of the other party, even though that other party had no knowledge of those words or acts when they occurred and did not concur in them. In the litigation that has ensued, one who is maintaining the same interpretation that is evidenced by the other party's earlier words, and acts, can introduce them to support his contention.' We emphasize the conduct of one party to the contract is by no means conclusive evidence as to the meaning of the contract. It is relevant, however, to show the contract is reasonably susceptible to the meaning evidenced by that party's conduct." (*Southern California Edison Co. v. Superior Court* (1995) 37 Cal.App.4th 839, 851 [44 Cal.Rptr.2d 227], internal citations omitted.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 749

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.51

319. Interpretation—Reasonable Time

If a contract does not state a specific time in which the parties are to meet the requirements of the contract, then the parties must meet them within a reasonable time. What is a reasonable time depends on the facts of each case, including the subject matter of the contract, the reasons each party entered into the contract, and the intentions of the parties at the time they entered the contract.

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words.* See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.

Sources and Authority

- Time of Performance of Contract. Civil Code section 1657. ~~provides: "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly as, for example, if it consists in the payment of money only it must be performed immediately upon the thing to be done being exactly ascertained."~~

- "[A]s the contract was silent as to the time of delivery a reasonable time for performance must be implied." ~~This rule of construction applies where the contract is silent as to the time of performance.~~ (~~See~~ *Palmquist v. Palmquist* (1963) 212 Cal.App.2d 322, 331 [27 Cal.Rptr. 744].)

- "The question of what constituted a reasonable time was of course one of fact." ~~The reasonableness of time for performance is a question of fact that depends on the circumstances of the particular case.~~ (*Lyon v. Goss* (1942) 19 Cal.2d 659, 673 [123 P.2d 11].~~); *Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 381 [11 Cal.Rptr.2d 524].)~~

- "[W]hat constitutes a reasonable time is a question of fact, depending upon ~~These circumstances include~~ the situation of the parties, the nature of the transaction, and the facts of the particular case." (*Sawday v. Vista Irrigation Dist.* (1966) 64 Cal.2d 833, 836 [52 Cal.Rptr. 1, 415 P.2d 816].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 762–764

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.41 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 13, *Attacking or Defending Existence of Contract—Absence of Essential Element*, 13.49

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.30

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.46

320. Interpretation—Construction Against Drafter

In determining the meaning of ~~a term~~the words of the contract, you must first consider all of the other instructions that I have given you. If, after considering these instructions, you still cannot agree on the meaning of the ~~term~~words, then you should interpret the contract ~~term~~ against [the party that drafted the ~~term~~ disputed words/~~]~~ [the party that caused the uncertainty].

New September 2003; Revised December 2014

Directions for Use

This instruction may be given with CACI No. 314, *Interpretation—Disputed Words.* See the Directions for Use and Sources and Authority to that instruction for discussion of when contract interpretation may be a proper jury role.~~This instruction should be given only to a deadlocked jury, so as to avoid giving them this tool to resolve the case before they have truly exhausted the other avenues of approach.~~

Sources and Authority

- Language Interpreted Against Party Causing Uncertainty. Civil Code section 1654. ~~provides: "In case of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist."~~

- "[T]his [Civil Code 1654] canon applies only as a tie breaker, when other canons fail to dispel ~~Section 1654 states the general rule, but this canon does not operate to the exclusion of all other rules of contract interpretation. It is used only when none of the canons of construction succeed in dispelling the~~ uncertainty." (*Pacific Gas & Electric Co. v. Superior Court* (1993) 15 Cal.App.4th 576, 596 [19 Cal.Rptr.2d 295], disapproved on other grounds in *Advanced Micro Devices, Inc. v. Intel Corp.* (1994) 9 Cal.4th 362, 376-377 [36 Cal.Rptr.2d 581, 885 P.2d 994].)

- "The trial court's instruction … embodies a general rule of contract interpretation that was applicable to the negotiated agreement between [the parties]. It may well be that in a particular situation the discussions and exchanges between the parties in the negotiation process may make it difficult or even impossible for the jury to determine which party caused a particular contractual ambiguity to exist, but this added complexity does not make the underlying rule irrelevant or inappropriate for a jury instruction. We conclude, accordingly, that the trial court here did not err in instructing the jury on Civil Code section 1654's general rule of contract interpretation." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 398 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

- "[I]f the uncertainty is not removed by application of the other rules of interpretation, a contract must be interpreted most strongly against the party who prepared it. This last rule is applied with particular force ~~This rule is applied more strongly~~ in the case of adhesion contracts." (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 801 [79 Cal.Rptr.2d 273].) ~~It also applies with~~

- "The doctrine of contra proferentem (construing ambiguous agreements against the drafter) applies

with even ~~It also applies with~~ greater force when the person who prepared the writing is a lawyer." (*Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1370 [62 Cal.Rptr.2d 27].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 757

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.32 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.15 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 21, *Asserting a Particular Construction of Contract*, 21.15

422. ~~Sale of~~Providing Alcoholic Beverages to Obviously Intoxicated Minors (Bus. & Prof. Code, § 25602.1)

[*Name of plaintiff***] claims [***name of defendant***] is responsible for [his/her] harm because [***name of defendant***] [sold/~~ or~~ gave] alcoholic beverages to [***name of alleged minor***], a minor who was already obviously intoxicated.**

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

1. **[That [***name of defendant***] was [required to be] licensed~~/authorized/required to be licensed or authorized]~~ to sell alcoholic beverages;]**

   [*or***]**

   [That [*name of defendant***] was authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave;]**

2. **[That [***name of defendant***] [sold/~~ or~~ gave] alcoholic beverages to [***name of alleged minor***];]**

   [or]

   [That [*name of defendant***] caused alcoholic beverages to be [sold/given away] to [***name of alleged minor***];]**

3. **That [***name of alleged minor***] was less than 21 years old at the time;**

4. **That when [***name of defendant***] provided the alcoholic beverages, [***name of alleged minor***] displayed symptoms that would lead a reasonable person to conclude that [he/she] was obviously intoxicated;**

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

6. **That [***name of defendant***]'s [selling/~~ or~~ giving] alcoholic beverages to [***name of alleged minor***] was a substantial factor in causing [***name of plaintiff***~~?~~]'s harm.**

In deciding whether [*name of alleged minor***] was obviously intoxicated, you may consider whether [he/she] displayed one or more of the following symptoms to [***name of defendant***] before the alcoholic beverages were provided: impaired judgment; alcoholic breath; incoherent or slurred speech; poor muscular coordination; staggering or unsteady walk or loss of balance; loud, boisterous, or argumentative conduct; flushed face; or other symptoms of intoxication. The mere fact that [***name of alleged minor***] had been drinking is not enough.**

New September 2003; Revised December 2009, June 2014, December 2014

Directions for Use

Business and Professions Code section 25602.1 imposes potential liability on those who have or are required to have a liquor license for the selling, furnishing, or giving away of alcoholic beverages to an obviously intoxicated minor. It also imposes potential liability on a person who is not required to be licensed who sells alcohol to an obviously intoxicated minor. (See *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 711 [168 Cal.Rptr.3d 440, 319 P.3d 201].) In this latter case, omit element 1, select "sold" in the opening paragraph and~~, delete "or gave"~~ in element 2, and select "selling"~~delete "or giving"~~ in element 6.

If the plaintiff is the minor who is suing for his or her own injuries (see *Chalup v. Aspen Mine Co.* (1985) 175 Cal.App.3d 973, 974 [221 Cal.Rptr. 97]), modify the instruction by substituting the appropriate pronoun for "[*name of alleged minor*]" throughout.

For purposes of this instruction, a "minor" is someone under the age of 21. (*Rogers v. Alvas* (1984) 160 Cal.App.3d 997, 1004 [207 Cal.Rptr. 60].)

Sources and Authority

- Liability for Providing Alcohol to Minors. Business and Professions Code section 25602.1.
- Sales Under the Alcoholic Beverage Control Act. Business and Professions Code section 23025.
- "In sum, if a plaintiff can establish the defendant provided alcohol to an obviously intoxicated minor, and that such action was the proximate cause of the plaintiff's injuries or death, section 25602.1--the applicable statute in this case--permits liability in two circumstances: (1) the defendant was either licensed to sell alcohol, required to be licensed, or federally authorized to sell alcoholic beverages in certain places, and the defendant sold, furnished, or gave the minor alcohol or caused alcohol to be sold, furnished, or given to the minor; or (2) the defendant was 'any other person' (i.e., neither licensed nor required to be licensed), and he or she sold alcohol to the minor or caused it to be sold. Whereas licensees (and those required to be licensed) may be liable if they merely furnish or give an alcoholic beverage away, a nonlicensee may be liable only if a *sale* occurs; that is, a nonlicensee, such as a social host, who merely furnishes or gives drinks away--even to an obviously intoxicated minor--retains his or her statutory immunity." (*Ennabe, supra,* 58 Cal.4th at pp. 709−710, original italics.)
- "[W]e conclude that the placement of section 25602.1 in the Business and Professions Code does not limit the scope of that provision to commercial enterprises. First, the structure of section 25602.1 suggests it applies to noncommercial providers of alcohol. The statute addresses four categories of persons and we assume those falling in the first three categories--those licensed by the Department of ABC, those without licenses but who are nevertheless required to be licensed, and those authorized to sell alcohol by the federal government--are for the most part engaged in some commercial enterprise. The final category of persons addressed by section 25602.1 is more of a catchall: 'any other person' who sells alcohol. Consistent with the plain meaning of the statutory language and the views of the Department of ABC, we find this final category includes private persons and ostensible social hosts who, for whatever reason, charge money for alcoholic drinks." (*Ennabe, supra,* 58 Cal.4th at p. 711.)

- "[Business and Professions Code] Section 23025's broad definition of a sale shows the Legislature intended the law to cover a wide range of transactions involving alcoholic beverages: a qualifying sale includes '*any* transaction' in which title to an alcoholic beverage is passed for '*any* consideration.' (Italics added.) Use of the term 'any' to modify the words 'transaction' and 'consideration' demonstrates the Legislature intended the law to have a broad sweep and thus include both indirect as well as direct transactions." (*Ennabe, supra*, 58 Cal.4th at p. 714, orginal italics.)

- In " 'The use of intoxicating liquor by the average person in such quantity as to produce intoxication causes many commonly known *outward* manifestations which are "plain" and "easily seen or discovered." If such outward manifestations exist and the seller still serves the customer so affected, he has violated the law, whether this was because he failed to observe what was plain and easily seen or discovered, or because, having observed, he ignored that which was apparent.' " (*Schaffield v. Abboud* (1993) 15 Cal.App.4th 1133, 1140 [19 Cal.Rptr.2d 205], original italics.)

- "[T]he standard for determining 'obvious intoxication' is measured by that of a reasonable person." (*Schaffield, supra*, 15 Cal.App.4th at p. 1140.)

- "We shall make no effort to state definitively the meaning of the word 'furnishes' … . As used in a similar context the word 'furnish' has been said to mean: ' "To supply; to offer for use, to give, to hand." ' It has also been said the word 'furnish' is synonymous with the words 'supply' or 'provide.' In relation to a physical object or substance, the word 'furnish' connotes possession or control over the thing furnished by the one who furnishes it. The word 'furnish' implies some type of affirmative action on the part of the furnisher; failure to protest or attempt to stop another from imbibing an alcoholic beverage does not constitute 'furnishing.' " (*Bennett v. Letterly* (1977) 74 Cal.App.3d 901, 904–905 [141 Cal.Rptr. 682], internal citations omitted.)

- "As instructed by the court, the jury was told to consider several outward manifestations of obvious intoxication, which included incontinence, unkempt appearance, alcoholic breath, loud or boisterous conduct, bloodshot or glassy eyes, incoherent or slurred speech, flushed face, poor muscular coordination or unsteady walking, loss of balance, impaired judgment, or argumentative behavior. This instruction was correct." (*Jones v. Toyota Motor Co.* (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611], internal citation omitted.)

- "[S]ection 25602.1's phrase 'causes to be sold' requires an affirmative act directly related to the sale of alcohol which necessarily brings about the resultant action to which the statute is directed, i.e., the furnishing of alcohol to an obviously intoxicated minor." (*Hernandez v. Modesto Portuguese Pentecost Assn.* (1995) 40 Cal.App.4th 1274, 1276 [48 Cal.Rptr.2d 229].)

- "The undisputed evidence shows [defendant]'s checker sold beer to Spitzer and that Spitzer later gave some of that beer to Morse. As in *Salem* [*Salem v. Superior Court* (1989) 211 Cal.App.3d 595, 600 [259 Cal.Rptr. 447]] , we conclude defendant cannot be held liable because the person to whom it sold alcohol was not the person whose negligence allegedly caused the injury at issue." (*Ruiz v. Safeway, Inc.* (2013) 209 Cal.App.4th 1455, 1462 [147 Cal.Rptr.3d 809].)

- "[O]bviously intoxicated minors who are served alcohol by a licensed purveyor of liquor, may bring a

cause of action for negligence against the purveyor for [their own] subsequent injuries." (*Chalup, supra,* 175 Cal.App.3d at p. 979.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1072

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.63

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-L, *Liability For Providing Alcoholic Beverages,* ¶ 2:2101 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach,* § 1.21 (Matthew Bender)

3 California Forms of Pleading and Practice, Ch. 19, *Alcoholic Beverages: Civil Liability,* §§ 19.12, 19.52, 19.75 (Matthew Bender)

1 California Points and Authorities, Ch. 15A, *Alcoholic Beverages: Civil Liability for Furnishing,* § 15A.21 et seq. (Matthew Bender)

456. Defendant Estopped From Asserting Statute of Limitations Defense

[*Name of plaintiff*] claims that even if [his/her/its] lawsuit was not filed on time, [he/she/it] may still proceed because [*name of defendant*] did or said something that caused [*name of plaintiff*] to delay filing the lawsuit. In order to establish the right to proceed, [*name of plaintiff*] must prove all of the following:

1. **That [*name of defendant*] said or did something that caused [*name of plaintiff*] to believe that it would not be necessary to file a lawsuit;**

2. **That [*name of plaintiff*] relied on [*name of defendant*]'s conduct and therefore did not file the lawsuit within the time otherwise required;**

3. **That a reasonable person in [*name of plaintiff*]'s position would have relied on [*name of defendant*]'s conduct;**

4. **That after the limitation period had expired, [*name of defendant*]'s representations by words or conduct proved to not be true; and**

5. **That [*name of plaintiff*] proceeded diligently to file suit once [he/she/it] discovered the actual facts.**

It is not necessary that [*name of defendant*] have acted in bad faith or intended to mislead [*name of plaintiff*].

New October 2008; Revised December 2014

Directions for Use

Equitable estoppel, including any disputed issue of fact, is to be decided by the court, even if there are disputed issues of fact. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745 [170 Cal.Rptr.3d 551].) This instruction is for use if the court submits the issue to the jury for advisory findings.

There is perhaps a question as to whether all the elements of equitable estoppel must be proved in order to establish an estoppel to rely on a statute of limitations. These elements are (1) the party to be estopped must know the facts; (2) the party must intend that his or her conduct will be acted on, or must act in such a way that the party asserting the estoppel had the right to believe that the conduct was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) that party must rely upon the conduct to his or her detriment. (See *Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 766–767 [41 Cal.Rptr.3d 819]; see also *Olofsson v. Mission Linen Supply* (2012) 211 Cal.App.4th 1236, 1246 [150 Cal.Rptr.3d 446] [equitable estoppel to deny family leave under California Family Rights Act].)

Most cases do not frame the issue as one of equitable estoppel and its four elements. All that is required is that the defendant's conduct actually have misled the plaintiff, and that plaintiff reasonably have relied

on that conduct. Bad faith or an intent to mislead is not required. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 384 [2 Cal.Rptr.3d 655, 73 P.3d 517]; *Shaffer v. Debbas* (1993) 17 Cal.App.4th 33, 43 [21 Cal.Rptr.2d 110].) Nor does it appear that there is a requirement that the defendant specifically intended to induce the plaintiff to defer filing suit. Therefore, no specific intent element has been included.

Sources and Authority

- "As the name suggests, equitable estoppel is an equitable issue for court resolution." (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)

- "While the judge determines equitable causes of action, the judge may (in rare instances) empanel an advisory jury to make preliminary factual findings. The factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder. '[W]hile a jury may be used for advisory verdicts as to questions of fact [in equitable actions], it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper.' " (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337], internal citations omitted.)

- "[CACI No. 456 is] appropriate for use when a trial court 'empanel[s] an advisory jury to make preliminary factual findings,' with respect to equitable estoppel … ." (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)

- "Equitable tolling and equitable estoppel are distinct doctrines. ' "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. … Equitable estoppel, however, … comes into play only after the limitations period has run and addresses … the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life … from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' Thus, equitable estoppel is available even where the limitations statute at issue expressly precludes equitable tolling." (*Lantzy, supra*, 31 Cal.4th at pp. 383–384, internal citations omitted.)

- "Accordingly, (1) if one potentially liable for a construction defect represents, while the limitations period is still running, that all actionable damage has been or will be repaired, thus making it unnecessary to sue, (2) the plaintiff reasonably relies on this representation to refrain from bringing a timely action, (3) the representation proves false after the limitations period has expired, and (4) the plaintiff proceeds diligently once the truth is discovered, the defendant may be equitably estopped to assert the statute of limitations as a defense to the action." (*Lantzy, supra*, 31 Cal.4th at p. 384, internal citations omitted.)

- " 'An estoppel may arise although there was no designed fraud on the part of the person sought to be estopped. … To create an equitable estoppel, "it is enough if the party has been induced to refrain from using such means or taking such action as lay in his power, by which he might have retrieved his position and saved himself from loss. … Where the delay in commencing action is

induced by the conduct of the defendant it cannot be availed of by him as a defense." ' " (*Vu v. Prudential Property & Casualty Ins. Co.* (2001) 26 Cal.4th 1142, 1152–1153 [113 Cal.Rptr.2d 70, 33 P.3d 487].)

- " 'A defendant will be estopped to invoke the statute of limitations where there has been "some conduct by the defendant, relied on by the plaintiff, which induces the belated filing of the action." It is not necessary that the defendant acted in bad faith or intended to mislead the plaintiff. [Citations.] It is sufficient that the defendant's conduct in fact induced the plaintiff to refrain from instituting legal proceedings. [Citation.] "[W]hether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law." [Citations.]' " (*Holdgrafer v. Unocal Corp.* (2008) 160 Cal.App.4th 907, 925–926 [73 Cal.Rptr.3d 216], internal citations omitted.)

- "It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act. Estoppel most commonly results from misleading statements about the need for or advisability of a claim; actual fraud or the intent to mislead is not essential. A fortiori, estoppel may certainly be invoked when there are acts of violence or intimidation that are intended to prevent the filing of a claim." (*John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 445 [256 Cal.Rptr. 766, 769 P.2d 948], internal citations omitted.)

- "It is well settled that the doctrine of estoppel *in pais* is applicable in a proper case to prevent a fraudulent or inequitable resort to the statute of limitations. Apropos to this rule are the following established principles: A person, by his conduct, may be estopped to rely on the statute; where the delay in commencing an action is induced by the conduct of the defendant, it cannot be availed of by him as a defense; one cannot justly or equitably lull his adversary into a false sense of security and thereby cause him to subject his claim to the bar of the statute of limitations, and then be permitted to plead the very delay caused by his conduct as a defense to the action when brought; actual fraud in the technical sense, bad faith or intent to mislead are not essential to the creation of an estoppel, but it is sufficient that the defendant made misrepresentations or so conducted himself that he misled a party, who acted thereon in good faith, to the extent that such party failed to commence the action within the statutory period; a party has a reasonable time in which to bring his action after the estoppel has expired, not exceeding the period of limitation imposed by the statute for commencing the action; and that whether an estoppel exists—whether the acts, representations or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact and not of law. It is also an established principle that in cases of estoppel to plead the statute of limitations, the same rules are applicable, as in cases falling within subdivision 4 of section 338, in determining when the plaintiff discovered or should have discovered the facts giving rise to his cause of action." (*Estate of Pieper* (1964) 224 Cal.App.2d 670, 690–691 [37 Cal.Rptr. 46], internal citations omitted.)

- "Although 'ignorance of the identity of the defendant … will not *toll* the statute', 'a defendant may be *equitably estopped* from asserting the statute of limitations when, as the result of intentional concealment, the plaintiff is unable to discover the defendant's actual identity'." (*Vaca*

v. Wachovia Mortgage Corp. (2011) 198 Cal.App.4th 737, 745 [129 Cal.Rptr.3d 354], original italics, internal citation omitted.)

- "Settlement negotiations are relevant and admissible to prove an estoppel to assert the statute of limitations." (*Holdgrafer, supra,* 160 Cal.App.4th at p. 927.)

