201. Highly Probable—Clear and Convincing Proof

Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means the party must persuade you that it is highly probable that the fact is true. I will tell you specifically which facts must be proved by clear and convincing evidence.

New September 2003; Revised October 2004, June 2015

Directions for Use

Evidence Code section 502 requires the court to instruct the jury regarding which party bears the burden of proof on each issue and the requisite degree of proof.

This instruction should be read immediately after CACI No. 200, *Obligation to Prove—More Likely True Than Not True*, if the jury will have to decide an issue by means of the clear-and-convincing evidence standard.

Sources and Authority

- Burden of Proof. Evidence Code section 115.
- Party With Burden of Proof. Evidence Code section 500.
- "Proof by clear and convincing evidence is required 'where particularly important individual interests or rights are at stake,' such as the termination of parental rights, involuntary commitment, and deportation. However, 'imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487 [286 Cal.Rptr. 40, 816 P.2d 892] (quoting *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389–390).)
- " 'Clear and convincing' evidence requires a finding of high probability." (*In re Angelia P.* (1981) 28 Cal.3d 908, 919 [171 Cal.Rptr. 637, 623 P.2d 198].)
- "Under the clear and convincing standard, the evidence must be ' " ' "so clear as to leave no substantial doubt" ' " ' and ' " ' "sufficiently strong to command the unhesitating assent of every reasonable mind." ' " ' " (*Butte Fire Cases* (2018) 24 Cal.App.5th 1150, 1158 [235 Cal.Rptr.3d 228].)
- "We decline to hold that CACI No. 201 should be augmented to require that 'the evidence must be "so clear as to leave no substantial doubt" and "sufficiently strong as to command the unhesitating assent of every reasonable mind." ' Neither *In re Angelia P., supra*, 28 Cal.3d 908, nor any more recent authority mandates that augmentation, and the proposed additional language is dangerously similar to that describing the burden of proof in criminal cases." (*Nevarrez v. San Marino Skilled Nursing & Wellness Center* (2013) 221 Cal.App.4th 102, 114 [163 Cal.Rptr.3d 874].)

CACI No. 201

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Burden of Proof and Presumptions, §§ 39, 40

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 45.4, 45.21

4 California Trial Guide, Unit 91, *Jury Deliberations and Rendition of Verdict*, § 91.20 (Matthew Bender)

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.90, 551.92 (Matthew Bender)

1 Cathcart et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 9, *Burdens of Proof and Persuasion*, 9.16

219. Expert Witness Testimony

During the trial you heard testimony from expert witnesses. The law allows an expert to state opinions about matters in his or her field of expertise even if he or she has not witnessed any of the events involved in the trial.

You do not have to accept an expert's opinion. As with any other witness, it is up to you to decide whether you believe the expert's testimony and choose to use it as a basis for your decision. You may believe all, part, or none of an expert's testimony. In deciding whether to believe an expert's testimony, you should consider:

a. The expert's training and experience;

b. The facts the expert relied on; and

c. The reasons for the expert's opinion.

New September 2003

Directions for Use

This instruction should not be given for expert witness testimony on the standard of care in professional malpractice cases if the testimony is uncontradicted. Uncontradicted testimony of an expert witness on the standard of care in a professional malpractice case is conclusive. (*Howard v. Owens Corning* (1999) 72 Cal.App.4th 621, 632–633 [85 Cal.Rptr.2d 386]; *Conservatorship of McKeown* (1994) 25 Cal.App.4th 502, 509 [30 Cal.Rptr.2d 542]; *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 156 [65 Cal.Rptr. 406].) In all other cases, the jury may reject expert testimony, provided that the jury does not act arbitrarily. (*McKeown, supra,* 25 Cal.App.4th at p. 509.)

Do not use this instruction in eminent domain and inverse condemnation cases. (See *Aetna Life and Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 877 [216 Cal.Rptr. 831]; CACI No. 3515, *Valuation Testimony*.)

For an instruction on hypothetical questions, see CACI No. 220, *Experts—Questions Containing Assumed Facts*. For an instruction on conflicting expert testimony, see CACI No. 221, *Conflicting Expert Testimony*.

Sources and Authority

- Qualification as Expert. Evidence Code section 720(a).
- " 'A properly qualified expert may offer an opinion relating to a subject that is beyond common experience, if that expert's opinion will assist the trier of fact.' 'However, even when the witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise. [Citation.] For example, an expert's opinion based on assumptions of fact

without evidentiary support [citation], or on speculative or conjectural factors [citation], has no evidentiary value [citation] and may be excluded from evidence. [Citations.] Similarly, when an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an "expert opinion is worth no more than the reasons upon which it rests." ' 'An expert who gives only a conclusory opinion does not assist the jury to determine what occurred, but instead supplants the jury by declaring what occurred.' " (*Property California SCJLW One Corp. v. Leamy* (2018) 25 Cal.App.5th 1155, 1163 [236 Cal.Rptr.3d 500], internal citation omitted.)