- "The estoppel issue in this case arises in a unique context. Defendants' wrongful conduct has given rise to separate causes of action for property damage and personal injury with separate statutes of limitation. Where the plaintiffs reasonably rely on defendants' promise to repair the property damage without a lawsuit, is a jury permitted to find that plaintiffs' decision to delay filing a personal injury lawsuit was also reasonable? We conclude such a finding is permissible on the facts of this case." (*Shaffer, supra,* 17 Cal.App.4th at p. 43, internal citation omitted.)

- "At the very least, [plaintiff] cannot establish the second element necessary for equitable estoppel. [Plaintiff] argues that [defendant] was estopped to rely on the time bar of section 340.9 by its continued reconsideration of her claim after December 31, 2001, had passed. But she cannot prove [defendant] intended its reconsideration of the claim to be relied upon, or acted in such a way that [plaintiff] had a right to believe it so intended." (*Ashou, supra,* 138 Cal.App.4th at p. 767.)

- " 'It is well settled that a public entity may be estopped from asserting the limitations of the claims statute where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act.' Estoppel as a bar to a public entity's assertion of the defense of noncompliance arises when a plaintiff establishes by a preponderance of the evidence (1) the public entity was apprised of the facts, (2) it intended its conduct to be acted upon, (3) the plaintiff was ignorant of the true state of facts, and (4) relied upon the conduct to his detriment." (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1239–1240 [92 Cal.Rptr.3d 1], internal citation omitted.)

- "A nondisclosure is a cause of injury if the plaintiff would have acted so as to avoid injury had the plaintiff known the concealed fact. The plaintiff's reliance on a nondisclosure was reasonable if the plaintiff's failure to discover the concealed fact was reasonable in light of the plaintiff's knowledge and experience. Whether the plaintiff's reliance was reasonable is a question of fact for the trier of fact unless reasonable minds could reach only one conclusion based on the evidence. The fact that a plaintiff was represented by counsel and the scope and timing of the representation are relevant to the question of the reasonableness of the plaintiff's reliance." (*Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 187–188 [104 Cal.Rptr.3d 508], internal citations omitted.)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 566–581

Haning et al., California Practice Guide: Personal Injury, Ch. 5-B, *When To Sue—Statute Of Limitations,* ¶ 5:111.6 (The Rutter Group)

5 Levy et al., California Torts, Ch. 71, *Commencement, Prosecution, and Dismissal of Action,* § 71.06 (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions,* § 345.81 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions,* § 143.50 (Matthew Bender)

1 Matthew Bender Practice Guide: California Pretrial Civil Procedure, Ch. 4, *Limitation of Actions,* 4.42

457. Statute of Limitations—Equitable Tolling—Other Prior Proceeding

[*Name of plaintiff***] claims that even if [his/her/its] lawsuit was not filed by [***insert date from applicable statute of limitations***], [he/she/it] may still proceed because the deadline for filing the lawsuit was extended by the time during which [***specify prior proceeding that qualifies as the tolling event, e.g., she was seeking workers' compensation benefits***]. In order to establish the right to proceed, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] received timely notice that [***name of plaintiff***] was [***e.g., seeking workers' compensation***] instead of filing a lawsuit;**

2. **That the facts of the two claims were so similar that an investigation of the [***e.g., workers' compensation claim***] gave or would have given [***name of defendant***] the information needed to defend the lawsuit; and**

3. **That [***name of plaintiff***] was acting reasonably and in good faith by [***e.g., seeking workers' compensation***].**

For [*name of defendant***] to have received timely notice, [***name of plaintiff***] must have filed the [***e.g., workers' compensation claim***] by [***insert date from applicable statute of limitations***] and the [***e.g., claim***] notified [***name of defendant***] of the need to begin investigating the facts that form the basis for the lawsuit.**

In considering whether [*name of plaintiff***] acted reasonably and in good faith, you may consider the amount of time after the [***e.g., workers' compensation claim***] was [resolved/abandoned] before [he/she/it] filed the lawsuit.**

New December 2009; Revised December 2014

Directions for Use

Equitable tolling, including any disputed issue of fact, is to be decided by the court, even if there are disputed issues of fact. (*Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745 [170 Cal.Rptr.3d 551].) This instruction is for use if the court submits the issue to the jury for advisory findings. ~~The verdict form should ask the jury to find the period of time that the limitation period was tolled on account of the other proceeding. The court can then add the additional time to the limitation period and determine whether the action is timely.~~

Equitable tolling is not available for legal malpractice (see *Laird v. Blacker* (1992) 2 Cal.4th 606, 618 [7 Cal.Rptr.2d 550, 828 P.2d 691] [statutory tolling provisions of Code Civ Proc., § 340.6 are exclusive for both one-year and four-year limitation periods]; see also CACI No. 610, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—One-Year Limit*, and CACI No. 611, *Affirmative Defense—Statute of Limitations—Attorney Malpractice—Four-Year Limit*) nor for medical malpractice with regard to the three-year limitation period of Code of Civil Procedure section 340.5. (See *Belton v. Bowers Ambulance*

Serv. (1999) 20 Cal.4th 928, 934 [86 Cal.Rptr.2d 107, 978 P.2d 591] [statutory tolling provisions of Code Civ. Proc., § 340.5 are exclusive only for three-year period; one-year period may be tolled on other grounds]; see also CACI No. 555, *Affirmative Defense—Statute of Limitations—Medical Malpractice—One-Year Limit*, and CACI No. 556, *Affirmative Defense—Statute of Limitations—Medical Malpractice—Three-Year Limit*.)

Sources and Authority

- "The equitable tolling of statutes of limitations is a judicially created, nonstatutory doctrine. It is 'designed to prevent unjust and technical forfeitures of the right to a trial on the merits when the purpose of the statute of limitations—timely notice to the defendant of the plaintiff's claims—has been satisfied.' Where applicable, the doctrine will 'suspend or extend a statute of limitations as necessary to ensure fundamental practicality and fairness.' " (*McDonald v. Antelope Valley Community College Dist.* (2008) 45 Cal.4th 88, 99 [84 Cal.Rptr.3d 734, 194 P.3d 1026], internal citations omitted.)

- "While the case law is not entirely clear, it appears that the weight of authority supports our conclusion that whether a plaintiff has demonstrated the elements of equitable tolling presents a question of fact." (*Hopkins, supra*, 225 Cal.App.4th at p. 755.)

- "[E]quitable tolling, '[a]s the name suggests … is an equitable issue for court resolution.' " (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)

- "While the judge determines equitable causes of action, the judge may (in rare instances) empanel an advisory jury to make preliminary factual findings. The factual findings are purely advisory because, on equitable causes of action, the judge is the proper fact finder. '[W]hile a jury may be used for advisory verdicts as to questions of fact [in equitable actions], it is the duty of the trial court to make its own independent findings and to adopt or reject the findings of the jury as it deems proper.' " (*Hoopes v. Dolan* (2008) 168 Cal.App.4th 146, 156 [85 Cal.Rptr.3d 337], internal citations omitted.)

- "[CACI No. 457 is] appropriate for use when a trial court 'empanel[s] an advisory jury to make preliminary factual findings,' with respect to equitable … tolling." (*Hopkins, supra*, 225 Cal.App.4th at p. 745.)

- "The equitable tolling doctrine rests on the concept that a plaintiff should not be barred by a statute of limitations unless the defendant would be unfairly prejudiced if the plaintiff were allowed to proceed. '[T]he primary purpose of the statute of limitations is normally satisfied when the defendant receives timely notification of the first of two proceedings.' The doctrine has been applied 'where one action stands to lessen the harm that is the subject of the second action; where administrative remedies must be exhausted before a second action can proceed; or where a first action, embarked upon in good faith, is found to be defective for some reason.' " (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 598 [95 Cal.Rptr.3d 18], internal citations omitted.)

- "[T]he effect of equitable tolling is that the limitations period stops running during the tolling event, and begins to run again only when the tolling event has concluded. As a consequence, the

tolled interval, no matter when it took place, is tacked onto the end of the limitations period, thus extending the deadline for suit by the entire length of time during which the tolling event previously occurred." (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 370–371 [2 Cal.Rptr.3d 655, 73 P.3d 517].)

- "A major reason for applying the doctrine is to avoid 'the hardship of compelling plaintiffs to pursue several duplicative actions simultaneously on the same set of facts.' '[D]isposition of a case filed in one forum may render proceedings in the second unnecessary or easier and less expensive to resolve.' " (*Guevara v. Ventura County Community College Dist.* (2008) 169 Cal.App.4th 167, 174 [87 Cal.Rptr.3d 50], internal citations omitted.)

- "[A]pplication of the doctrine of equitable tolling requires timely notice, and lack of prejudice, to the defendant, and reasonable and good faith conduct on the part of the plaintiff. These elements seemingly are present here. As noted, the federal court, without prejudice, declined to assert jurisdiction over a timely filed state law cause of action and plaintiffs thereafter promptly asserted that cause in the proper state court. Unquestionably, the same set of facts may be the basis for claims under both federal and state law. We discern no reason of policy which would require plaintiffs to file simultaneously two separate actions based upon the same facts in both state and federal courts since 'duplicative proceedings are surely inefficient, awkward and laborious.' " (*Addison v. State* (1978) 21 Cal.3d 313, 319 [146 Cal.Rptr. 224, 578 P.2d 941], internal citations omitted.)

- " ' "The timely notice requirement essentially means that the first claim must have been filed within the statutory period. Furthermore[,] the filing of the first claim must alert the defendant in the second claim of the need to begin investigating the facts which form the basis for the second claim. Generally this means that the defendant in the first claim is the same one being sued in the second." "The second prerequisite essentially translates to a requirement that the facts of the two claims be identical or at least so similar that the defendant's investigation of the first claim will put him in a position to fairly defend the second." "The third prerequisite of good faith and reasonable conduct on the part of the plaintiff is less clearly defined in the cases. But in *Addison v. State of California, supra,* 21 Cal.3d 313[,] the Supreme Court did stress that the plaintiff filed his second claim a short time after tolling ended." ' " (*McDonald, supra,* 45 Cal.4th at p. 102, fn. 2, internal citations omitted.)

- "The third requirement of good faith and reasonable conduct may turn on whether 'a plaintiff delayed filing the second claim until the statute on that claim had nearly run …' or 'whether the plaintiff [took] affirmative actions which … misle[d] the defendant into believing the plaintiff was foregoing his second claim.' " (*Tarkington v. California Unemployment Ins. Appeals Bd.* (2009) 172 Cal.App.4th 1494, 1505 [92 Cal.Rptr.3d 131].)

- "Where exhaustion of an administrative remedy is mandatory prior to filing suit, equitable tolling is automatic: 'It has long been settled in this and other jurisdictions that whenever the exhaustion of administrative remedies is a prerequisite to the initiation of a civil action, the running of the limitations period is tolled during the time consumed by the administrative proceeding.' This rule prevents administrative exhaustion requirements from rendering illusory nonadministrative remedies contingent on exhaustion." (*McDonald, supra,* 45 Cal.4th at p. 101, internal citation

omitted.)

- "The trial court rejected equitable tolling on the apparent ground that tolling was unavailable where, as here, the plaintiff was advised the alternate administrative procedure he or she was pursuing was voluntary and need not be exhausted. In reversing summary judgment, the Court of Appeal implicitly concluded equitable tolling is in fact available in such circumstances and explicitly concluded equitable tolling is not foreclosed as a matter of law under the FEHA. The Court of Appeal was correct on each count." (*McDonald, supra,* 45 Cal.4th at p. 114.)

- "Equitable tolling and equitable estoppel [see CACI No. 456] are distinct doctrines. ' "Tolling, strictly speaking, is concerned with the point at which the limitations period begins to run and with the circumstances in which the running of the limitations period may be suspended. … Equitable estoppel, however, … comes into play only after the limitations period has run and addresses … the circumstances in which a party will be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit within the applicable limitations period. [Equitable estoppel] is wholly independent of the limitations period itself and takes its life … from the equitable principle that no man [may] profit from his own wrongdoing in a court of justice." ' " (*Lantzy, supra,* 31 Cal.4th at pp. 383–384.)

- "[V]oluntary abandonment [of the first proceeding] does not categorically bar application of equitable tolling, but it may be relevant to whether a plaintiff can satisfy the three criteria for equitable tolling." (*McDonald, supra,* 45 Cal.4th at p. 111.)

- "The equitable tolling doctrine generally requires a showing that the plaintiff is seeking an alternate remedy in an established procedural context. Informal negotiations or discussions between an employer and employee do not toll a statute of limitations under the equitable tolling doctrine." (*Acuna v. San Diego Gas & Electric Co.* (2013) 217 Cal.App.4th 1402, 1416 [159 Cal.Rptr.3d 749], internal citation omitted.)

- "Section 340.6, subdivision (a), states that 'in no event' shall the prescriptive period be tolled except under those circumstances specified in the statute. Thus, the Legislature expressly intended to disallow tolling under any circumstances not enumerated in the statute." (*Laird, supra,* 2 Cal.4th at p. 618 [applying rule to one-year limitation period].)

- "We see no reason to apply the second sentence of section 340.5 to the one-year period it does not mention, in addition to the three-year period it does mention. The general purpose of MICRA does not require us to expand that sentence beyond its language." (*Belton, supra,* 20 Cal.4th at p. 934 [rejecting application of rule to one-year limitation period].)

- "[E]quitable tolling has never been applied to allow a plaintiff to extend the time for pursuing an administrative remedy by filing a lawsuit. Despite broad language used by courts in employing the doctrine, equitable tolling has been applied almost exclusively to extend statutory deadlines for judicial actions, rather than deadlines for commencing administrative proceedings." (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1109 [150 Cal.Rptr.3d 405].)

Secondary Sources

Rylaarsdam et al., California Practice Guide: Civil Procedure Before Trial—Statutes of Limitations, Ch. 1-A, *Definitions And Distinctions* ¶ 1:57.2 (The Rutter Group)

3 California Torts, Ch. 32, *Liability of Attorneys,* § 32.60[1][g.1] (Matthew Bender)

30 California Forms of Pleading and Practice, Ch. 345, *Limitation of Actions,* § 345.21 (Matthew Bender)

14 California Points and Authorities, Ch. 143, *Limitation of Actions,* § 143.46 (Matthew Bender)

VF-406. Negligence—~~Sale of~~Providing Alcoholic Beverages to Obviously Intoxicated Minor

We answer the questions submitted to us as follows:

1. **[Was [*name of defendant*] [required to be] licensed~~] [authorized] [required to be licensed or authorized]~~ to sell alcoholic beverages?]**

[*or*]

[Was [*name of defendant*] authorized by the federal government to sell alcoholic beverages on a military base or other federal enclave?]

____ 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*] [sell/~~ or~~ give] alcoholic beverages to [*name of alleged minor*]?**

____ Yes ____ No]

[or]

[Did [*name of defendant*] cause alcoholic beverages to be [sold/given away] to [*name of alleged minor*]?]

____ Yes ____ No]

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

3. **Was [*name of alleged minor*] less than 21 years old at the time?**

____ 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. **When [*name of defendant*] provided the alcoholic beverages, ~~Did~~ did [*name of alleged minor*] display symptoms that would lead a reasonable person to conclude that [*name of alleged minor*] was obviously intoxicated?**

____ Yes ____ No

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

5. Did [*name of alleged minor***] later harm [***name of plaintiff***]?**
____ Yes ____ No

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

6. Was [*name of defendant***]'s [selling/~~or~~ giving] alcoholic beverages to [***name of alleged minor***] a substantial factor in causing [***name of plaintiff***]'s harm?**
____ 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 2009, December 2010, December 2014

Directions for Use

This verdict form is based on CACI No. 422, ~~*Sale of*~~*Providing Alcoholic Beverages to Obviously Intoxicated Minors.*

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.

Omit question 1 if the defendant is a person such as a social host who, though not required to be licensed, sells alcohol to an obviously intoxicated minor. (See *Ennabe v. Manosa* (2014) 58 Cal.4th 697, 711 [168 Cal.Rptr.3d 440, 319 P.3d 201].) ~~This verdict form is based on CACI No. 422, *Sale of Alcoholic Beverages to Obviously Intoxicated Minors.*~~

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

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

If the comparative fault of the plaintiff is an issue, this form should be modified. See CACI No. VF-401, *Negligence—Single Defendant—Plaintiff's Negligence at Issue—Fault of Others Not at Issue*, for a model form involving the issue of comparative fault.

1010. Affirmative Defense—Recreation Immunity—Exceptions (Civ. Code, § 846)

[*Name of defendant***] is not responsible for [***name of plaintiff***]'s harm if [he/she] proves that [***name of plaintiff***]'s harm resulted from [his/her] entry on or use of [***name of defendant***]'s property for a recreational purpose~~,~~. However, [*name of defendant*] is still responsible for [*name of plaintiff*]'s harm if [*name of plaintiff*] proves that**

[*Choose one or more of the following three options*:]

[~~unless [*name of plaintiff*] proves~~ [*name of defendant*] willfully or maliciously failed to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property.~~all of the following:~~

~~1. That [*name of defendant*] knew or should have known of the [condition/use/structure/activity on the property] that created an unreasonable risk of serious injury;~~

~~2. That [*name of defendant*] knew or should have known that someone would probably be seriously injured by the dangerous [condition/use/structure/activity]; and~~

~~3. That [*name of defendant*] knowingly failed to protect others from the dangerous [condition/use/structure/activity].]~~

[**or**]

[~~unless [*name of plaintiff*] proves that~~ a charge or fee was paid to [*name of defendant***] to use the property.]**

[**or**]

[~~unless [*name of plaintiff*] proves that~~ [*name of defendant***] expressly invited [***name of plaintiff***] to use the property for the recreational purpose.]**

New September 2003; Revised October 2008, December 2014

Directions for Use

This instruction sets forth the statutory exceptions to recreational immunity. (See Civ. Code, § 846.) Choose one or more of the optional exceptions according to the facts. Depending on the facts, the court could instruct that the activity involved was a "recreational purpose" as a matter of law. For a comprehensive list of "recreational purposes," refer to Civil Code section 846.

Whether the term "willful or malicious failure" has a unique meaning under this statute is not entirely clear. One court construing this statute has said that three elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the

danger, and (3) conscious failure to act to avoid the peril. (See *New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689−690 [217 Cal.Rptr. 522].)

Federal courts interpreting California law have addressed whether the "express invitation" must be personal to the user. The Ninth Circuit has held that invitations to the general public do not qualify as "express invitations" within the meaning of section 846. In *Ravell v. United States* (9th Cir. 1994) 22 F.3d 960, 963, the Ninth Circuit held that California law requires a personal invitation for a section 846 invitation, citing *Johnson v. Unocal Corp*. (1993) 21 Cal.App.4th 310, 317 [26 Cal.Rptr.2d 148]. However, the issue has not been definitively resolved by the California Supreme Court.

Sources and Authority

- Recreational Immunity. Civil Code section 846 ~~provides:~~.

  ~~An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.~~

  ~~A "recreational purpose," as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.~~

  ~~An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.~~

  ~~This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.~~

  ~~Nothing in this section creates a duty of care or ground of liability for injury to person or property.~~

- "[A]n owner of ... real property owes no duty of care to keep the premises safe for entry or use by others for recreational purposes or to give recreational users warning of hazards on the property, unless: (1) the landowner willfully or maliciously fails to guard or warn against a dangerous

condition, use, structure or activity; (2) permission to enter for a recreational purpose is granted for a consideration; or (3) the landowner expressly invites rather than merely permits the user to come upon the premises." (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1099-1100 [17 Cal.Rptr.2d 594, 847 P.2d 560].)

- "Generally, whether one has entered property for a recreational purpose within the meaning of the statute is a question of fact, to be determined through a consideration of the 'totality of the facts and circumstances, including ... the prior use of the land. While the plaintiff's subjective intent will not be controlling, it is relevant to show purpose.' " (*Ornelas, supra,* 4 Cal.4th at p. 1102, internal citation omitted.)

- "The phrase 'interest in real property' should not be given a narrow or technical interpretation that would frustrate the Legislature's intention in passing and amending section 846." (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 196 [266 Cal.Rptr. 491, 785 P.2d 1183].)

- "[D]efendants' status as business invitees of the landowner does not satisfy the prerequisite that the party seeking to invoke the immunity provisions of section 846 be '[a]n owner of any estate or any other interest in real property, whether possessory or nonpossessory.' Although such invitee may be entitled to be present on the property during such time as the work is being performed, such presence does not convey any estate or interest in the property." (*Jenson v. Kenneth I. Mullen, Consulting Engineers, Inc.* (1989) 211 Cal.App.3d 653, 658 [259 Cal.Rptr. 552].)

- ~~"Three essential elements must be present to raise a negligent act to the level of wilful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 689-690 [217 Cal.Rptr. 522].)~~

- "The concept of willful misconduct has a well-established, well-defined meaning in California law. 'Willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results.' " (*New, supra,* 171 Cal.App.3d at p. 689, internal citations omitted.)

- "Clearly, consideration means some type of entrance fee or charge for permitting a person to use specially constructed facilities. There are many amusement facilities in government-owned parks that charge admission fees and a consideration in this or a similar context was intended." (*Moore v. City of Torrance* (1979) 101 Cal.App.3d 66, 72 [166 Cal.Rptr. 192], disapproved of on other grounds in *Delta Farms Reclamation Dist. v. Superior Court* (1983) 33 Cal.3d 699, 707 [190 Cal.Rptr. 494, 660 P.2d 1168].)

- "A landowner must gain some immediate and reasonably direct advantage, usually in the form of an entrance fee, before the exception to immunity for consideration under section 846 comes into play." (*Johnson, supra,* 21 Cal.App.4th at p. 317.)

- "The purpose of section 846 is to encourage landowners to permit people to use their property for recreational use without fear of reprisal in the form of lawsuits. The trial court should therefore

construe the exceptions for consideration and express invitees narrowly. (*Johnson, supra,* 21 Cal.App.4th at p. 315.)

- "Civil Code section 846's liability shield does not extend to acts of vehicular negligence by a landowner or by the landowner's employee while acting within the course of the employment. We base this conclusion on section 846's plain language. The statutory phrase 'keep the premises safe' is an apt description of the property-based duties underlying premises liability, a liability category that does not include vehicular negligence. Furthermore, a broad construction of that statutory phrase would render superfluous another provision of section 846 shielding landowners from liability for failure to warn recreational users about hazardous conditions or activities on the land." (*Klein v. United States of America* (2010) 50 Cal.4th 68, 72 [112 Cal.Rptr.3d 722, 235 P.3d 42].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1103–1111

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.22 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.30 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.21 (Matthew Bender)

17 California Points and Authorities, Ch. 178, *Premises Liability*, § 178.130 et seq. (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ § 16:34 (Thomson Reuters)

VF-1001. Premises Liability—Affirmative Defense —Recreation Immunity—Exceptions

We answer the questions submitted to us as follows:

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

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

2. **Was [***name of defendant***] negligent in the [use/maintenance] of the property?**
   ____ Yes ____ No

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

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

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

4. **Did [***name of plaintiff***] enter on or use [***name of defendant***]'s property for a recreational purpose?**
   ____ Yes ____ No

   If your answer to question 4 is yes, then answer question 5. If you answered no, skip ~~the next three~~ question 5~~s~~ and answer question ~~8~~6.

5. **Did [***name of defendant***] willfully or maliciously fail to protect others from or warn others about a dangerous [condition/use/structure/activity] on the property~~know or should [he/she/it] have known of a [condition/use/structure/activity on the property] that created an unreasonable risk of serious injury~~?**
   ____ Yes ____ No

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

~~6. Did [*name of defendant*] know or should [he/she/it] have known that someone would probably be seriously injured by the dangerous [condition/use/structure/activity]?~~

~~_____ 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. Did [***name of defendant***] knowingly fail to protect others from the dangerous [condition/use/structure/activity]?**~~
~~_____ 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~~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, October 2008, December 2010, December 2014

Directions for Use

This verdict form is based on CACI No. 1000, *Premises Liability—Essential Factual Elements*, and CACI No. 1010, *Affirmative Defense—Recreation Immunity—Exceptions*.

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. 1000, *Premises Liability—Essential Factual Elements*, and CACI No. 1010, *Affirmative Defense—Recreation Immunity*.~~

Question 5 should be modified if either of the other two exceptions to recreational immunity from Civil Code section 846 is at issue. (See CACI No. 1010.)

If specificity is not required, users do not have to itemize all the damages listed in question ~~8~~6. The breakdown is optional depending on the circumstances.

If there are multiple causes of action, users may wish to combine the individual forms into one form. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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.

~~This verdict form should be modified (see CACI No. 1010, *Affirmative Defense—Recreation Immunity*) if either of the two other grounds for countering this defense is at issue.~~

1123. Affirmative Defense—Design Immunity (Gov. Code, § 830.6)

[*Name of defendant***] claims that it is not responsible for harm to [***name of plaintiff***] caused by the plan or design of the [***insert type of property, e.g., "highway"***]. In order to prove this claim, [***name of defendant***] must prove both of the following:**

1. **That the plan or design was [prepared in conformity with standards previously] approved before [construction/improvement] by the [***legislative body of the public entity, e.g., city council***]/[***other body or employee, e.g., city civil engineer***]] exercising discretionary authority to approve the plan or design; and**

2. **That the plan or design of the [***e.g., highway***] was a substantial factor in causing harm to [***name of plaintiff***].**

New December 2014

Directions for Use

Give this instruction to present the affirmative defense of design immunity to a claim for liability caused by a dangerous condition on public property. (Gov. Code, § 830.6; see *Martinez v. County of Ventura* (2014) 225 Cal.App.4th 364, 369 [169 Cal.Rptr.3d 880] [design immunity is an affirmative defense that the public entity must plead and prove].)

A public entity claiming design immunity must establish three elements: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design before construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1, 26 P.3d 332].) The first two elements, causation and discretionary approval, are issues of fact for the jury to decide. (*Id.* at pp. 74–75; see also *Alvis v. County of Ventura* (2009) 178 Cal.App.4th 536, 550 [100 Cal.Rptr.3d 494] [elements may only be resolved as issues of law if facts are undisputed].) The third element, substantial evidence of reasonableness, must be tried by the court, not the jury. (*Cornette, supra,* 26 Cal.4th at pp. 66−67; see Gov. Code, § 830.6.)

Sources and Authority

- Design Immunity. Government Code section 830.6.

- "The purpose of design immunity 'is to prevent a jury from second-guessing the decision of a public entity by reviewing the identical questions of risk that had previously been considered by the government officers who adopted or approved the plan or design. [Citation.]' ' "[T]o permit reexamination in tort litigation of particular discretionary decisions where reasonable men may differ as to how the discretion should be exercised would create too great a danger of impolitic interference with the freedom of decision-making by those public officials in whom the function of making such decisions has been vested." ' " (*Martinez, supra,* 225 Cal.App.4th at p. 369, internal citations omitted.)

- "Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.' " (*Cornette, supra,* 26 Cal.4th at pp. 66-67.)

- "To prove [the discretionary approval element of design immunity], the entity must show that the design was approved 'in advance' of the construction 'by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved … .' 'Approval … is a vital precondition of the design immunity.' " (*Martinez, supra,* 225 Cal.App.4th at p. 369, internal citations omitted.)

- "In many cases, the evidence of discretionary authority to approve a design decision is clear, or even undisputed. For example, '[a] detailed plan, drawn up by a competent engineering firm, and approved by a city engineer in the exercise of his or her discretionary authority, is persuasive evidence of the element of prior approval. [Citation.]' When the discretionary approval issue is disputed, however, as it was here, we must determine whether the person who approved the construction had the discretionary authority to do so." (*Martinez, supra,* 225 Cal.App.4th at pp. 370−371, internal citations omitted.)

- "[T]he public entity claiming design immunity must prove that the person or entity who made the decision is vested with the authority to do so. Recognizing 'implied' discretionary approval would vitiate this requirement and provide public entities with a blanket release from liability that finds no support in section 830.6." (*Martinez, supra,* 225 Cal.App.4th at p. 373.)

Secondary Sources

5 Witkin, Summary of California Law (10th Ed. 2005), Torts §§ 229, 280 et seq.

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, Liability For "Dangerous Conditions" Of Public Property, ¶ 2:2855 et seq. (The Rutter Group)

~~1123~~1124. Loss of Design Immunity (*Cornette*)

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

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

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

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

   [or]

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

New September 2003; Revised June 2010; Renumbered from CACI No. 1123 and Revised December 2014

Directions for Use

Give this instruction if the plaintiff claims that the public entity defendant ~~is entitled to~~has lost its design immunity ~~unless~~ because of~~the~~ changed ~~-~~conditions since the design or plan was originally adopted~~exception can be established~~. Read either or both options for element 3 depending on the facts of the case.

~~–~~If the applicability of design immunity in the first instance is disputed, give CACI No. 1123, *Affirmative Defense—Design Immunity*. Also in this case, the introductory paragraph might begin with "Even if [*name of defendant*] proves both of these elements" (from No. 1123).

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

~~so they seldom become issues for the jury.~~

Users should include CACI No. 1102, *Definition of "Dangerous Condition,"* and CACI No. 1103, *Notice*, to define ~~"notice" and~~ "dangerous condition" and "notice" in connection with this instruction. Additionally, the meaning and legal requirements for a "change of physical condition" have been the subject of numerous decisions involving specific contexts. Appropriate additional instructions to account for these decisions may be necessary.

Sources and Authority

- Design Immunity. Government Code section 830.6. ~~provides: "Neither a public entity nor a public employee is liable under this chapter for an injury caused by the plan or design of a construction of, or an improvement to, public property where such plan or design has been approved in advance of the construction or improvement by the legislative body of the public entity or by some other body or employee exercising discretionary authority to give such approval or where such plan or design is prepared in conformity with standards previously so approved, if the trial or appellate court determines that there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor. Notwithstanding notice that constructed or improved public property may no longer be in conformity with a plan or design or a standard which reasonably could be approved by the legislative body or other body or employee, the immunity provided by this section shall continue for a reasonable period of time sufficient to permit the public entity to obtain funds for and carry out remedial work necessary to allow such public property to be in conformity with a plan or design approved by the legislative body of the public entity or other body or employee, or with a plan or design in conformity with a standard previously approved by such legislative body or other body or employee. In the event that the public entity is unable to remedy such public property because of practical impossibility or lack of sufficient funds, the immunity provided by this section shall remain so long as such public entity shall reasonably attempt to provide adequate warnings of the existence of the condition not conforming to the approved plan or design or to the approved standard. However, where a person fails to heed such warning or occupies public property despite such warning, such failure or occupation shall not in itself constitute an assumption of the risk of the danger indicated by the warning."~~

- "[W]here a plan or design of a construction of, or improvement to, public property, although shown to have been reasonably approved in advance or prepared in conformity with standards previously so approved, as being safe, nevertheless in its actual operation under *changed physical conditions* produces a dangerous condition of public property and causes injury, the public entity does not retain the statutory immunity from liability conferred on it by section 830.6." (*Dammann v. Golden Gate Bridge, Highway & Transportation Dist.* (2012) 212 Cal.App.4th 335, 343 [150 Cal.Rptr.3d 829], quoting *Baldwin v. State* (1972) 6 Cal.3d 424, 438 [99 Cal.Rptr. 145, 491 P.2d 1121], original italics.)

- " "Design immunity does not necessarily continue in perpetuity. To demonstrate loss of design immunity a plaintiff must also establish three elements: (1) the plan or design has become dangerous because of a change in physical conditions; (2) the public entity had actual or constructive notice of the dangerous condition thus created; and (3) the public entity had a reasonable time to obtain the

funds and carry out the necessary remedial work to bring the property back into conformity with a reasonable design or plan, or the public entity, unable to remedy the condition due to practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings." (*Cornette v. Dept. of Transportation* (2001) 26 Cal.4th 63, 66 [109 Cal.Rptr.2d 1, 26 P.3d 332]~~, *supra*, 26 Cal.4th at p. 66~~ ___, internal citations omitted.)

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

- "Section 830.6 makes it quite clear that 'the trial or appellate court' is to determine whether 'there is any substantial evidence upon the basis of which (a) a reasonable public employee could have adopted the plan or design or the standards therefor or (b) a reasonable legislative body or other body or employee could have approved the plan or design or the standards therefor.' The question presented by this case is whether the Legislature intended that the three issues involved in determining whether a public entity has lost its design immunity should also be tried by the court. Our examination of the text of section 830.6, the legislative history of that section, and our prior decisions leads us to the conclusion that, where triable issues of material fact are presented, as they were here, a plaintiff has a right to a jury trial as to the issues involved in loss of design immunity." (*Cornette, supra,* 26 Cal.4th at pp. 66-67.)

- "[T]echnological advances … do not constitute the 'changed physical conditions' necessary to defeat the [defendant]'s defense of design immunity under *Baldwin* and *Cornette*." (*Dammann, supra,* 22 Cal.App.4th at p. 351.)

Secondary Sources

5 Witkin, Summary of California Law (10th Ed. 2005), Torts § 284

Haning et al., California Practice Guide: Personal Injury, Ch. 2(III)-D, Liability For "Dangerous Conditions" Of Public Property, ¶ 2:2865 et seq. (The Rutter Group)

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

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

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

1244. Affirmative Defense—Sophisticated User

[*Name of defendant*] claims that [he/she/it] is not responsible for any harm to [*name of plaintiff*] based on a failure to warn because [*name of plaintiff*] is a sophisticated user of the [*product*]. To succeed on this defense, [*name of defendant*] must prove that, at the time of the injury, [*name of plaintiff*], because of [his/her] particular position, training, experience, knowledge, or skill, knew or should have known of the [*product*]'s risk, harm, or danger.

New October 2008; Revised December 2014

Directions for Use

Give this instruction as a defense to CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements*, or CACI No. 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements*.

In some cases, it may be necessary to expand this instruction to state that the plaintiff knew or should have known of the particular risk posed by the product, of the severity of the potential consequences, and how to use the product to reduce or avoid the risks, to the extent that information was known to the defendant. (See *Buckner v. Milwaukee Electric Tool Corp.* (2013) 222 Cal.App.4th 522, 536 [166 Cal.Rptr.3d 202].)

Sources and Authority

- "A manufacturer is not liable to a sophisticated user of its product for failure to warn of a risk, harm, or danger, if the sophisticated user knew or should have known of that risk, harm, or danger." (*Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, 71 [74 Cal.Rptr.3d 108, 179 P.3d 905].)

- "The sophisticated user defense exempts manufacturers from their typical obligation to provide product users with warnings about the products' potential hazards. The defense is considered an exception to the manufacturer's general duty to warn consumers, and therefore, in most jurisdictions, if successfully argued, acts as an affirmative defense to negate the manufacturer's duty to warn." (*Johnson, supra,* 43 Cal.4th at p. 65, internal citation omitted.)

- "Under the sophisticated user defense, sophisticated users need not be warned about dangers of which they are already aware or should be aware. Because these sophisticated users are charged with knowing the particular product's dangers, the failure to warn about those dangers is not the legal cause of any harm that product may cause. The rationale supporting the defense is that 'the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers.' This is because the user's knowledge of the dangers is the equivalent of prior notice." (*Johnson, supra,* 43 Cal.4th at p. 65, internal citations omitted.)

- "[T]he defense applies equally to strict liability and negligent failure to warn cases. The duty to

warn is measured by what is generally known or should have been known to the class of sophisticated users, rather than by the individual plaintiff's subjective knowledge." (*Johnson, supra,* 43 Cal.4th at pp. 65–66, internal citations omitted.)

- "[A] manufacturer is not liable to a sophisticated user for failure to warn, even if the failure to warn is a failure to provide a warning required by statute." (*Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal.App.4th 549, 556 [101 Cal.Rptr.3d 726].)

- "The sophisticated user defense concerns warnings. Sophisticated users 'are charged with knowing the particular product's dangers.' 'The rationale supporting the defense is that "the failure to provide warnings about risks already known to a sophisticated purchaser usually is not a proximate cause of harm resulting from those risks suffered by the buyer's employees or downstream purchasers." [Citation.]' [¶] [Plaintiff]'s design defect cause of action was not concerned with warnings. Instead, he alleged that respondents' design of their refrigerant was defective. We see no logical reason why a defense that is based on the need for warning should apply." (*Johnson, supra,* 179 Cal.App.4th at p. 559, internal citations omitted.)

- "The relevant time for determining user sophistication for purposes of this exception to a manufacturer's duty to warn is when the sophisticated user is injured and knew or should have known of the risk." (*Johnson, supra,* 43 Cal.4th at p. 73.)

- "*Johnson* did not impute an intermediary's knowledge to the plaintiff, or charge him with any knowledge except that which had been made available to him through his training and which, by reason of his profession and certification, he should have had. In contrast, [defendant]'s proposed instruction is not based on the theory that [plaintiff] had the opportunity to acquire any knowledge of the dangers of asbestos, let alone the obligation to do so. Instead, it contends that its customers … knew or should have known (from public sources) of the dangers of asbestos, and that its duty to warn [plaintiff] is measured by the knowledge [the customers] should have had. It is apparent that such a theory has nothing to do with *Johnson*." (*Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 28–29 [117 Cal.Rptr.3d 791].)

- "Thus, in actions by employees or servants, the critical issue concerns their knowledge (or potential knowledge), rather than an intermediary's sophistication. [¶] This conclusion flows directly from [Restatement Third of Torts] section 388 itself. Under section 388, a supplier of a dangerous item to users 'directly or through a third person' is subject to liability for a failure to warn, when the supplier 'has no reason to believe that those for whose use the [item] is supplied will realize its dangerous condition.' Accordingly, to avoid liability, there must be some basis for the supplier to believe that the ultimate user knows, or should know, of the item's hazards. In view of this requirement, the intermediary's sophistication is not, as matter of law, sufficient to avert liability; there must be a sufficient reason for believing that the intermediary's sophistication is likely to operate to protect the user, or that the user is likely to discover the hazards in some other manner. The fact that the user is an employee or servant of the sophisticated intermediary cannot plausibly be regarded as a sufficient reason, as a matter of law, to infer that the latter will protect the former. We therefore reject [defendant]' s contention that an intermediary's sophistication invariably shields suppliers from liability to the intermediary's employees or servants." (*Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1296−1297 [164 Cal.Rptr.3d 112].)

- "In order to establish the defense, a manufacturer must demonstrate that sophisticated users of the product know what the risks are, including the degree of danger involved (i.e., the severity of the potential injury), and how to use the product to reduce or avoid the risks, to the extent that information is known to the manufacturer." (*Buckner*, *supra*, ~~*v. Milwaukee Electric Tool Corp.* (2013)~~ 222 Cal.App.4th at p.~~522,~~ 536 ~~[166 Cal.Rptr.3d 202]~~.)

- "[S]peculation about a risk does not give rise to constructive knowledge of a risk under the 'should have known' test." (*Scott v. Ford Motor Co.* (2014) 224 Cal.App.4th 1492, 1501 [169 Cal.Rptr.3d 823].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1467, 1537, 1541–1542

Haning et al., California Practice Guide: Personal Injury, Ch. 2(II)-D, *Strict Liability For Defective Products*, ¶ 2:1277 (The Rutter Group)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.185 (Matthew Bender)

19 California Points and Authorities, Ch. 190, *Products Liability*, § 190.246 (Matthew Bender)

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

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We answer the questions submitted to us as follows:

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

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

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

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

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

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

[4. Is the [*product*] one about which an ordinary consumer can form reasonable minimum safety expectations?
____ Yes ____ No

If your answer to question 4 is yes, answer question 5. If your answer is no, skip question 5 and answer question 6.]

4[5. Did the [*product*] fail to perform as safely as an ordinary consumer would have expected when used or misused in an intended or reasonably foreseeable way?
____ Yes ____ No

Regardless of your answer to question 5, answer question 6~~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~~.]

[6. Did the risk of the [*product*]'s design outweigh the benefits of the design?
____ Yes ____ No

If your answer to either question 5 or question 6 is yes, answer question 7. If you

answered no to both questions 5 and 6, stop here, answer no further questions, and have the presiding juror sign and date this form.]

~~5~~7. Was the [*product*]'s design a substantial factor in causing harm to [*name of plaintiff*]?
____ Yes ____ No

If your answer to question ~~5~~ 7 is yes, then answer question ~~6~~8. If you answered no, stop here, answer no further questions, and have the presiding juror sign and date this form.

~~6~~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 September 2003; Revised October 2004, April 2007, April 2009, December 2010, June 2011, December 2011, December 2014

Directions for Use

This verdict form is based on CACI Nos. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements*, 1204, *Strict Liability—Design Defect—Risk-Benefit Test—Essential Factual Elements—Shifting Burden of Proof*, and 1245, *Affirmative Defense—Product Misuse or Modification*. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 9 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue*, may be added at the end.

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 can be used in a case in which the jury will decide design defect under both the consumer expectation and the risk-benefit tests. If only the risk-benefit test is at issue, omit questions 4 and 5. If only the consumer expectation test is at issue, omit question 6. Modify the transitional language following questions 5 and 6 if only one test is at issue in the case. Include question 4 if the court has decided to give to the jury the preliminary question as to whether the consumer expectation test can be applied to the product at issue in the case. (See *Saller v. Crown Cork & Seal Co., Inc.* (2010) 187 Cal.App.4th 1220, 1233–1234 [115 Cal.Rptr.3d 151].)~~This verdict form is based on CACI No. 1203, *Strict Liability—Design Defect—Consumer Expectation Test—Essential Factual Elements*, and CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. If the comparative fault or negligence of the plaintiff or of third persons is at issue, questions 6 through 10 of CACI No. VF-1200, *Strict Products Liability—Manufacturing Defect—Comparative Fault at Issue*, may be added at the end.~~

An additional question may be needed if the defendant claims that the plaintiff's injuries were caused by some product other than the defendant's.

If specificity is not required, users do not have to itemize all the damages listed in question ~~6~~8. The breakdown is optional depending on the circumstances.

~~If there are multiple causes of action, users may wish to combine the individual forms into one form. However, do not combine this verdict form with CACI No. VF-1202, *Strict Products Liability—Design Defect—Risk-Benefit Test*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431]) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer expectation test.~~ If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.

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

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

Revoked December 2014; See CACI No. VF-1201

We answer the questions submitted to us as follows:

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

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

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

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

3. Did the risks of the [*product*]'s design outweigh the benefits of the design?
____ 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. What are [*name of plaintiff*]'s damages?

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

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

[c. Past noneconomic loss, including [physical

~~pain/mental suffering:]~~

~~$ _____]~~

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

~~$ _____]~~

~~TOTAL $ _____~~

~~Signed: _____~~
~~Presiding Juror~~

~~Dated: _____~~

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

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

~~Directions for Use~~

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

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

~~If specificity is not required, users do not have to itemize all the damages listed in question 4. The breakdown is optional depending on the circumstances.~~

~~If there are multiple causes of action, users may wish to combine the individual forms into one form. However, do not combine this verdict form with CACI No. VF-1201, *Strict Products Liability—Design Defect—Consumer Expectation Test—Affirmative Defense—Misuse or Modification*. The verdict forms must make it clear to the jury that the two tests are alternative theories of liability (*Bracisco v. Beech Aircraft Corp.* (1984) 159 Cal.App.3d 1101, 1106–1107 [206 Cal.Rptr. 431]) and that the burden shifting to the defendant to prove that the benefits outweigh the risks does not apply to the consumer-expectation test. If different damages are recoverable on different causes of action, replace the damages tables in all of the verdict forms with CACI No. VF-3920, *Damages on Multiple Legal Theories*.~~

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

1620. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Essential Factual Elements

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[*Name of plaintiff*] claims that [*name of defendant*]'s conduct caused [him/her] to suffer serious emotional distress. To establish this claim, [*name of plaintiff*] must prove all of the following:

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

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

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

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 June 2014, December 2014

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. The doctrine of "negligent infliction of emotional distress" is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

A "direct victim" case is one in which the plaintiff's claim of emotional distress is based on the violation of a duty that the defendant owes directly to the plaintiff. (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 205 [147 Cal.Rptr.3d 41].) The California Supreme Court has allowed plaintiffs to recover damages as "direct victims" in only three types of factual situations: (1) the negligent mishandling of corpses (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 879 [2 Cal.Rptr.2d 79, 820 P.2d 181]); (2) the negligent misdiagnosis of a disease that could potentially harm another (*Molien, supra,* 27 Cal.3d at p. 923); and (3) the negligent breach of a duty arising out of a preexisting relationship (*Burgess v. Superior Court* (1992) 2 Cal.4th 1064, 1076 [9 Cal.Rptr.2d 615, 831 P.2d 1197]).

The judge will normally decide whether a duty was owed to the plaintiff as a direct victim. If the issue of whether the plaintiff is a direct victim is contested, a special instruction with the factual dispute laid out for the jury will need to be drafted.

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*.

If the plaintiff witnesses the injury of another, use CACI No. 1621, *Negligence—Recovery of Damages*

for Emotional Distress—No Physical Injury—Bystander—Essential Factual Elements. For instructions for use for emotional distress arising from exposure to carcinogens, HIV, or AIDS, see CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements,* and CACI No. 1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements*.

Elements 1 and 3 of this instruction could be modified for use in a strict products liability case. A plaintiff may seek damages for the emotional shock of viewing the injuries of another when the incident is caused by defendant's defective product. (*Kately v. Wilkinson* (1983) 148 Cal.App.3d 576, 587 [195 Cal.Rptr. 902].)

The explanation in the last paragraph of what constitutes "serious" emotional distress comes from the California Supreme Court. (See *Molien, supra,* 27 Cal.3d at p.928.) In *Wong v. Jing,* an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as "severe" emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

Sources and Authority

- " '[The] negligent causing of emotional distress is not an independent tort but the tort of negligence ... .' 'The traditional elements of duty, breach of duty, causation, and damages apply. Whether a defendant owes a duty of care is a question of law. Its existence depends upon the foreseeability of the risk and upon a weighing of policy considerations for and against imposition of liability.' " (*Marlene F. v. Affiliated Psychiatric Medical Clinic, Inc.* (1989) 48 Cal.3d 583, 588 [257 Cal.Rptr. 98, 770 P.2d 278], internal citations omitted.)

- " 'Direct victim' cases are cases in which the plaintiff's claim of emotional distress is not based upon witnessing an injury to someone else, but rather is based upon the violation of a duty owed directly to the plaintiff." (*Ragland, supra,* 209 Cal.App.4th at p. 205.)

- "[D]uty is found where the plaintiff is a 'direct victim,' in that the emotional distress damages result from a duty owed the plaintiff 'that is "assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two." ' " (*McMahon v. Craig* (2009) 176 Cal.App.4th 1502, 1510 [97 Cal.Rptr.3d 555].)

- "We agree that the unqualified requirement of physical injury is no longer justifiable." (*Molien, supra,* 27 Cal.3d at p. 928.)

- "[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, supra,* 27 Cal.3d at pp. 927–928.)

- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and

can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong*, *supra*, ~~*v. Jing* (2010)~~ 189 Cal.App.4th at p.~~1354,~~ 1378 ~~[117 Cal.Rptr.3d 747]~~.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1004

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:215 et seq. (The Rutter Group)

1 California Torts, Ch. 5, *Negligent Infliction of Emotional Distress*, § 5.03 (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. (Matthew Bender)

1621. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—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 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 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;**

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

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, June 2014

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. The doctrine of "negligent infliction of emotional distress" is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

A "bystander" case is one in which a plaintiff seeks recovery for damages for emotional distress suffered as a percipient witness of an injury to another person. If the plaintiff is a direct victim of tortious conduct, use CACI No. 1620, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Direct Victim—Essential Factual Elements.* For instructions for use for emotional distress arising from exposure to carcinogens, HIV, or AIDS, see CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements,* and CACI No. 1623, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—*

Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements.

This instruction should be read in conjunction with instructions in the Negligence series (see CACI No. 400 et seq.) to further develop element 1.

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.

The explanation in the last paragraph of what constitutes "serious" emotional distress comes from the California Supreme Court. (See *Molien, supra*, 27 Cal.3d at p.928.) In *Wong v. Jing*, an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as "severe" emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

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." (*Dillon v. Legg* (1968) 68 Cal.2d 728, 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." (*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, supra*, 27 Cal.3d at pp. 927–928.)

- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong, supra, ~~v. Jing~~ (~~2010~~)* 189 Cal.App.4th at p.~~1354,~~ 1378 ~~[117 Cal.Rptr.3d 747]~~.)

Secondary Sources

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

Croskey, et al., California Practice Guide: Insurance Litigation, Ch. 11-F, *Negligent Infliction Of Emotional Distress*, ¶ 11:101 (The Rutter Group)

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)

1622. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***]'s conduct caused [him/her] to suffer serious emotional distress by exposing [***name of plaintiff***] to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was exposed to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] as a result of [***name of defendant***]'s negligence;**

2. **That [***name of plaintiff***] suffered serious emotional distress from a fear that [he/she] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure;**

3. **That reliable medical or scientific opinion confirms that it is more likely than not that [***name of plaintiff***] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure; and**

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

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 June 2014

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. The doctrine of "negligent infliction of emotional distress" is not a separate tort or cause of action. It simply allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise currently injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

Recovery for emotional distress without other current harm or injury is allowed for negligent exposure to a disease-causing substance, but only if the plaintiff can establish that it is more likely than not that the plaintiff will contract the disease. (See *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 997 [25 Cal.Rptr.2d 550, 863 P.2d 795.) There may be other harmful agents and medical conditions that could support this claim for damages.

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*.

If plaintiff alleges that defendant's conduct constituted oppression, fraud, or malice, then CACI No. 1623,

Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements, should be read.

The explanation in the last paragraph of what constitutes "serious" emotional distress comes from the California Supreme Court. (See *Molien, supra*, 27 Cal.3d at p.928.) In *Wong v. Jing*, an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as "severe" emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

Sources and Authority

- " '[D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact ... .' " (*Potter, supra,* 6 Cal.4th at p. 986, internal citation omitted.)

- "[T]he way to avoid damage awards for unreasonable fear, i.e., in those cases where the feared cancer is at best only remotely possible, is to require a showing of the actual likelihood of the feared cancer to establish its significance." (*Potter, supra,* 6 Cal.4th at p. 990.)

- "[D]amages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure." (*Potter, supra,* 6 Cal.4th at p. 997.)

- " '[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, supra*, 27 Cal.3d at pp. 927-928.)

- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong, supra, ~~v. Jing~~ ~~(2010)~~* 189 Cal.App.4th at p.~~1354,~~ 1378 ~~[117 Cal.Rptr.3d 747]~~.)

- "[W]e hold that the cost of medical monitoring is a compensable item of damages where the proofs demonstrate, through reliable medical expert testimony, that the need for future monitoring is a reasonably certain consequence of a plaintiff's toxic exposure and that the recommended monitoring is reasonable." (*Potter, supra,* 6 Cal.4th at p. 1009.)

- "All of the policy concerns expressed in *Potter* apply with equal force in the fear of AIDS context." (*Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1074 [33 Cal.Rptr.2d 172].)

- "[Plaintiff parent] claims the likelihood of actual injury to [child] is immaterial and that, in short, the rule announced in *Potter* regarding fear of cancer should not be applied to a case involving fear of AIDS. We disagree." (*Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 786

[31 Cal.Rptr.2d 709].)

- "[W]hen a defendant demonstrates that a plaintiff's smoking is negligent and that a portion of the plaintiff's fear of developing cancer is attributable to the smoking, comparative fault principles may be applied in determining the extent to which the plaintiff's emotional distress damages for such fear should be reduced to reflect the proportion of such damages for which the plaintiff should properly bear the responsibility." (*Potter, supra,* 6 Cal.4th at pp. 965, 1011.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1036

Haning, et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages,* ¶ 3:218.6 (The Rutter Group)

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress,* § 5.02 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress,* § 362.11[3][c] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress,* § 153.38 (Matthew Bender)

1623. Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Malicious, Oppressive, or Fraudulent Conduct—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] acted with [malice/oppression/fraudulent intent] in exposing [***name of plaintiff***] to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] and that this conduct caused [***name of plaintiff***] to suffer serious emotional distress. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was exposed to [***insert applicable carcinogen, toxic substance, HIV, or AIDS***] as a result of [***name of defendant***]'s negligent conduct;**

2. **That [***name of defendant***] acted with [malice/oppression/fraudulent intent] because [***insert one or more of the following, as applicable***]:**

   [[*Name of defendant***] intended to cause injury to [***name of plaintiff***];] [or]**

   [[*Name of defendant***]'s conduct was despicable and was carried out with a willful or conscious disregard of [***name of plaintiff***]'s rights or safety;] [or]**

   [[*Name of defendant***]'s conduct was despicable and subjected [***name of plaintiff***] to cruel and unjust hardship in conscious disregard of [***name of plaintiff***]'s rights;] [or]**

   [[*Name of defendant***] intentionally misrepresented or concealed a material fact known to [***name of defendant***], intending to cause [***name of plaintiff***] harm;]**

3. **That [***name of plaintiff***] suffered serious emotional distress from a fear that [he/she] will develop [***insert applicable cancer, HIV, or AIDS***] as a result of the exposure;**

4. **That reliable medical or scientific opinion confirms that [***name of plaintiff***]'s risk of developing [***insert applicable cancer, HIV, or AIDS***] was significantly increased by the exposure and has resulted in an actual risk that is significant; and**

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

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.

"Despicable conduct" is conduct that is so mean, vile, base, or contemptible that it would be looked down on and despised by reasonable people.

New September 2003; Revised June 2014, December 2014

Directions for Use

Use this instruction in a negligence case if the only damages sought are for emotional distress. There is no separate tort or cause of action for "negligent infliction of emotional distress." The doctrine is one that allows certain persons to recover damages for emotional distress only on a negligence cause of action even though they were not otherwise currently injured or harmed. (See *Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 928 [167 Cal.Rptr. 831, 616 P.2d 813].)

Recovery for emotional distress without other current harm or injury is allowed for negligent exposure to a disease-causing substance. If the plaintiff can prove oppression, fraud, or malice, it is not necessary to establish that it is more likely than not that the plaintiff will contract the disease. (See *Potter v. Firestone Tire and Rubber Co.* (1993) 6 Cal.4th 965, 998 [25 Cal.Rptr.2d 550, 863 P.2d 795.) Use CACI No. 1622, *Negligence—Recovery of Damages for Emotional Distress—No Physical Injury—Fear of Cancer, HIV, or AIDS—Essential Factual Elements*, if plaintiff alleges exposure without oppression, fraud, or malice.

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*.

"Oppression, fraud, or malice" is used here as defined by Civil Code section 3294, except that the higher "clear and convincing" burden of proof is not required in this context. (See *Potter, supra*, 6 Cal.4th at p. 1000.)

In some cases the judge should make clear that the defendant does not need to have known of the individual plaintiff where there is a broad exposure and plaintiff is a member of the class that was exposed.

The explanation in the next-to-last paragraph of what constitutes "serious" emotional distress comes from the California Supreme Court. (See *Molien, supra*, 27 Cal.3d at p.928.) In *Wong v. Jing*, an appellate court subsequently held that serious emotional distress from negligence without other injury is the same as "severe" emotional distress for the tort of intentional infliction of emotional distress. (*Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1378 [117 Cal.Rptr.3d 747].)

Sources and Authority

- Punitive Damages: Malice, Oppression, and Fraud Defined. Civil Code section 3294(c).
- " '[D]amages for negligently inflicted emotional distress may be recovered in the absence of physical injury or impact ... .' " (*Potter, supra*, 6 Cal.4th at p. 986.)
- "[A] toxic exposure plaintiff need not meet the more likely than not threshold for fear of cancer recovery in a negligence action if the plaintiff pleads and proves that the defendant's conduct in causing the exposure amounts to 'oppression, fraud, or malice' as defined in Civil Code section 3294." (*Potter, supra*, 6 Cal.4th at p. 998.)
- " '[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, supra*, 27 Cal.3d at pp. 927-928.)

- "[D]amages for fear of cancer may be recovered only if the plaintiff pleads and proves that (1) as a result of the defendant's negligent breach of a duty owed to the plaintiff, the plaintiff is exposed to a toxic substance which threatens cancer; and (2) the plaintiff's fear stems from a knowledge, corroborated by reliable medical or scientific opinion, that it is more likely than not that the plaintiff will develop the cancer in the future due to the toxic exposure." (*Potter, supra*, 6 Cal.4th at p. 997.)

- "In our view, this articulation of 'serious emotional distress' is functionally the same as the articulation of 'severe emotional distress' [as required for intentional infliction of emotional distress]. Indeed, given the meaning of both phrases, we can perceive no material distinction between them and can conceive of no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury." (*Wong, supra, ~~v. Jing~~ ~~(2010)~~* 189 Cal.App.4th at p.~~1354,~~ 1378 ~~[117 Cal.Rptr.3d 747]~~.)

- "All of the policy concerns expressed in ***Potter*** apply with equal force in the fear of AIDS context." (*Kerins v. Hartley* (1994) 27 Cal.App.4th 1062, 1074 [33 Cal.Rptr.2d 172].)

- "[Plaintiff parent] claims the likelihood of actual injury to [child] is immaterial and that, in short, the rule announced in *Potter* regarding fear of cancer should not be applied to a case involving fear of AIDS. We disagree." (*Herbert v. Regents of University of California* (1994) 26 Cal.App.4th 782, 786 [31 Cal.Rptr.2d 709].)

- "Despicable conduct is conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people." (*Mock v. Mich. Millers Mut. Ins. Co.* (1992) 4 Cal.App.4th 306, 331 [5 Cal.Rptr.2d 594].)

- "Used in its ordinary sense, the adjective 'despicable' is a powerful term that refers to circumstances that are 'base,' 'vile,' or 'contemptible.' " (*College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 725 [34 Cal.Rptr.2d 898, 882 P.2d 894].)

- ~~[Although]~~ "Civil Code section 3294 requires a plaintiff to prove oppression, fraud, or malice by 'clear and convincing evidence' for purposes of punitive damages~~,~~ recovery. We decline to impose this stringent burden of proof for recovery of fear of cancer damages in negligence cases for two reasons. First, we have already adopted strict limitations on the availability of damages for negligently inflicted fear of cancer; an additional hurdle at this point is unnecessary for public policy purposes. Second, to recover compensatory damages in an action for intentional infliction of emotional distress, a plaintiff need only prove the fact that a defendant intentionally inflicted such distress by a preponderance of the evidence. It is therefore both logical and consistent to utilize the same burden of proof for recovery of compensatory damages when a defendant has acted with 'oppression, fraud or malice' to negligently inflict emotional distress." ~~this higher burden of proof has not been applied to fear-of-cancer cases.~~ (*Potter, supra*, 6 Cal.4th at p. 1000, fn. 20.)

- "[W]hen a defendant demonstrates that a plaintiff's smoking is negligent and that a portion of the plaintiff's fear of developing cancer is attributable to the smoking, comparative fault principles may

be applied in determining the extent to which the plaintiff's emotional distress damages for such fear should be reduced to reflect the proportion of such damages for which the plaintiff should properly bear the responsibility." (*Potter, supra,* 6 Cal.4th at p. 1011.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1036

Haning, et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages,* ¶ 3:218.6 (The Rutter Group)

1 Levy et al., California Torts, Ch. 5, *Negligent Infliction of Emotional Distress,* § 5.02 (Matthew Bender)

32 California Forms of Pleading and Practice, Ch. 362, *Mental Suffering and Emotional Distress,* § 362.11[3][c] (Matthew Bender)

15 California Points and Authorities, Ch. 153, *Mental Suffering and Emotional Distress,* § 153.38 (Matthew Bender)

1803. Appropriation of Name or Likeness—Essential Factual Elements

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

1. **That [*name of defendant*] used [*name of plaintiff*]'s name, likeness, or identity without [his/her] permission;**

2. **That [*name of defendant*] gained a commercial benefit [or some other advantage] by using [*name of plaintiff*]'s name, likeness, or identity;**

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.~~; [and]~~**

~~**[5. That the privacy interests of [*name of plaintiff*] outweigh the public interest served by [*name of defendant*]'s use of [his/her] name, likeness, or identity.**~~

~~**In deciding whether [*name of plaintiff*]'s privacy interest outweighs the public's interest, you should consider where the information was used, the extent of the use, the public interest served by the use, and the seriousness of the interference with [*name of plaintiff*]'s privacy.]**~~

New September 2003; Revised December 2014

Directions for Use

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

If the alleged "benefit" is not commercial, the judge will need to determine whether the advantage gained by the defendant qualifies as "some other advantage."

If suing under both the common law and Civil Code section 3344, the judge may need to explain that a person's voice, for example, may qualify as "identity" if the voice is sufficient to cause listeners to identify the plaintiff. The two causes of action overlap, and the same conduct should be covered by both.

Even if the elements are established, the First Amendment may require that the right to be protected from unauthorized publicity be balanced against the public interest in the dissemination of news and information.~~The last bracketed element and the last bracketed paragraph are appropriate in cases that implicate a defendant's First Amendment right to freedom of expression and freedom of the press.~~ (See *Gionfriddo v. Major League Baseball* (2001) 94 Cal.App.4th 400, 409~~–410~~ [114 Cal.Rptr.2d 307].) In a closely related right-of-publicity claim, the California Supreme Court has held that an artist who is faced

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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.~~; [and]~~**

~~**[5. That the privacy interests of [*name of plaintiff*] outweigh the public interest served by [*name of defendant*]'s use of [his/her] name, likeness, or identity.**~~

~~**In deciding whether [*name of plaintiff*]'s privacy interest outweighs the public's interest, you should consider where the information was used, the extent of the use, the public interest served by the use, and the seriousness of the interference with [*name of plaintiff*]'s privacy.]**~~

New September 2003; Revised December 2014

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

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with a challenge to his or her work may raise as affirmative defense that the work is protected by the First Amendment because it contains significant transformative elements or that the value of the work does not derive primarily from the celebrity's fame. (*Comedy III Productions, Inc. v. Gary Saderup, Inc.* (2001) 25 Cal.4th 387, 407 [106 Cal.Rptr.2d 126, 21 P.3d 797]; see CACI No. 1805, *Affirmative Defense to Use or Appropriation of Name or Likeness—First Amendment (Comedy III).*) Therefore, if there is an issue of fact regarding a First Amendment balancing test, it most probably should be considered to be an affirmative defense. (Cf. *Gionfriddo, supra* ["Given the significant public interest in this sport, plaintiffs can only prevail if they demonstrate a substantial competing interest."].)

Sources and Authority

- "A common law cause of action for appropriation of name or likeness may be pleaded by alleging (1) the defendant's use of the plaintiff's identity; (2) the appropriation of plaintiff's name or likeness to defendant's advantage, commercially or otherwise; (3) lack of consent; and (4) resulting injury." (*Eastwood v. Superior Court* (1983) 149 Cal.App.3d 409, 417 [198 Cal.Rptr. 342], internal citations omitted.)

- "The common law cause of action may be stated by pleading the defendant's unauthorized use of the plaintiff's identity; the appropriation of the plaintiff's name, voice, likeness, signature, or photograph to the defendant's advantage, commercially or otherwise; and resulting injury." (*Ross v. Roberts* (2013) 222 Cal.App.4th 677, 684−685 [166 Cal.Rptr.3d 359].)~~Section 652C of the Restatement Second of Torts provides: "One who appropriates to his own use or benefit the name or likeness of another is subject to liability to the other for invasion of his privacy."~~

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

- "[T]he appearance of an 'endorsement' is not the *sine qua non* of a claim for commercial appropriation." (*Eastwood, supra*, 149 Cal.App.3d at p. 419.)

- "[N]o cause of action will lie for the '[p]ublication of matters in the public interest, which rests on the right of the public to know and the freedom of the press to tell it.' " (*Montana v. San Jose Mercury News* (1995) 34 Cal.App.4th 790, 793 [40 Cal.Rptr.2d 639], internal citation omitted.)

- "The difficulty in defining the boundaries of the right, as applied in the publication field, is inherent in the necessity of balancing the public interest in the dissemination of news, information and education against the individuals' interest in peace of mind and freedom from emotional disturbances. When words relating to or actual pictures of a person or his name are published, the circumstances may indicate that public interest is predominant. Factors deserving consideration may include the medium of publication, the extent of the use, the public interest served by the publication, and the seriousness of the interference with the person's privacy." (*Gill v. Curtis Publishing Co.* (1952) 38 Cal.2d 273, 278-279 [239 P.2d 630].)

- "Even if each of these elements is established, however, the common law right does not provide relief for every publication of a person's name or likeness. The First Amendment requires that the right to

be protected from unauthorized publicity 'be balanced against the public interest in the dissemination of news and information consistent with the democratic processes under the constitutional guaranties of freedom of speech and of the press.' " (*Gionfriddo, supra,* 94 Cal.App.4th at pp. 409-410, internal citations and footnote omitted.)

- "Public interest attaches to people who by their accomplishments or mode of living create a bona fide attention to their activities." (*Dora v. Frontline Video, Inc.* (1993) 15 Cal.App.4th 536, 542 [18 Cal.Rptr.2d 790], internal citation omitted.)

- "[T]he fourth category of invasion of privacy, namely, appropriation, 'has been *complemented* legislatively by Civil Code section 3344, adopted in 1971.' " ~~complements the common law tort of appropriation.~~ (*Eastwood, supra,* 149 Cal.App.3d at pp. 416–417.)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 676–678

4 Levy et al., California Torts, Ch. 46, *Invasion of Privacy*, § 46.05 (Matthew Bender)

37 California Forms of Pleading and Practice, Ch. 429, *Privacy*, §§ 429.35, 429.36 (Matthew Bender)

18 California Points and Authorities, Ch. 184, *Privacy: Invasion of Privacy*, § 184.21 (Matthew Bender)

1 California Civil Practice: Torts ~~(Thomson West)~~ § 20:16 (Thomson Reuters)

2336. Bad Faith (Third Party)—Unreasonable Failure to Defend—Essential Factual Elements

[*Name of plaintiff*] claims [he/she/it] was harmed by [*name of defendant*]'s breach of the obligation of good faith and fair dealing because [*name of defendant*] failed to defend [*name of plaintiff*] in a lawsuit that was brought against [him/her/it]. To establish this claim, [*name of plaintiff*] must prove all of the following:

1. **That [*name of plaintiff*] was insured under an insurance policy with [*name of defendant*];**

2. **That a lawsuit was brought against [*name of plaintiff*];**

3. **That [*name of plaintiff*] gave [*name of defendant*] timely notice that [he/she/it] had been sued;**

4. **That [*name of defendant*], unreasonably or without proper cause, failed to defend [*name of plaintiff*] against the lawsuit;**

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 October 2004; Revised December 2007, December 2014

Directions for Use

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

~~This instruction also assumes that the judge~~The court will decide the issue of whether the claim was potentially covered by the policy. (See *California Shoppers, Inc. v. Royal Globe Ins. Co.* (1985) 175 Cal.App.3d 1, 52 [221 Cal.Rptr. 171].) If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute establishes a possibility of coverage and thus a duty to defend. (*North Counties Engineering, Inc. v. State Farm General Ins. Co.* (2014) 224 Cal.App.4th 902, 922 [169 Cal.Rptr.3d 726].) Therefore, the jury does not resolve factual disputes that determine coverage.~~If there are factual disputes regarding this issue, a special interrogatory could be used.~~

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

~~If it is alleged that a demand was made in excess of limits and there is a claim that the defendant should have contributed the policy limits, then this instruction will need to be modified. Note that an excess insurer generally owes no duty to defend without exhaustion of the primary coverage by judgment or~~

~~settlement.~~

Sources and Authority

- "A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* 78 Cal.App.4th 847, 881 [93 Cal. Rptr. 2d 364], internal citations omitted.)

- "To prevail in an action seeking declaratory relief on the question of the duty to defend, 'the insured must prove the existence of a *potential for coverage*, while the insurer must establish *the absence of any such potential*. In other words, the insured need only show that the underlying claim *may* fall within policy coverage; the insurer must prove it *cannot*.' The duty to defend exists if the insurer 'becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement.' " (*Delgado v. Interinsurance Exchange of Automobile Club of Southern California* (2009) 47 Cal.4th 302, 308 [97 Cal.Rptr.3d 298, 211 P.3d 1083], original italics, internal citation omitted.)

- " ' [A]n insurer has a duty to defend an insured if it becomes aware of, or if the third party lawsuit pleads, facts giving rise to the potential for coverage under the insuring agreement. … This duty … is separate from and broader than the insurer's duty to indemnify. … ' ' "[F]or an insurer, the existence of a duty to defend turns not upon the ultimate adjudication of coverage under its policy of insurance, but upon those facts known by the insurer at the inception of a third party lawsuit. … Hence, the duty 'may exist even where coverage is in doubt and ultimately does not develop.' … " … ' " (*State Farm Fire & Casualty Co. v. Superior Court* (2008) 164 Cal.App.4th 317, 323 [78 Cal.Rptr.3d 828], internal citations omitted.)

- "If any facts stated or fairly inferable in the complaint, or otherwise known or discovered by the insurer, suggest a claim potentially covered by the policy, the insurer's duty to defend arises and is not extinguished until the insurer negates all facts suggesting potential coverage. On the other hand, if, as a matter of law, neither the complaint nor the known extrinsic facts indicate any basis for potential coverage, the duty to defend does not arise in the first instance." (*GGIS Ins. Services, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1493, 1506 [86 Cal.Rptr.3d 515].)

- "In determining its duty to defend, the insurer must consider facts from any source—the complaint, the insured, and other sources. An insurer does not have a continuing duty to investigate the potential for coverage if it has made an informed decision on coverage at the time of tender. However, where the information available at the time of tender shows no coverage, but information available later shows otherwise, a duty to defend may then arise." (*American States Ins. Co. v. Progressive Casualty Ins. Co.* (2009) 180 Cal.App.4th 18, 26 [102 Cal.Rptr.3d 591], internal citations omitted.)

- "The duty does not depend on the labels given to the causes of action in the underlying claims against the insured; 'instead it rests on whether the *alleged facts or known extrinsic facts* reveal a *possibility* that the claim may be covered by the policy.' " (*Travelers Property Casualty Co. of America v. Charlotte Russe Holding, Inc.* (2012) 207 Cal.App.4th 969, 976 [144 Cal.Rptr.3d 12], original italics,

disapproved on other grounds in *Hartford Casualty Ins. Co. v. Swift Distribution, Inc.* (2014) 59 Cal.4th 277, 295 [172 Cal.Rptr.3d 653, 326 P.3d 253].)

- "The obligation of the insurer to defend is of vital importance to the insured. 'In purchasing his insurance the insured would reasonably expect that he would stand a better chance of vindication if supported by the resources and expertise of his insurer than if compelled to handle and finance the presentation of his case. He would, moreover, expect to be able to avoid the time, uncertainty and capital outlay in finding and retaining an attorney of his own.' 'The insured's desire to secure the right to call on the insurer's superior resources for the defense of third party claims is, in all likelihood, typically as significant a motive for the purchase of insurance as is the wish to obtain indemnity for possible liability.' " (*Amato v. Mercury Casualty Co. (Amato II)* (1997) 53 Cal.App.4th 825, 831–832 [61 Cal.Rptr.2d 909], internal citations omitted.)

- "An anomalous situation would be created if, on the one hand, an insured can sue for the tort of breach of the implied covenant if the insurer accepts the defense and later refuses a reasonable settlement offer, but, on the other hand, an insured is denied tort recovery if the insurer simply refuses to defend. ... This dichotomy could have the effect of encouraging an insurer to stonewall the insured at the outset by simply refusing to defend." (*Campbell v. Superior Court* (1996) 44 Cal.App.4th 1308, 1319–1320 [52 Cal.Rptr.2d 385].)

- "[T]he mere existence of a legal dispute does not create a potential for coverage: 'However, we have made clear that where the third party suit never presented any potential for policy coverage, the duty to defend does not arise in the first instance, and the insurer may properly deny a defense. *Moreover, the law governing the insurer's duty to defend need not be settled at the time the insurer makes its decision*.' " (*Griffin Dewatering Corp. v. Northern Ins. Co. of New York* (2009) 176 Cal.App.4th 172, 209 [97 Cal.Rptr.3d 568], original italics.)

- "The trial court erroneously thought that because the case law was 'unsettled' when the insurer first turned down the claim, that unsettledness created a potential for a covered claim. … [I]f an insurance company's denial of coverage is reasonable, as shown by substantial case law in favor of its position, there can be no bad faith even though the insurance company's position is *later* rejected by our state Supreme Court." (*Griffin Dewatering Corp., supra,* 176 Cal.App.4th at p. 179, original italics.)

- "Unresolved factual disputes impacting insurance coverage do not absolve the insurer of its duty to defend. 'If coverage depends on an unresolved dispute over a factual question, the very existence of that dispute would establish a possibility of coverage and thus a duty to defend.' " (*Howard v. American National Fire Insurance Company* (2010) 187 Cal.App.4th 498, 520 [115 Cal.Rptr.3d 42].)

- ~~"A breach of the duty to defend in itself constitutes only a breach of contract, but it may also violate the covenant of good faith and fair dealing where it involves unreasonable conduct or an action taken without proper cause. On the other hand, '[i]f the insurer's refusal to defend is reasonable, no liability will result.' " (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 881 [93 Cal.Rptr.2d 364], internal citations omitted.)~~

- " 'If the insurer is obliged to take up the defense of its insured, it must do so as soon as possible, both to protect the interests of the insured, and to limit its own exposure to loss. . . . [T]he duty to defend

must be assessed at the outset of the case.' It follows that a belated offer to pay the costs of defense may mitigate damages but will not cure the initial breach of duty." (*Shade Foods, Inc.*, *supra,* 78 Cal.App.4th at p. 881, internal citations omitted.)

- "No tender of defense is required if the insurer has already denied coverage of the claim. In such cases, notice of suit and tender of the defense are excused because other insurer has already expressed its unwillingness to undertake the defense." (Croskey et al., California~~.~~ Practice Guide: Insurance Litigation~~, (The Rutter Group)~~ ¶ 7:614 (The Rutter Group).)

Secondary Sources

2 Witkin, Summary of California Law (10th ed. 2005) Insurance, § 297

Croskey et al., California Practice Guide: Insurance Litigation, Ch. 12B-D, Third Party Cases—Refusal To Defend Cases, ¶¶ 12:598–12:650.5 (The Rutter Group)

2 California Liability Insurance Practice: Claims and Litigation (Cont.Ed.Bar) Actions for Failure to Defend, §§ 25.1–26.38

2 California Insurance Law and Practice, Ch. 13, *Claims Handling and the Duty of Good Faith*, § 13.08 (Matthew Bender)

6 Levy et al., California Torts, Ch. 82, *Claims and Disputes Under Insurance Policies*, §§ 82.10–82.16 (Matthew Bender)

26 California Forms of Pleading and Practice, Ch. 308, *Insurance*, § 308.24 (Matthew Bender)

2407. Affirmative Defense—Employee's Duty to Mitigate Damages

[*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. To succeed, [***name of defendant***] must prove all of the following:**

1. **That employment substantially similar to [***name of plaintiff***]'s former job was available to [him/her];**

2. **That [***name of plaintiff***] failed to make reasonable efforts to seek [and retain] this employment; and**

3. **The amount that [***name of plaintiff***] could have earned from this employment.**

In deciding whether the employment was substantially similar, you should consider, among other factors, whether:

(a) The nature of the work was different from [*name of plaintiff***]'s employment with [***name of defendant***];**

(b) The new position was substantially inferior to [*name of plaintiff***]'s former position;**

(c) The salary, benefits, and hours of the job were similar to [*name of plaintiff***]'s former job;**

(d) The new position required similar skills, background, and experience;

(e) The job responsibilities were similar; [and]

(f) The job was in the same locality; [and]

(g) [*insert other relevant factor(s)***].**

[In deciding whether [*name of plaintiff***] failed to make reasonable efforts to retain comparable employment, you should consider whether [***name of plaintiff***] quit or was discharged from that employment for a reason within [his/her] control.]**

New September 2003; Revised February 2007, December 2014

Directions for Use

This instruction may be given when there is evidence that the employee's damages could have been mitigated. The bracketed language at the end of the instruction regarding plaintiff's

failure to retain a new job is based on the holding in *Stanchfield v. Hamer Toyota, Inc.* (1995) 37 Cal.App.4th 1495, 1502-1503 [44 Cal.Rptr.2d 565].

In deciding whether the plaintiff could have obtained a substantially similar job, the trier of fact may consider several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system. (See *California School Employees Assn. v. Personnel Commission* (1973) 30 Cal.App.3d 241, 250-255 [106 Cal.Rptr. 283].) Read only those factors that have been shown by the evidence.

This instruction should be given in all employment cases, not just in breach of contract cases. See Chin et al., Cal. ifornia Practice Guide: Employment Litigation, ~~(Rutter Group)~~ ¶ 17:492 (Rutter Group).

This instruction should not be used for wrongful demotion cases.

Sources and Authority

- "The general rule is that the measure of recovery by a wrongfully discharged employee is the amount of salary agreed upon for the period of service, less the amount which the employer affirmatively proves the employee has earned or with reasonable effort might have earned from other employment. However, before projected earnings from other employment opportunities not sought or accepted by the discharged employee can be applied in mitigation, the employer must show that the other employment was comparable, or substantially similar, to that of which the employee has been deprived; the employee's rejection of or failure to seek other available employment of a different or inferior kind may not be resorted to in order to mitigate damages." (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182 [89 Cal.Rptr. 737, 474 P.2d 689], internal citations omitted; see also *Rabago-Alvarez v. Dart Industries, Inc.* (1976) 55 Cal.App.3d 91, 98 [127 Cal.Rptr. 222] ["Plaintiff concedes that the trial court was entitled to deduct her actual earnings"]; but see *Villacorta v. Cemex Cement, Inc.* (2013) 221 Cal.App.4th 1425, 1432 [165 Cal.Rptr.3d 441] [wages actually earned from an inferior job may not be used to mitigate damages].)

- "The burden is on the employer to prove that substantially similar employment was available which the wrongfully discharged employee could have obtained with reasonable effort." (*Chyten v. Lawrence & Howell Investments* (1993) 23 Cal.App.4th 607, 616 [46 Cal.Rptr.2d 459].)

- "[W]e conclude that the trial court should not have deducted from plaintiff's recovery against defendant the amount that the court found she might have earned in employment which was substantially inferior to her position with defendant." (*Rabago-Alvarez, supra, ~~v. Dart Industries, Inc.~~ ~~(1976)~~* 55 Cal.App.3d at p. ~~91,~~ 99 ~~[127 Cal.Rptr. 222]~~.)

- "[I]n those instances where the jury determines the employee was fired from a substantially similar position for cause, any amount the employee with reasonable effort could have earned by retaining that employment should be deducted from the amount of damages

which otherwise would have been awarded to the employee under the terms of the original employment agreement." (*Stanchfield, supra,* 37 Cal.App.4th at pp. 1502-1503.)

- "The location of the new job is one of the factors to consider in determining whether the new job is inferior." (*Villacorta, supra,* 221 Cal.App.4th at p. 1432.)

- "There is some authority for the proposition that whether or not the other employment is comparable or substantially similar or equivalent to the prior position is a question of fact. On the other hand the issue of substantial similarity or inferiority of employment is one that has often been decided as a matter of law in California."~~In deciding whether a school bus driver could have obtained a substantially similar job in other nearby school districts, the court looked at several factors, including salary, benefits, hours of work per day, hours of work per year, locality, and availability of a merit-based system.~~ (*California School Employees Assn.*, *supra*, ~~*v. Personnel Commission* (1973)~~ 30 Cal.App.3d at pp. 253−254 ~~241, 250-255 [106 Cal.Rptr. 283]~~, internal citations omitted.)

- "[S]elf-employment is not unreasonable mitigation as long as the discharged employee applies sufficient effort trying to make the business successful, even if those efforts fail." (*Cordero-Sacks v. Housing Authority of City of Los Angeles* (2011) 200 Cal.App.4th 1267, 1284–1285 [134 Cal.Rptr.3d 883].)

Secondary Sources

Chin et al., California Practice Guide: Employment Litigation, Ch. 17-F, *Mitigation Of Damages (Avoidable Consequences Doctrine)*, ¶¶ 17:490, 17:495, 17:497, 17:499–17:501 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Contract Actions, §§ 8.40–8.41

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline*, § 60.08[4] (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline*, §§ 249.18, 249.65 (Matthew Bender)

2431. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Violate Public Policy

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[*Name of plaintiff***] claims that [he/she] was forced to resign rather than commit a violation of public policy. It is a violation of public policy [***specify claim in case, e.g. , for an employer to require that an employee engage in price fixing***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That~~,~~ [***name of defendant***] required [***name of plaintiff***] to [***specify alleged conduct in violation of public policy, e.g., "engage in price fixing"***];**

3. **That this requirement was so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

4. **That [***name of plaintiff***] resigned because of this requirement;**

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

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

New September 2003; Revised June 2014, December 2014

Directions for Use

This instruction should be given if a plaintiff claims that his or her constructive termination was wrongful because the defendant required the plaintiff to commit an act in violation of public policy. If the plaintiff alleges he or she was subjected to intolerable working conditions that violate public policy, see CACI No. 2432, *Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions for Improper Purpose That Violates Public Policy*.

This instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* See also CACI No. 2510, *"Constructive Discharge" Explained*.

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal. Rptr. 2d 874, 824 P.2d 680; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66, 80 fn. 6 [78 Cal. Rptr. 2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Sources and Authority

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy,

the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)

- "[A]n employer's authority over its employees does not include the right to demand that the employee commit a criminal act to further its interests, and an employer may not coerce compliance with such unlawful directions by discharging an employee who refuses to follow such an order. An employer engaging in such conduct violates a basic duty imposed by law upon all employers, and thus an employee who has suffered damages as a result of such discharge may maintain a tort action for wrongful discharge against the employer." (*Tameny, supra,* 27 Cal.3d at p. 178.)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], footnote omitted.)

- "[T]he cases in which violations of public policy are found generally fall into four categories: (1) refusing to violate a statute; (2) performing a statutory obligation (3) exercising a statutory right or privilege; and (4) reporting an alleged violation of a statute of public importance." (*Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1090–1091 [4 Cal.Rptr.2d 874, 824 P.2d 680], internal citations and fn. omitted, overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal.4th 66, 80, fn. 6 [78 Cal.Rptr.2d 16, 960 P.2d 1046]; accord *Stevenson, supra,* 16 Cal.4th at p. 889.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245 [32 Cal.Rptr.2d 223, 876 P.2d 1022], internal citation omitted.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner, supra,* 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 222

Chin et al., Cal~~.~~ifornia Practice Guide: Employment Litigation, Ch. 4-G, Constructive Discharge, ~~(The Rutter Group)~~ ¶¶ 4:405–406, 4:409–410, 4:421–422~~, 5:2, 5:45–47, 5:50, 5:70, 5:105, 5:115, 5:150–151, 5:170, 5:195, 5:220~~ (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, Wrongful Discharge In Violation Of Public Policy (Tameny Claims), ¶¶ 5:2, 5:45–5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–5.46

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline,* § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline,* §§ 249.12, 249.15 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and*

Discipline, §§ 100.31, 100.35–100.38 (Matthew Bender)

California Civil Practice: Employment Litigation ~~(Thomson West)~~ §§ 6:23–6:25 (Thomson Reuters)

2432. Constructive Discharge in Violation of Public Policy—Plaintiff Required to Endure Intolerable Conditions ~~for Improper Purpose~~ That Violate~~s~~ Public Policy

[*Name of plaintiff***] claims that [***name of defendant***] forced [him/her] to resign for reasons that violate public policy. It is a violation of public policy [***specify claim in case, e.g., for an employer to require an employee to work more than forty hours a week for less than minimum wage***]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

2. **That [***name of plaintiff***] was subjected to working conditions that violated public policy, in that [***describe conditions imposed on the employee that constitute the violation, e.g., "[name of plaintiff] was treated ~~intolerably in retaliation for filing a workers' compensation claim~~required to work more than forty hours a week for less than minimum wage"***];**

3. **That [***name of defendant***] intentionally created or knowingly permitted these working conditions;**

4. **That these working conditions were so intolerable that a reasonable person in [***name of plaintiff***]'s position would have had no reasonable alternative except to resign;**

5. **That [***name of plaintiff***] resigned because of these working conditions;**

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

7. **That the working conditions were a substantial factor in causing [***name of plaintiff***]'s harm.**

To be intolerable, the adverse working conditions must be unusually or repeatedly offensive to a reasonable person in [*name of plaintiff***]'s position.**

New September 2003; Revised December 2014

Directions for Use

This instruction should be given if plaintiff claims that his or her constructive termination was wrongful because defendant subjected plaintiff to intolerable working conditions in violation of public policy. The instruction must be supplemented with CACI No. 2433, *Wrongful Discharge in Violation of Public Policy—Damages.* See also CACI No. 2510, *"Constructive Discharge" Explained.*

The judge should determine whether the purported reason for plaintiff's resignation would amount to a violation of public policy. (See *Gantt v. Sentry Insurance* (1992) 1 Cal.4th 1083, 1092 [4 Cal. Rptr. 2d 874, 824 P.2d 680; overruled on other grounds in *Green v. Ralee Engineering Co.* (1998) 19 Cal. 4th 66,

80 fn. 6 [78 Cal. Rptr. 2d 16, 960 P.2d 1046].) The jury should then be instructed that the alleged conduct would constitute a public-policy violation if proved.

Sources and Authority

- "[W]hen an employer's discharge of an employee violates fundamental principles of public policy, the discharged employee may maintain a tort action and recover damages traditionally available in such actions." (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 170 [164 Cal.Rptr. 839, 610 P.2d 1330].)

- "[T]his court established a set of requirements that a policy must satisfy to support a tortious discharge claim. First, the policy must be supported by either constitutional or statutory provisions. Second, the policy must be 'public' in the sense that it 'inures to the benefit of the public' rather than serving merely the interests of the individual. Third, the policy must have been articulated at the time of the discharge. Fourth, the policy must be 'fundamental' and 'substantial.' " (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889-890 [66 Cal.Rptr.2d 888, 941 P.2d 1157], fn. omitted.)

- "In addition to statutes and constitutional provisions, valid administrative regulations may also serve as a source of fundamental public policy that impacts on an employer's right to discharge employees when such regulations implement fundamental public policy found in their enabling statutes." (*D'sa v. Playhut, Inc.* (2000) 85 Cal.App.4th 927, 933 [102 Cal.Rptr.2d 495], internal citation omitted.)

- "Plaintiffs assert, in essence, that they were terminated for refusing to engage in conduct that violated fundamental public policy, to wit, nonconsensual sexual acts. They also assert, in effect, that they were discharged in retaliation for attempting to exercise a fundamental right -- the right to be free from sexual assault and harassment. Under either theory, plaintiffs, in short, should have been granted leave to amend to plead a cause of action for wrongful discharge in violation of public policy." (~~In~~ *Rojo v. Kliger* (1990) 52 Cal.3d 65, ~~88~~ 91 [276 Cal.Rptr. 130, 801 P.2d 373].~~), the court held that an employee terminated in retaliation for refusing her employer's sexual advances may state a wrongful termination cause of action in tort.~~

- "Constructive discharge occurs when the employer's conduct effectively forces an employee to resign. Although the employee may say, 'I quit,' the employment relationship is actually severed involuntarily by the employer's acts, against the employee's will. As a result, a constructive discharge is legally regarded as a firing rather than a resignation." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1244-1245 [32 Cal.Rptr.2d 223, 876 P.2d 1022], internal citation omitted.)

- "Although situations may exist where the employee's decision to resign is unreasonable as a matter of law, '[w]hether conditions were so intolerable as to justify a reasonable employee's decision to resign is normally a question of fact. [Citation.]' " (*Vasquez v. Franklin Management Real Estate Fund, Inc.* (2013) 222 Cal.App.4th 819, 827 [166 Cal.Rptr.3d 242].)

- "In order to establish a constructive discharge, an employee must plead and prove ... that the employer either intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of the employee's resignation that a reasonable employer would realize that a reasonable person in the employee's position would be compelled to resign." (*Turner,*

supra, 7 Cal.4th at p. 1251.)

- "The conditions giving rise to the resignation must be sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job to earn a livelihood and to serve his or her employer. The proper focus is on whether the resignation was coerced, not whether it was simply one rational option for the employee." (*Turner, supra,* 7 Cal.4th at p. 1246.)

- "In some circumstances, a single intolerable incident, such as a crime of violence against an employee by an employer, or an employer's ultimatum that an employee commit a crime, may constitute a constructive discharge. Such misconduct potentially could be found 'aggravated.' " (*Turner, supra,* 7 Cal.4th at p. 1247, fn. 3.)

- "The mere existence of illegal conduct in a workplace does not, without more, render employment conditions intolerable to a reasonable employee." (*Turner, supra,* 7 Cal.4th at p. 1254.)

- "[T]he standard by which a constructive discharge is determined is an objective one-the question is 'whether a reasonable person faced with the allegedly intolerable employer actions or conditions of employment would have no reasonable alternative except to quit.' " (*Turner, supra,* 7 Cal.4th at p. 1248, internal citations omitted.)

- "The length of time the plaintiff remained on the job may be one relevant factor in determining the intolerability of employment conditions from the standpoint of a reasonable person." (*Turner, supra,* 7 Cal.4th at p. 1254.)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Agency and Employment, § 222

Chin et al., Cal~~.~~ifornia Practice Guide: Employment Litigation, Ch. 4-G, Constructive Discharge, ~~(The Rutter Group)~~ ¶¶ 4:405–4:406, 4:409–4:411, 4:421–4:422~~, 5:2, 5:45–5:47~~ (The Rutter Group)

Chin et al., California Practice Guide: Employment Litigation, Ch. 5-A, Wrongful Discharge In Violation Of Public Policy (Tameny Claims), ¶¶ 5:2, 5:45–5:47, 5:50, 5:70, 5:105, 5:115, 5:150, 5:151, 5:170, 5:195, 5:220 (The Rutter Group)

1 Wrongful Employment Termination Practice (Cont.Ed.Bar 2d ed.) Public Policy Violations, §§ 5.45–5.46

4 Wilcox, California Employment Law, Ch. 60, *Liability for Wrongful Termination and Discipline,* § 60.04 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 249, *Employment Law: Termination and Discipline,* §§ 249.15, 249.50 (Matthew Bender)

10 California Points and Authorities, Ch. 100, *Employer and Employee: Wrongful Termination and*

Discipline, §§ 100.31, 100.32, 100.36–100.38 (Matthew Bender)

California Civil Practice: Employment Litigation ~~(Thomson West)~~ §§ 6:23–6:25 (Thomson Reuters)

2442. Protected Disclosure by State Employee—California Whistleblower Protection Act—Essential Factual Elements (Gov. Code, § 8547.8(c))

[*Name of plaintiff***] claims that [he/she] made a protected disclosure in good faith and that [***name of defendant***] discharged [him/her] as a result. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [***specify protected disclosure, e.g., reported waste, fraud, abuse of authority, violation of law, threats to public health, bribery, misuse of government property***];**

2. **That [***name of plaintiff***]'s communication [disclosed/ [or] demonstrated an intention to disclose] evidence of [an improper governmental activity/ [or] a condition that could significantly threaten the health or safety of employees or the public];**

3. **That [***name of plaintiff***] made this communication in good faith [for the purpose of remediating the health or safety condition];**

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

5. **That [***name of plaintiff***]'s communication was a contributing factor in [***name of defendant***]'s decision to discharge [***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.**

New December 2014

Directions for Use

Under the California Whistleblower Protection Act (Gov. Code, § 8547 et seq.) (the Act), a state employee or applicant for state employment has a right of action against any person who retaliates against him or her for having made a "protected disclosure." The statute prohibits a "person" from intentionally engaging in acts of reprisal, retaliation, threats, coercion, or similar acts against the employee or applicant. (Gov. Code, § 8547.8(c).) A "person" includes the state and its agencies. (Gov. Code, § 8547.2(d).)

While retaliatory discharge is clearly within the statute, adverse employment actions short of discharge are also prohibited. For adverse actions other than termination, replace "discharged" in the opening paragraph and in element 4, and "discharge" in element 5, with the applicable action. 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 2 alleges a protected disclosure. (See Gov. Code, § 8547.2(e) ["protected disclosure" defined].)

If an "improper governmental activity" is alleged in element 2, it may be necessary to expand the instruction with language from Government Code section 8547.2(c) to define the term. If the court has found that an improper governmental activity is involved as a matter of law, the jury should be instructed that the issue has been resolved.

If a health or safety violation is alleged in element 2, include the bracketed language at the end of element 3.

The statute addresses the possibility of a mixed-motive adverse action. If the plaintiff can establish that a protected disclosure was a "contributing factor" to the adverse action (see element 5), the employer may offer evidence to attempt to prove by clear and convincing evidence that it would have taken the same action for other permitted reasons. (Gov. Code, § 8547.8(e); see CACI No. 2443, *Affirmative Defense—Same Decision*.)

The affirmative defense includes refusing an illegal order as a second protected matter (along with engaging in protected disclosures). (See Gov. Code, § 8547.8(e); see also Gov. Code, § 8547.2(b) [defining "illegal order"].), However, Government Code section 8547.8(c), which creates the plaintiff's cause of action under the Act, mentions only making a protected disclosure; it does not expressly reference refusing an illegal order. But arguably, there would be no need for an affirmative defense to refusing an illegal order if the refusal itself is not protected. Therefore, whether a plaintiff may state a claim based on refusing an illegal order may be unclear; thus the committee has not included refusing an illegal order as within the elements of this instruction.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Civil Action Under California Whistleblower Protection Act. Government Code section 8547.8(c).
- "Improper Governmental Activity" Defined. Government Code section 8547.2(c).
- "Person" Defined. Government Code section 8547.2(d).
- "Protected Disclosure" Defined. Government Code section 8547.2(e).
- Governmental Claims Act Not Applicable. Government Code section 905.2(h).
- "The [Whistleblower Protection Act] prohibits improper governmental activities, which include interference with or retaliation for reporting such activities." (*Cornejo v. Lightbourne* (2013) 220 Cal.App.4th 932, 939 [163 Cal.Rptr.3d 530].)
- "[Government Code] Section 8547.8 requires a state employee who is a victim of conduct

> prohibited by the [Whistleblower Protection] Act to file a written complaint with the Personnel Board within 12 months of the events at issue and instructs, 'any action for damages shall not be available to the injured party …' unless he or she has filed such a complaint. The Legislature could hardly have used stronger language to indicate its intent that compliance with the administrative procedure of sections 8547.8 and 19683 is to be regarded as a mandatory prerequisite to a suit for damages under the Act than to say a civil action is 'not … available' to persons who have not complied with the procedure." (*Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1112−1113 [150 Cal.Rptr.3d 405], internal citations omitted.)

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005), Agency §§ 284 et seq.

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

2443. Affirmative Defense—Same Decision (Gov. Code, § 8547.8(e))

If [*name of plaintiff*] proves that [his/her] [making a protected disclosure/refusing an illegal order] was a contributing factor to [his/her] discharge, [*name of defendant*] is not liable if [he/she/it] proves by clear and convincing evidence that [he/she/it] would have discharged [*name of plaintiff*] anyway at that time, for legitimate, independent reasons.

New December 2014

Directions for Use

Give this instruction in a so-called same-decision or mixed-motive case under the California Whistleblower Protection Act. (See Gov. Code, § 8547 et seq.; CACI No. 2442, *Protected Disclosure by State Employee—California Whistleblower Protection Act—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. (Gov. Code, § 8547.8(e).)

Select "refusing an illegal order" if the court has allowed the case to proceed based on that basis. The affirmative defense statute includes refusing an illegal order as protected activity along with making a protected disclosure. The statute that creates the plaintiff's cause of action does not expressly mention refusing an illegal order (Compare Gov. Code, § 8547.8(e) with Gov. Code, § 8547.2(c).) See the Directions for Use to CACI No. 2442.

Sources and Authority

- California Whistleblower Protection Act. Government Code section 8547 et seq.
- Same-Decision Affirmative Defense. Government Code section 8547.8(e).

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005), Agency §§ 284 et seq.

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

2540. Disability Discrimination—Disparate Treatment—Essential Factual Elements

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

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

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

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

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

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

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

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**

6. **~~[~~That [***name of plaintiff***]'s [history of [a]] [***e.g., physical condition***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];~~] [or]~~**

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

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.**

New September 2003; Revised June 2006, December 2007, April 2009, December 2009, June 2010, June 2012, June 2013, December 2014

Directions for Use

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

In the introductory paragraph and in elements 3 and 6, select the bracketed language on "history" of disability ~~include "perceived" or "history of"~~ if the claim of discrimination is based on a ~~perceived disability or a~~ history of disability rather than a current actual disability.

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

~~Under element 3, select the claimed basis of discrimination: an actual disability, a history of a disability, a perceived disability, or a perceived history of a disability. For an actual disability, select "knew that [*name of plaintiff*] had." For a perceived disability, select "treated [*name of plaintiff*] as if [he/she] had."~~ Modify elements 3 and 6 if plaintiff was not actually disabled or had a history of disability, but alleges discrimination because he or she was perceived to be disabled. (See Gov. Code, § 12926(o); see also~~See~~ Gov. Code, § 12926(j)(4), (~~l~~m)(4) [mental and physical disability include being regarded or treated as disabled by the employer].) This can be done with language in element 3 that the employer "treated [*name of plaintiff*] as if [he/she] ... " and with language in element 6 "That [*name of employer*]'s belief that … ."

If the plaintiff alleges discrimination on the basis of his or her association with someone who was or was perceived to be disabled, give CACI No. 2547, *Disability-Based Associational Discrimination—Essential Factual Elements.* (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655−660 [163 Cal.Rptr.3d 392] [claim for "disability based associational discrimination" adequately pled].)

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

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

Read the first option for element 5 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact

for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 6 if either the second or third option is included for element 5.

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

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

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Inability to Perform Essential Job Duties. Government Code section 12940(a)(1).
- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Perception of Disability and Assocation With Disabled Person Protected. Government Code section 12926(o).
- "Substantial" Limitation Not Required. Government Code section 12926.1(c).
- "[T]he plaintiff initially has the burden to establish a prima facie case of discrimination. The plaintiff can meet this burden by presenting evidence that demonstrates, even circumstantially or by inference, that he or she (1) suffered from a disability, or was regarded as suffering from a disability; (2) could perform the essential duties of the job with or without reasonable accommodations, and (3) was subjected to an adverse employment action because of the disability or perceived disability. To establish a prima facie case, a plaintiff must show ' " ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a [prohibited] discriminatory criterion … ." ' " …' The prima facie burden is light; the evidence necessary to sustain the burden is minimal. As noted above, while the elements of a plaintiff's prima facie case can vary considerably, generally an employee need only offer sufficient circumstantial evidence to give rise to a reasonable *inference* of discrimination." (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 310 [115 Cal.Rptr.3d 453], original italics, internal citations omitted.)
- "If the employee meets this [prima facie] burden, it is then incumbent on the employer to show that it had a legitimate, nondiscriminatory reason for its employment decision. When this showing is made,

the burden shifts back to the employee to produce substantial evidence that employer's given reason was either 'untrue or pretextual,' or that the employer acted with discriminatory animus, in order to raise an inference of discrimination." (*Furtado v. State Personnel Bd.* (2013) 212 Cal.App.4th 729, 744 [151 Cal.Rptr.3d 292], internal citations omitted.)

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

- "At most, [plaintiff] alleges only that he anticipated becoming disabled for some time after the organ donation. This is insufficient. [Plaintiff] cannot pursue a cause of action for discrimination under FEHA on the basis of his 'actual' physical disability in the absence of factual allegations that he was in fact, physically disabled." (*Rope*, *supra*, 220 Cal.App.4th at p. 659.)

- "[Defendant] asserts the statute's 'regarded as' protection is limited to persons who are denied or who lose jobs based on an employer's reliance on the 'myths, fears or stereotypes' frequently associated with disabilities. … However, the statutory language does not expressly restrict FEHA's protections to the narrow class to whom [defendant] would limit its coverage. To impose such a restriction would exclude from protection a large group of individuals, like [plaintiff], with more mundane long-term medical conditions, the significance of which is exacerbated by an employer's failure to reasonably accommodate. Both the policy and language of the statute offer protection to a person who is not actually disabled, but is wrongly perceived to be. The statute's plain language leads to the conclusion that the 'regarded as' definition casts a broader net and protects *any* individual 'regarded' or 'treated' by an employer 'as having, or having had, any physical condition that makes achievement of a major life activity difficult' or may do so in the future. We agree most individuals who sue exclusively under this definitional prong likely are and will continue to be victims of an employer's 'mistaken' perception, based on an unfounded fear or stereotypical assumption. Nevertheless, FEHA's protection is nowhere expressly premised on such a factual showing, and we decline the invitation to import such a requirement." (*Gelfo v. Lockheed Martin Corp.* (2006) 140 Cal.App.4th 34, 53 [43 Cal.Rptr.3d 874], original italics, internal citations omitted.)

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

- "We say on this record that [defendant] took action against [plaintiff] based on concerns or fear about his possible future disability. The relevant FEHA definition of an individual regarded as disabled applies only to those who suffer certain specified physical disabilities or those who have a condition with 'no present disabling effect' but which 'may become a physical disability … .' According to the pleadings, [defendant] fired [plaintiff] to avoid accommodating him because of his association with his physically disabled sister. That is not a basis for liability under the 'regarded as' disabled standard." (*Rope, supra, ~~v. Auto-Chlor System of Washington, Inc.~~ (~~2013~~)* 220 Cal.App.4th at p.~~635,~~ 659 ~~[163 Cal.Rptr.3d 392]~~, internal citations omitted.)

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

- "[W]e interpret FEHA as authorizing an employer to distinguish between disability-caused misconduct and the disability itself in the narrow context of threats or violence against coworkers. If employers are not permitted to make this distinction, they are caught on the horns of a dilemma. They may not discriminate against an employee based on a disability but, at the same time, must provide all employees with a safe work environment free from threats and violence." (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 166 [125 Cal.Rptr.3d 1], internal citations omitted.)

- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)

- "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.)

- "Being unable to work during pregnancy is a disability for the purposes of section 12940." (*Sanchez v. Swissport, Inc.* (2013) 213 Cal.App.4th 1331, 1340 [153 Cal.Rptr.3d 367].)

Secondary Sources

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

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, *California Fair Employment And Housing Act (FEHA),* ¶¶ 9:2160–9:2241 (The Rutter Group)

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

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

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

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

2547. Disability-Based Associational Discrimination—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully discriminated against [him/her] based on [his/her] association with a disabled person. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of plaintiff***] was [***specify basis of association or relationship, e.g., the brother of [name of disabled person]***], who had [a] [***e.g., physical condition***];**

4. [**That [***name of disabled person***]'s [***e.g., physical condition***] was costly to [***name of defendant***] because [***specify reason, e.g., [name of disabled person] was covered under [plaintiff]'s employer-provided health care plan***];]**

   [or]

   [That [*name of defendant***] feared [***name of plaintiff***]'s association with [***name of disabled person***] because [***specify, e.g., [name of disabled person] has a disability with a genetic component and [name of plaintiff] may develop the disability as well***];]**

   [or]

   [That [*name of plaintiff***] was somewhat inattentive at work because [***name of disabled person***]'s [***e.g., physical condition***] requires [***name of plaintiff***]'s attention, but not so inattentive that to perform to [***name of defendant***]'s satisfaction [***name of plaintiff***] would need an accommodation;]**

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

   [or]

   [That [*name of defendant***] subjected [***name of plaintiff***] to an adverse employment action;]**

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**

6. **That [***name of plaintiff***]'s association with [***name of disabled person***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**

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.**

New December 2014

Directions for Use

Give this instruction if plaintiff claims that he or she was subjected to an adverse employment action because of his or her association with a disabled person. Discrimination based on an employee's association with a person who is (or is perceived to be) disabled is an unlawful employment practice under the FEHA. (See Gov. Code, § 12926(o).)

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

Three versions of disability-based associational discrimination have been recognized, called "expense," "disability by association," and "distraction." (See *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 655−660 [163 Cal.Rptr.3d 392] [claim for "disability-based associational discrimination" adequately pled].) Element 4 sets forth options for the three versions.

Read the first option for element 5 if there is no dispute as to whether the employer's acts constituted an adverse employment action. Read the second option and also give CACI No. 2509, *"Adverse Employment Action" Explained,* if whether there was an adverse employment action is a question of fact for the jury. If constructive discharge is alleged, give the third option for element 5 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 6 if either the second or third option is included for element 5.

Element 6 requires that the disability be a substantial motivating reason for the adverse action. (See *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 232 [152 Cal.Rptr.3d 392, 294 P.3d 49]; see also CACI No. 2507, *"Substantial Motivating Reason" Explained*.)

If the existence of the associate's disability is disputed, additional instructions defining "medical condition," "mental disability," and "physical disability," may be required. (See Gov. Code, § 12926(i), (j), (m).)

Sources and Authority

- Disability Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).

- "Medical Condition" Defined. Government Code section 12926(i).
- "Mental Disability" Defined. Government Code section 12926(j).
- "Physical Disability" Defined. Government Code section 12926(m).
- Association With Disabled Person Protected. Government Code section 12926(o).
- " 'Three types of situation are, we believe, within the intended scope of the rarely litigated … association section. We'll call them "expense," "disability by association," and "distraction." They can be illustrated as follows: an employee is fired (or suffers some other adverse personnel action) because (1) ("expense") his spouse has a disability that is costly to the employer because the spouse is covered by the company's health plan; (2a) ("disability by association") the employee's homosexual companion is infected with HIV and the employer fears that the employee may also have become infected, through sexual contact with the companion; (2b) (another example of disability by association) one of the employee's blood relatives has a disabling ailment that has a genetic component and the employee is likely to develop the disability as well (maybe the relative is an identical twin); (3) ("distraction") the employee is somewhat inattentive at work because his spouse or child has a disability that requires his attention, yet not so inattentive that to perform to his employer's satisfaction he would need an accommodation, perhaps by being allowed to work shorter hours.' " (*Rope, supra,* 220 Cal.App.4th at p. 657.)
- " '[A]n employer who discriminates against an employee because of the latter's association with a disabled person is liable even if the motivation is purely monetary. But if the disability plays no role in the employer's decision … then there is no *disability* discrimination.' " (*Rope, supra,* 220 Cal.App.4th at p.658.)
- "Requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply *a* motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision. At the same time, … proof that discrimination was a *substantial* factor in an employment decision triggers the deterrent purpose of the FEHA and thus exposes the employer to liability, even if other factors would have led the employer to make the same decision at the time." (*Harris, supra,* 56 Cal.4th at p. 232, original italics.)
- "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.)

Secondary Sources

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

Chin et al., California Practice Guide: Employment Litigation, Ch. 9-C, Disability Discrimination—California Fair Employment And Housing Act (FEHA), ¶¶ 9:2213-9:2215 (The Rutter Group)

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 defendant***] was [***name of plaintiff***]'s employer;**

2. **[That [***name of defendant***] believed that [***name of plaintiff***] [had disclosed/might disclose] to a [government agency/law enforcement agency/person with authority over [***name of plaintiff***]/ [or] an employee with authority to investigate, discover, or correct legal [violations/noncompliance]] that [***specify information disclosed***];]**

   [*or***]**

   [That [*name of plaintiff***] [provided information to/testified before] a public body that was conducting an investigation, hearing, or inquiry;**

   [*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 [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***] had reasonable cause to believe that the [information provided to/testimony before] the public body disclosed [a violation of a [state/federal] statute/[a violation of/noncompliance with] a [local/state/federal] rule or regulation];]**

   [*or***]**

   [That [*name of plaintiff***]'s participation in [***specify activity***] would result in [a violation of a [state/federal statute/[a violation of/noncompliance with] a [local/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 merely 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, state, or local 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 disclosure is protected even though disclosing the information may be part of [*name of plaintiff***]'s job duties.]**

New December 2012; Revised June 2013, December 2013, Revoked June 2014; Restored and Revised December 2014

Directions for Use

The whistle-blower protection statute of the Labor Code prohibits retaliation against an employee who discloses information about, or refuses to participate in, an illegal activity. (Lab. Code, § 1102.5(b), (c).) Liabiliity may be predicated on retaliation by "any person acting on behalf of the employer." (Lab. Code, § 1102.5(a)−(d).) Modifications to the instruction may be required if liability is predicated on an agency theory and the agent is also a defendant.

Select the first option for elements 2 and 3 for disclosure of information; select the second options for providing information to or testifying before a public body conducting an investigation, hearing, or inquiry. Select the third options for refusal to participate in an unlawful activity. In the first option for element 2, choose "might disclose" if the allegation is that the employer believed that the employee might disclose the information in the future. (Cf. *Rope v. Auto-Chlor System of Washington, Inc.* (2013) 220 Cal.App.4th 635, 648−649 [163 Cal.Rptr.3d 392] [under prior version of statute, no liability for anticipatory or preemptive retaliation based on fear that plaintiff might file a complaint in the future].)

Select any of the optional paragraphs explaining what disclosures are and are not protected as appropriate to the facts of the case. It has been held that a report of publicly known facts is not a protected disclosure. (*Mize-Kurzman v. Marin Community College Dist.* (2012) 202 Cal.App.4th 832, 858 [136 Cal.Rptr.3d 259].)

"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

- Retaliation Against Whistleblower Prohibited. Labor Code section 1102.5.
- Affirmative Defense: Same Decision. Labor Code section 1102.6.
- "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, supra,* 202 Cal.App.4th at p. 847.)
- "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)

2732. Retaliatory Unfair Immigration-Related Practice—Essential Factual Elements (Lab. Code, § 1019)

[*Name of plaintiff***] claims that [***name of defendant***] [***specify unfair immigration-related practice, e.g., threatened to report [him/her] to immigration authorities***] in retaliation for [his/her] [***specify right, e.g., making a claim for minimum wage***]. In order to establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***]**

   [in good faith filed a complaint or informed someone about [*name of defendant***]'s alleged [***specify violation of Labor Code or local ordinance, e.g., failure to pay the minimum wage to its employees***][;/.]]**

   [or]

   [sought information regarding whether or not [*name of defendant***] was in compliance with [***specify requirement under Labor Code or local ordinance, e.g., minimum wage requirements***][;/.]]**

   [or]

   [informed someone of that person's potential rights and remedies for [*name of defendant***]'s alleged [***specify violation of Labor Code or local ordinance, e.g., failure to pay the minimum wage to its employees***] and assisted [him/her] in asserting those rights[;/.]]**

2. **That [***name of defendant***]**

   [requested more or different documents than those that are required by federal immigration law, or refused to honor documents that on their face reasonably appeared to be genuine[;/.]]

   [or]

   [used the federal E-Verify system to check the employment authorization status of [*name of plaintiff***] at a time or in a manner not required or authorized by federal immigration law[;/.]]**

   [or]

   [filed or threatened to file a false [police report/report or complaint with a state or local agency][;/.]]

   [or]

   [contacted or threatened to contact immigration authorities.]

3. **That [***name of defendant***]'s conduct was for the purpose of, or with the intent of, retaliating against [***name of plaintiff***] for exercising [his/her] legally protected rights;**

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

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

[If you find that [*name of defendant***] acted as described in element 2 fewer than 90 days after [***name of plaintiff***] acted as described in element 1, you may but are not required to conclude, without further evidence, that [***name of defendant***] acted with a retaliatory purpose and intent.]**

New December 2014

Directions for Use

One who is the victim of an "unfair immigration-related practice" as defined, or his or her representative, may bring a civil action for equitable relief and any damages or penalties. (Lab. Code, § 1019(a).) While most commonly this claim would be brought by an employee against an employer, the statute prohibits unfair immigration-related practices by "an employer or any other person" against "an employee or other person." (Lab. Code, § 1019(d)(1).) Therefore, the statute does not require an employment relationship between the parties.

Engaging in an unfair immigration-related practice against a person within 90 days of the person's exercise of protected rights raises a rebuttable presumption that the defendant did so in retaliation for the plaintiff's exercise of those rights. (Lab. Code, § 1019(c).) The statute does not specify whether the presumption is one affecting only the burden of producing evidence (see Evid. Code, §§ 603, 604) or one affecting the burden of proof. (See Evid. Code, § 605.) If the statute implements a public policy against the use of immigration-related coercion to deter workers from exercising their rights under the Labor Code, its presumption would affect the burden of proof. (See Evid. Code, § 605.) The last optional paragraph of the instruction may then be given if applicable on its facts. If, however, the presumption affects only the burden of producing evidence, it ceases to exist when the defendant produces evidence rebutting the presumption, such as a reason for the action other than retaliation. (Evid. Code, § 604.) In that case, the last paragraph would not be given.

Sources and Authority

- Retaliatory Use of Immigration-Related Practices. Labor Code section 1019.
- Unlawful Employment of Aliens. 8 United States Code section 1324a.

Secondary Sources

3 Witkin, Summary of California Law (10th ed. 2005), Agency § 337

Chin, et al., California Practice Guide: Employment Litigation, Ch. 7-E, Employment Discrimination—California Labor Code, ¶¶ 7:1510 et seq. (The Rutter Group)

3040. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—~~General Conditions of Confinement Claim~~Substantial Risk of Serious Harm (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] subjected [him/her] to prison conditions that violated [his/her] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That while imprisoned, [***name of plaintiff***] was ~~imprisoned under conditions that~~ [***describe violation that created risk, e.g., ~~deprived [him/her] of out-of-cell exercise~~placed in a cell block with rival gang members***];**

2. **That [***name of defendant***]'s conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

3. **That [***name of defendant***] knew ~~or it was obvious~~ that [his/her~~/its~~] conduct created a substantial risk of serious harm to [***name of plaintiff***]'s health or safety;**

4. **That there was no reasonable justification for the conduct;**

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

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

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

Whether the risk was obvious is a factor that you may consider in determining whether [*name of defendant***] knew of the risk.**

New September 2003; Revised December 2010, June 2011; Renumbered from CACI No. 3011 December 2012, Revised December 2014

Directions for Use

In prison-conditions cases, the inmate must show that the defendant was deliberately indifferent to his or her health or safety. (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811].) "Deliberate indifference" involves a two part inquiry. First, the inmate must show that the prison officials were aware of a "substantial risk of serious harm" to the inmate's health or safety. Second, the inmate must show that the prison officials had no "reasonable" justification for the deprivation, in spite of that risk. (*Thomas v. Ponder* (9th Cir. 2010) 611 F.3d 1144, 1150.) Elements 3 and 4 express the deliberate-indifference components.

The "official duties" referred to in element 5 must be duties created pursuant to any state, county, or

municipal law, ordinance, or regulation. This aspect of color of law most likely will not be an issue for the jury, so it has been omitted to shorten the wording of element 5.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.

- "It is undisputed that the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment." (*Helling v. McKinney* (1993) 509 U.S. 25, 31 [113 S.Ct. 2475, 125 L.Ed.2d 22].)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer, supra*, 511 U.S. at p. 834, internal citations omitted.)

- "A deprivation is sufficiently serious when the prison official's act or omission results 'in the denial of the minimal civilized measure of life's necessities.' " (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1074.)

- "The objective question of whether a prison officer's actions have exposed an inmate to a substantial risk of serious harm is a question of fact, and as such must be decided by a jury if there is any room for doubt." (*Lemire, supra,* 726 F.3d at pp. 1075−1076.)

- "Whether a prison official had the requisite knowledge of a substantial risk is a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, and a factfinder may conclude that a prison official knew of a substantial risk from the very fact that the risk was obvious." (*Farmer, supra*, 511 U.S. at p. 842, internal citation omitted.)

- "When instructing juries in deliberate indifference cases with such issues of proof, courts should be careful to ensure that the requirement of subjective culpability is not lost. It is not enough merely to find that a reasonable person would have known, or that the defendant should have known, and juries should be instructed accordingly." (*Farmer, supra*, 511 U.S. at p. 843 fn. 8.)

- "The second step, showing 'deliberate indifference,' involves a two part inquiry. First, the inmate must show that the prison officials were aware of a 'substantial risk of serious harm' to an inmate's health or safety. This part of our inquiry may be satisfied if the inmate shows that the risk posed by the deprivation is obvious. Second, the inmate must show that the prison officials had no 'reasonable' justification for the deprivation, in spite of that risk." (*Thomas, supra,* 611 F.3d at p. 1150, footnotes and internal citations omitted.)

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an

inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- "[E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is 'part of the penalty that criminal offenders pay for their offenses against society,' 'only those deprivations denying "the minimal civilized measure of life's necessities" are sufficiently grave to form the basis of an Eighth Amendment violation.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- "Prison officials have a duty to ensure that prisoners are provided adequate shelter, food, clothing, sanitation, medical care, and personal safety." (*Johnson v. Lewis* (9th Cir. 2000) 217 F.3d 726, 731, internal citations omitted.)

- "The precise role of legitimate penological interests is not entirely clear in the context of an Eighth Amendment challenge to conditions of confinement. The Supreme Court has written that the test of *Turner v. Safley*, 482 U.S. 78, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1987), which requires only a reasonable relationship to a legitimate penological interest to justify prison regulations, does not apply to Eighth Amendment claims. The existence of a legitimate penological justification has, however, been used in considering whether adverse treatment is sufficiently gratuitous to constitute punishment for Eighth Amendment purposes." (*Grenning v. Miller-Stout* (9th Cir. 2014) 739 F.3d 1235, 1240.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

Secondary Sources

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

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law—Prisons*, ¶¶ 11.02–11.03 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.28 (Matthew Bender)

3041. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Medical Care (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] provided [him/her] with inadequate medical care in violation of [his/her] constitutional rights. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] had a serious medical need;**

2. **That [***name of defendant***] acted with deliberate indifference to this need;**

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

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

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

A serious medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the unnecessary and pointless infliction of pain.

To establish "deliberate indifference," [*name of plaintiff***] must prove (1) that [***name of defendant***] knew [***name of plaintiff***] faced a substantial risk of serious harm and (2) that [he/she] disregarded that risk by failing to take reasonable measures to correct it. Negligence is not enough to establish deliberate indifference.**

[In determining whether [*name of defendant***] was deliberately indifferent, you should consider the personnel, financial, and other resources available to [him/her] or those that [he/she] could reasonably have obtained. [***Name of defendant***] is not responsible for services that [he/she] could not provide or cause to be provided because the necessary personnel, financial, and other resources were not available or could not be reasonably obtained.]**

New September 2003; Revised December 2010; Renumbered from CACI No. 3012 December 2012; Revised June 2014, December 2014

Directions for Use

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

The Ninth Circuit has held that in considering whether an individual prison medical provider was deliberately indifferent, the jury should be instructed to consider the economic resources made available

to the prison health care system. (See *Peralta v. Dillard* (9th Cir. 2014) 744 F.3d 1076, 1084 [*en banc*].) Although this holding is not binding on California courts, the last optional paragraph may be given if the defendant has presented evidence of lack of economic resources and the court decides that this defense should be presented to the jury.

Sources and Authority

- Deprivation of Civil Rights: Title 42 United States Code section 1983.

- "[D]eliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' proscribed by the Eighth Amendment. This is true whether the indifference is manifested by prison doctors in their response to the prisoner's needs or by prison guards in intentionally denying or delaying access to medical care or intentionally interfering with the treatment once prescribed. Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under section 1983." (*Estelle v. Gamble* (1976) 429 U.S. 97, 104-105 [97 S.Ct. 285, 50 L.Ed.2d 251], internal citation and footnotes omitted.)

- "Our cases have held that a prison official violates the Eighth Amendment only when two requirements are met. First, the deprivation alleged must be, objectively, 'sufficiently serious.' For a claim ... based on a failure to prevent harm, the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm. The second requirement follows from the principle that 'only the unnecessary and wanton infliction of pain implicates the Eighth Amendment.' To violate the Cruel and Unusual Punishments Clause, a prison official must have a 'sufficiently culpable state of mind.' In prison-conditions cases that state of mind is one of 'deliberate indifference' to inmate health or safety ... ." (*Farmer v. Brennan* (1994) 511 U.S. 825, 834 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)

- " 'To set forth a constitutional claim under the Eighth Amendment predicated upon the failure to provide medical treatment, first the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, a plaintiff must show the defendant's response to the need was deliberately indifferent.' The 'deliberate indifference' prong requires '(a) a purposeful act or failure to respond to a prisoner's pain or possible medical need, and (b) harm caused by the indifference.' 'Indifference may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown in the way in which prison [officials] provide medical care.' '[T]he indifference to [a prisoner's] medical needs must be substantial. Mere "indifference," "negligence," or "medical malpractice" will not support this [claim].' Even gross negligence is insufficient to establish deliberate indifference to serious medical needs." (*Lemire v. Cal. Dep't of Corr. & Rehab.* (9th Cir. 2013) 726 F.3d 1062, 1081−1082, internal citations omitted.)

- "We hold ... that a prison official cannot be found liable under the Eighth Amendment for denying an inmate humane conditions of confinement unless the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." (*Farmer, supra,* 511 U.S. at p. 837.)

- "The subjective standard of deliberate indifference requires 'more than ordinary lack of due care for the prisoner's interests or safety.' The state of mind for deliberate indifference is subjective recklessness. But the standard is 'less stringent in cases involving a prisoner's medical needs . . . because "the State's responsibility to provide inmates with medical care ordinarily does not conflict with competing administrative concerns." ' " (*Snow v. McDaniel* (9th Cir. 2012) 681 F.3d 978, 985, internal citations omitted.)

- "[D]eliberate indifference 'may appear when prison officials deny, delay or intentionally interfere with medical treatment, or it may be shown by the way in which prison physicians provide medical care.'. … '[A] prisoner need not show his harm was substantial.' " (*Wilhelm v. Rotman* (9th Cir. 2012) 680 F.3d 1113, 1122, internal citation omitted.)

- "[A]llegations that a prison official has ignored the instructions of a prisoner's treating physician are sufficient to state a claim for deliberate indifference." (*Wakefield v. Thompson* (9th Cir. 1999) 177 F.3d 1160, 1165.)

- "[A] complaint that a physician has been negligent in diagnosing or treating a medical condition does not state a valid claim of medical mistreatment under the Eighth Amendment. Medical malpractice does not become a constitutional violation merely because the victim is a prisoner." (*Estelle, supra,* 429 U.S. at p. 106.)

- "It has been recognized ... that inadequate medical treatment may, in some instances, constitute a violation of 42 United States Code section 1983. In *Sturts v. City of Philadelphia,* for example, the plaintiff alleged that defendants acted 'carelessly, recklessly and negligently' when they failed to remove sutures from his eye, neck and face. The court concluded that although plaintiff was alleging inadequate medical treatment, he had stated a cause of action under section 1983: '... where a prisoner has received some medical attention and the dispute is over the adequacy of the treatment, federal courts are generally reluctant to second guess medical judgments. In some cases, however, the medical attention rendered may be so woefully inadequate as to amount to no treatment at all, thereby rising to the level of a § 1983 claim. ...'" (*Ochoa v. Superior Court* (1985) 39 Cal.3d 159, 176-177 [216 Cal.Rptr. 661, 703 P.2d 1], internal citations omitted.)

- "Because society does not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are 'serious.' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 9 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citation omitted.)

- "[T]here is a two-pronged test for evaluating a claim for deliberate indifference to a serious medical need: First, the plaintiff must show a serious medical need by demonstrating that failure to treat a prisoner's condition could result in further significant injury or the unnecessary and wanton infliction of pain. Second, the plaintiff must show the defendant's response to the need was deliberately indifferent. This second prong . . . is satisfied by showing (a) a purposeful act or failure to respond to a prisoner's pain or possible medical need and (b) harm caused by the indifference." (*Akhtar v. Mesa* (9th Cir. 2012) 698 F.3d 1202, 1213.)

- "A prison medical official who fails to provide needed treatment because he lacks the necessary

resources can hardly be said to have intended to punish the inmate. The challenged instruction properly advised the jury to consider the resources [defendant] had available in determining whether he was deliberately indifferent." (*Peralta, supra,* 744 F.3d at p. 1084.)

- "A 'serious' medical need exists if the failure to treat a prisoner's condition could result in further significant injury or the 'unnecessary and wanton infliction of pain.' The 'routine discomfort' that results from incarceration and which is 'part of the penalty that criminal offenders pay for their offenses against society' does not constitute a 'serious' medical need." (*Doty v. County of Lassen* (9th Cir. 1994) 37 F.3d 540, 546, internal citations and footnote omitted.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is "'pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

Secondary Sources

3 Witkin, Cal. Criminal Law (4th ed. 2012) Punishment, § 244

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

Schwarzer, et al., California Practice Guide: Federal Civil Procedure Before Trial, Ch. 2E-10, *Special Jurisdictional Limitations--Eleventh Amendment As Limitation On Actions Against States*, ¶ 2:4923 (The Rutter Group)

3 Civil Rights Actions, Ch. 11, *Deprivation of Rights Under Color of State Law-Prisons*, ¶ 11.09 (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 114, *Civil Rights: Prisoners' Rights*, § 114.15 (Matthew Bender)

19A California Points and Authorities, Ch. 196, *Public Entities*, § 196.183 (Matthew Bender)

3070. Disability Discrimination—Access Barriers to Public Facility—Construction-Related Accessibility Standards Act—Essential Factual Elements (Civ. Code, §§ 54.3, 55.56)

[*Name of defendant***] is the owner of [a/an] [***e.g., restaurant***] named [***name of business***] that is open to the public. [***Name of plaintiff***] is a disabled person who [***specify disability that creates accessibility problems***].**

[*Name of plaintiff***] claims that [he/she] was denied full and equal access to [***name of defendant***]'s business on a particular occasion because of physical barriers. To establish this claim, [***name of plaintiff***] must prove both of the following:**

1. **That [***name of defendant***]'s business had barriers that violated construction-related accessibility standards in that [***specify barriers***]; and [either]**

2. **[That [***name of plaintiff***] personally encountered the violation on a particular occasion.]**

   [or]

   [That [*name of plaintiff***] was deterred from accessing [***name of defendant***]'s business on a particular occasion.]**

[A violation that [*name of plaintiff***] personally encountered may be sufficient to cause a denial of full and equal access if [he/she] experienced difficulty, discomfort, or embarrassment because of the violation.]**

[To prove that [*name of plaintiff***] was deterred from accessing [***name of defendant***]'s business on a particular occasion, [he/she] must prove both of the following:**

1. **That [***name of plaintiff***] had actual knowledge of one or more violations that prevented or reasonably dissuaded [him/her] from accessing [***name of defendant***]'s business, which [***name of plaintiff***] intended to patronize on a particular occasion.**

2. **That the violation(s) would have actually denied [***name of plaintiff***] full and equal access if [he/she] had tried to patronize [***name of defendant***]'s business on that particular occasion.]**

New December 2014

Directions for Use

Use this instruction if a plaintiff seeks statutory damages based on a construction-related accessibility claim under the Disabled Persons Act (DPA) or the Unruh Civil Rights Act. (See Civ. Code, § 55.56(a).) Do not give this instruction if actual damages are sought. CACI No. 3067, *Unruh Civil Rights Act—Damages,* may be given for claims for actual damages under the Unruh Act and adapted for use

under .the DPA.

The DPA provides disabled persons with rights of access to public facilities. (See Civ. Code, §§ 54, 54.1.) Under the DPA, a disabled person who encounters barriers to access at a public accommodation may recover minimum statutory damages for each particular occasion on which he or she was denied access. (Civ. Code, §§ 54.3, 55.56(e).) However, the Construction Related Accessibility Standard Act (CRASA) requires that before statutory damages may be recovered, the disabled person either have personally encountered the violation on a particular occasion or have been deterred from accessing the facility on a particular occasion. (See Civ. Code, § 55.56.)

Give either or both options for element 2 depending on whether the plaintiff personally encountered the barrier or was deterred from patronizing the business because of awareness of the barrier. The next-to-last paragraph is explanatory of the first option, and the last paragraph is explanatory of the second option.

Sources and Authority

- Disabled Persons Act: Right of Access to Public Facilities. Civil Code sections 54, 54.1.
- Action for Interference With Admittance to or Enjoyment of Public Facilities. Civil Code section 54.3.
- Construction-Related Accessibility Standard Act. Civil Code section 55.56.
- "Part 2.5 of division 1 of the Civil Code, currently consisting of sections 54 to 55.3, is commonly referred to as the "Disabled Persons Act," although it has no official title. Sections 54 and 54.1 generally guarantee individuals with disabilities equal access to public places, buildings, facilities and services, as well as common carriers, housing and places of public accommodation, while section 54.3 specifies remedies for violations of these guarantees, including a private action for damages." (*Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 674 fn. 8 [94 Cal.Rptr.3d 685, 208 P.3d 623].)
- "[L]egislation (applicable to claims filed on or after Jan. 1, 2009 ([Civ. Code,] § 55.57)) restricts the availability of statutory damages under sections 52 and 54.3, permitting their recovery only if an accessibility violation actually denied the plaintiff full and equal access, that is, only if 'the plaintiff personally encountered the violation on a particular occasion, or the plaintiff was deterred from accessing a place of public accommodation on a particular occasion' (§ 55.56, subd. (b)). It also limits statutory damages to one assessment per occasion of access denial, rather than being based on the number of accessibility standards violated. (*Id.*, subd. (e).)" (*Munson, supra*, 46 Cal.4th at pp. 677−678.)
- " '[S]ection 54.3 imposes the standing requirement that the plaintiff have suffered an actual denial of equal access before any suit for damages can be brought. … [A] plaintiff cannot recover damages under section 54.3 unless the violation actually denied him or her access to some public facility. [¶] Plaintiff's attempt to equate a denial of equal access with the presence of a violation of federal or state regulations would nullify the standing requirement of section 54.3, since any

disabled person could sue for statutory damages whenever he or she encountered noncompliant facilities, regardless of whether that lack of compliance actually impaired the plaintiff's access to those facilities. Plaintiff's argument would thereby eliminate any distinction between a cause of action for equitable relief under section 55 and a cause of action for damages under section 54.3.' " (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1223 [99 Cal.Rptr.3d 746].)

- "Like the Unruh Civil Rights Act, the DPA incorporates the ADA to the extent that 'A violation of the right of an individual under the Americans with Disabilities Act of 1990 (Public Law 101-336) also constitutes a violation of this section.' (Civ. Code, § 54, subd. (c)." (*Baughman v. Walt Disney World Co.* (2013) 217 Cal.App.4th 1438, 1446 [159 Cal.Rptr.3d 825].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005), Constitutional Law § 957 et seq.

4342. Reduced Rent for Breach of Habitability

If you find that there has been a substantial breach of habitability, then you must find the reasonable reduced rental value of the property based on the uninhabitable conditions. To find this value, take the amount of monthly rent required by the [lease/rental agreement/sublease] and reduce it by the [dollar amount/ [or] percent] that you consider to reflect the uninhabitable conditions. Apply this reduction for the period of time, up to present, that the conditions were present. [You may make different reductions for different months if the conditions did not affect habitability uniformly over that period of time.]

New December 2014

Directions for Use

Give this instruction if the court decides that the jury should determine the reduced rental value of the premises based on a breach of the warranty of habitability. The court may instruct the jury to find a dollar reduction or a percent reduction, or may leave it up to the jury as to which approach to use. In this latter case, include both bracketed options.

Give the optional last sentence if the condition would not cause uniform hardship throughout the period. For example, the hardship caused by a broken furnace or air conditioner would vary according to the weather.

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 up 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.

Sources and Authority

- Breach of Warranty of Habitability. Code of Civil Procedure section 1174.2.

- "The second method suggested by *Green* [*Green v. Superior Court* (1974) 10 Cal.3d 616] is to first recognize the agreed contract rent as something the two parties have agreed to as proper for the premises as impliedly warranted. Then the court should take testimony and find on the percentage reduction of habitability (or usability) by the tenant by reason of the subsequently ascertained defects. Then reduce the agreed rent by this percentage, multiply the difference by the number of months of occupancy and voila!—the tenant's damages." (*Cazares v. Ortiz* (1980) 109 Cal.App.3d Supp. 23, 29 [168 Cal.Rptr. 108].)

Secondary Sources

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 3-D, Warranty Of Habitability—Measure Of Damages—Adjusting Rental Value, ¶¶ 3:82 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 3-E, Warranty Of Habitability—Tenant Remedies, ¶¶ 3:138 et seq. (The Rutter Group)

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

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

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

2. **That [***name of plaintiff***] was harmed by [***name of defendant***]'s failure.**

New December 2010; Revised June 2011, December 2014

Directions for Use

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

Also give CACI No. 303, *Breach of Contract—Essential Factual Elements*.

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

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

This instruction may be adapted for use with a claim by a homeowner who purchased the property from the developer-owner against the contractor for construction defects. Th~~ate~~ claim would be based on the homeowner's status as a third-party beneficiary of the builder-developer contract. (See *Burch v. Superior Court* (2014) 223 Cal.App.4th 1411, 1422−1423 [168 Cal.Rptr.3d 81] ; see also *Gilbert Financial Corp. v. Steelform Contracting Co.* (1978) 82 Cal.App.3d 65, 69-70 [homeowner can be beneficiary of contractor-subcontractor contract].)

Sources and Authority

- "[A]lthough [general contractor] … had a contractual relationship with the City, it also

had a duty of care to perform in a competent manner." (*Willdan v. Sialic Contractors Corp.* (2007) 158 Cal.App.4th 47, 57 [69 Cal.Rptr.3d 633].)

- "The defect complained of and the alleged breach of the warranty relate solely to fabrication and workmanship—the seams opened and the edges raveled. The failure of the carpet to last for the period warranted was occasioned by the defective sewing of the seams and binding of the edges, constituting a breach of the warranty as it related to good workmanship in assembling and installing it, but not as to the quality of the carpet itself." (*Southern California Enterprises, Inc. v. D. N. & E. Walter & Co.* (1947) 78 Cal.App.2d 750, 753–754 [178 P.2d 785], superceded by statute as stated in *Cardinal Health 301, Inc. v. Tyco Electronics Corp.* (2008) 169 Cal.App.4th 116, 132 [87 Cal. Rptr. 3d 5].)

- "[Subcontractor] agreed to perform the waterproofing and drainage work on the retaining walls built by [contractor] and had the duty to perform those tasks in a good and workmanlike manner." (*Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App.4th 740, 749 [50 Cal.Rptr.3d 709].)

- " 'Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort as well as a breach of the contract.' The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement." (*Kuitems, supra,* 104 Cal.App.2d at p. 485.)

- "Obviously, the statement in the written contract that it contains the entire agreement of the parties cannot furnish the appellants an avenue of escape from the entirely reasonable obligation implied in all contracts to the effect that the work performed 'shall be fit and proper for its said intended use' … ." (*Kuitems, supra,*104 Cal.App.2d at p. 485.)

- "[N]o warranty other than that of good workmanship can be implied where the contractor faithfully complies with plans and specifications supplied by the owner … ." (*Sunbeam Constr. Co. v. Fisci* (1969) 2 Cal.App.3d 181, 186 [82 Cal.Rptr. 446], internal citations omitted.)

- "[T]here is implied in a sales contract for newly constructed real property a warranty of quality and fitness. … '[T]he builder or seller of new construction—not unlike the manufacturer or merchandiser of personalty—makes implied representations, ordinarily indispensable to the sale, that the builder has used reasonable skill and judgment in constructing the building.' … '[W]e conclude builders and sellers of new construction should be held to what is impliedly represented—that the completed structure was designed and constructed in a reasonably workmanlike manner.' " (*Burch, supra,* 223 Cal.App.4th at p. 1423, internal citations omitted.)

- "[A] contract to build an entire building is essentially a contract for material and labor, and there is an implied warranty protecting the owner from defective construction.

Clearly, it would be anomalous to imply a warranty of quality when construction is pursuant to a contract with the owner—but fail to recognize a similar warranty when the sale follows completion of construction." (*Pollard v. Saxe & Yolles Dev. Co.* (1974) 12 Cal.3d 374, 378–379 [115 Cal.Rptr. 648, 525 P.2d 88], internal citations omitted.)

- "Several cases dealing with construction contracts and other contracts for labor and material show that ordinarily such contracts give rise to an implied warranty that the product will be fit for its intended use both as to workmanship and materials. These cases support the proposition that although the provisions of the Uniform Sales Act with respect to implied warranty (Civ. Code, §§ 1734–1736) apply only to sales, similar warranties may be implied in other contracts not governed by such statutory provisions when the contracts are of such a nature that the implication is justified. … [¶] The reference in the stipulation to merchantability, a term generally used in connection with sales, does not preclude reliance on breach of warranty although the contract is one for labor and material. With respect to sales, merchantability requires among other things that the substance sold be reasonably suitable for the ordinary uses it was manufactured to meet. The defect of which [plaintiff] complains is that the tubing was not reasonably suitable for its ordinary use, and his cause of action may properly be considered as one for breach of a warranty of merchantability. There is no justification for refusing to imply a warranty of suitability for ordinary uses merely because an article is furnished in connection with a construction contract rather than one of sale. The evidence, if taken in the light most favorable to [plaintiff], would support a determination that there was an implied warranty of merchantability." (*Aced, supra*, 55 Cal.2d at p. 583, internal citations omitted.)

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

Secondary Sources

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

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

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

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

11 Miller & Starr, California Real Estate, ~~(3d ed. 2008)~~ § 29:5 (Ch. 29, Defective Construction)~~Ch. 29, *Defective Construction*, § 29:5~~ (3d ed. 2008) (Thomson Reuters ~~West~~)

Acret, California Construction Law Manual ~~(6th ed. 2005)~~ § 5:39 (Ch. 5, Construction Defects) ~~Ch. 5, *Construction Defects,* § 5:39~~ (6th ed. 2005) (Thomson Reuters ~~West~~)

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

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

5012. Introduction to Special Verdict Form

I will give you [a] verdict form[s] with questions you must answer. I have already instructed you on the law that you are to use in answering these questions. You must follow my instructions and the form[s] carefully. You must consider each question separately. Although you may discuss the evidence and the issues to be decided in any order, you must answer the questions on the verdict form[s] in the order they appear. After you answer a question, the form tells you what to do next. ~~All 12 of you must deliberate on and answer each question.~~ At least 9 of you must agree on an answer before ~~all of~~ you can move on to the next question. However, the same 9 or more people do not have to agree on each answer.

All 12 of you must deliberate on and answer each question regardless of how you voted on any earlier question. Unless the verdict form tells all 12 jurors to stop and answer no further questions, every juror must deliberate and vote on all of the remaining questions.

When you have finished filling out the form[s], your presiding juror must write the date and sign it at the bottom [of the last page] and then notify the [bailiff/clerk/court attendant] that you are ready to present your verdict in the courtroom.

New September 2003; Revised April 2004, October 2008, December 2009, December 2014

Directions for Use

This instruction should be given if a special verdict form is used.~~If this instruction is read, do not read the sixth paragraph of CACI No. 5009, *Predeliberation Instructions*.~~

Sources and Authority

- General and Special Verdict Forms. Code of Civil Procedure section 624. ~~provides: "The verdict of a jury is either general or special. A general verdict is that by which they pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant; a special verdict is that by which the jury find the facts only, leaving the judgment to the Court. The special verdict must present the conclusions of fact as established by the evidence, and not the evidence to prove them; and those conclusions of fact must be so presented as that nothing shall remain to the Court but to draw from them conclusions of law."~~

- Special Verdicts; Requirements for Award of Punitive Damages. Code of Civil Procedure section 625. ~~provides: "In all cases the court may direct the jury to find a special verdict in writing, upon all, or any of the issues, and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. In all cases in which the issue of punitive damages is presented to the jury the court shall direct the jury to find a special verdict in writing separating punitive damages from compensatory damages. The special verdict or finding must be filed with the clerk and entered upon the minutes. Where a special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court~~

~~must give judgment accordingly.”~~

- “A special verdict presents to the jury each ultimate fact in the case, so that ‘nothing shall remain to the Court but to draw from them conclusions of law.’ This procedure presents certain problems: ‘ “The requirement that the jury must resolve every controverted issue is one of the recognized pitfalls of special verdicts. ‘[T]he possibility of a defective or incomplete special verdict, or possibly no verdict at all, is much greater than with a general verdict that is tested by special findings ... .’ ” ’ With a special verdict, we do not imply findings on all issues in favor of the prevailing party, as with a general verdict. The verdict’s correctness must be analyzed as a matter of law.” (*Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 285 [73 Cal.Rptr.2d 596], internal citations omitted.)

- “When a jury is composed of 12 persons, it is sufficient if *any* nine jurors arrive at each special verdict, regardless of the jurors’ votes on other special verdict questions.” (*Keener v. Jeld-Wen, Inc.* (2009) 46 Cal.4th 247, 255 [92 Cal.Rptr.3d 862, 206 P.3d 403], original italics.)

- “Appellate courts differ concerning the use of special verdicts. In one case the court said, ‘we should utilize opportunities to force counsel into requesting special verdicts.’ In contrast, a more recent decision included the negative view: ‘Toward this end we advise that special findings be requested of juries only when there is a compelling need to do so. Absent strong reason to the contrary their use should be discouraged.’ Obviously, it is easier to tell after the fact, rather than before, whether the special verdict is helpful in disclosing the jury conclusions leading to the end result.” (*All-West Design, Inc. v. Boozer* (1986) 183 Cal.App.3d 1212, 1221 [228 Cal.Rptr. 736], internal citations omitted.)

- “[W]e begin with the requirement that at least nine of twelve jurors agree that each element of a cause of action has been proved by a preponderance of the evidence. The elements of a cause of action constitute the essential or ultimate facts in a civil case comparable to the elements of a single, discrete criminal offense in a criminal case. Analogizing a civil ‘cause of action’ to a single, discrete criminal offense, and applying the criminal law jury agreement principles to civil law, we conclude that jurors need not agree from among a number of alternative acts which act is proved, so long as the jurors agree that each element of the cause of action is proved.” (*Stoner v. Williams* (1996) 46 Cal.App.4th 986, 1002 [54 Cal.Rptr.2d 243, footnote omitted.)

- “In civil cases in which there exist multiple causes of action for which multiple or alternative acts could support elements of more than one cause of action, possible jury confusion could result as to whether a specific cause of action is proved. In those cases, … we presume that jury instructions may be appropriate to inform the jury that it must agree on specific elements of each specific cause of action. Yet, this still does not require that the jurors agree on exactly how each particular element of a particular cause of action is proved.” (*Stoner, supra*, 46 Cal.App.4th at p. 1002.)

- “[A] juror who dissented from a special verdict finding negligence should not be disqualified from fully participating in the jury’s further deliberations, including the determination of proximate cause. The jury is to determine all questions submitted to it, and when the jury is composed of twelve persons, each should participate as to each verdict submitted to it. To hold that a juror may be disqualified by a special verdict on negligence from participation in the next special verdict would deny the parties of ‘the right to a jury of 12 persons deliberating on all issues.’ Permitting any nine

jurors to arrive at each special verdict best serves the purpose of less-than-unanimous verdicts, overcoming minor disagreements and avoiding costly mistrials. Once nine jurors have found a party negligent, dissenting jurors can accept the finding and participate in determining proximate cause just as they may participate in apportioning liability, and we may not assume that the dissenting jurors will violate their oaths to deliberate honestly and conscientiously on the proximate cause issue." (*Resch v. Volkswagen of America, Inc.* (1984) 36 Cal.3d 676, 682 [205 Cal.Rptr. 827, 685 P.2d 1178], internal citations omitted.)

Secondary Sources

7 Witkin, California Procedure (5th ed. 2008) Trial, §§ 342–346

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.21 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 318, *Judgments*, § 318.49 (Matthew Bender)

28 California Forms of Pleading and Practice, Ch. 326A, *Jury Verdicts*, § 326A.11 et seq. (Matthew Bender)

1 Matthew Bender Practice Guide: California Trial and Post-Trial Civil Procedure, Ch. 18, *Jury Verdicts*, 18.11 et seq.