- "Under Evidence Code section 720, subdivision (a), a person is qualified to testify as an expert if he or she 'has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates.' '[T]he determinative issue in each case must be whether the witness has sufficient skill or experience in the field so that his testimony would be likely to assist the jury in the search for the truth . . . . [Citation.] Where a witness has disclosed sufficient knowledge, the question of the degree of knowledge goes more to the weight of the evidence than its admissibility. [Citation.]' " (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 969 [191 Cal.Rptr.3d 766].)
- The "credibility of expert witnesses is a matter for the jury after proper instructions from the court." (*Williams v. Volkswagenwerk Aktiengesellschaft* (1986) 180 Cal.App.3d 1244, 1265 [226 Cal.Rptr. 306].)
- "[U]nder Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. Other provisions of law, including decisional law, may also provide reasons for excluding expert opinion testimony. [¶] But courts must also be cautious in excluding expert testimony. The trial court's gatekeeping role does not involve choosing between competing expert opinions." (*Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771–772 [149 Cal.Rptr.3d 614, 288 P.3d 1237], footnote omitted.)
- " 'Generally, the opinion of an expert is admissible when it is "[r]elated to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact . . . ." [Citations.] Also, "[t]estimony in the form of an opinion that is otherwise admissible is not objectionable because it embraces the ultimate issue to be decided by the trier of fact." [Citation.] However, " 'Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates.' " ' Expert testimony will be excluded ' " 'when it would add nothing at all to the jury's common fund of information, i.e., when 'the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." ' " ' "

(*Burton v. Sanner* (2012) 207 Cal.App.4th 12, 19 [142 Cal.Rptr.3d 782], internal citations omitted.)

- Under Evidence Code section 801(a), expert witness testimony "must relate to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact." (*New v. Consolidated Rock Products Co.* (1985) 171 Cal.App.3d 681, 692 [217 Cal.Rptr. 522].)
- Expert witnesses are qualified by special knowledge to form opinions on facts that they have not personally witnessed. (*Manney v. Housing Authority of The City of Richmond* (1947) 79 Cal.App.2d 453, 460 [180 P.2d 69].)
- "Although a jury may not arbitrarily or unreasonably disregard the testimony of an expert, it is not bound by the expert's opinion. Instead, it must give to each opinion the weight which it finds the opinion deserves. So long as it does not do so arbitrarily, a jury may entirely reject the testimony of a plaintiff's expert, even where the defendant does not call any opposing expert and the expert testimony is not contradicted." (*Howard, supra,* 72 Cal.App.4th at p. 633, citations omitted.)
- "When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth." (*People v. Sanchez* (2016) 63 Cal.4th 665, 686 [204 Cal.Rptr.3d 102, 374 P.3d 320].)
- "Any expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so. Because the jury must independently evaluate the probative value of an expert's testimony, Evidence Code section 802 properly allows an expert to relate generally the kind and source of the 'matter' upon which his opinion rests. A jury may repose greater confidence in an expert who relies upon well-established scientific principles. It may accord less weight to the views of an expert who relies on a single article from an obscure journal or on a lone experiment whose results cannot be replicated. There is a distinction to be made between allowing an expert to describe the type or source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception." (*People v. Sanchez*, *supra*, 63 Cal.4th at pp. 685–686, original italics.)

Secondary Sources

1 Witkin, California Evidence (5th ed. 2012) Opinion Evidence, §§ 26–44

Jefferson, California Evidence Benchbook (3d ed. 1997) §§ 29.18–29.55

1 Levy et al., California Torts, Ch. 3, *Proof of Negligence*, § 3.04 (Matthew Bender)

3A California Trial Guide, Unit 60, *Opinion Testimony*, § 60.05 (Matthew Bender)

California Products Liability Actions, Ch. 4, *The Role of the Expert*, § 4.03 (Matthew Bender)

CACI No. 219

48 California Forms of Pleading and Practice, Ch. 551, *Trial*, §§ 551.70, 551.113 (Matthew Bender)

302. Contract Formation—Essential Factual Elements

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

1. **That the contract terms were clear enough that the parties could understand what each was required to do;**
2. **That the parties agreed to give each other something of value [a promise to do something or not to do something may have value]; and**
3. **That the parties agreed to the terms of the contract.**

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

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

New September 2003; Revised October 2004, June 2011, June 2014

Directions for Use

This instruction should only be given if the existence of a contract is contested. At other times, the parties may be contesting only a limited number of contract formation issues. Also, some of these issues may be decided by the judge as a matter of law. Read the bracketed paragraph only if element 3 is read.

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

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

Sources and Authority

- Essential Elements of Contract. Civil Code section 1550.
- Who May Contract. Civil Code section 1556.
- Consent. Civil Code section 1565.

CACI No. 302

- Mutual Consent. Civil Code section 1580.
- Good Consideration. Civil Code section 1605.
- Writing Is Presumption of Consideration. Civil Code section 1614.
- Burden of Proof on Consideration. Civil Code section 1615.
- "Whether parties have reached a contractual agreement and on what terms are questions for the fact finder when conflicting versions of the parties' negotiations require a determination of credibility." (*Hebberd-Kulow Enterprises, Inc. v. Kelomar, Inc.* (2013) 218 Cal.App.4th 272, 283 [159 Cal.Rptr.3d 869].)
- "Whether a contract is illegal or contrary to public policy is a question of law to be determined from the circumstances of each particular case." (*Jackson v. Rogers & Wells* (1989) 210 Cal.App.3d 336, 349–350 [258 Cal.Rptr. 454].)
- "In order for acceptance of a proposal to result in the formation of a contract, the proposal 'must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance promised is reasonably certain.' [Citation.]" (*Weddington Productions, Inc. v. Flick* (1998) 60 Cal.App.4th 793, 811 [71 Cal.Rptr.2d 265].)
- "Whether a contract is sufficiently definite to be enforceable is a question of law for the court." (*Ladas v. California State Automobile Assn.* (1993) 19 Cal.App.4th 761, 770, fn. 2 [23 Cal.Rptr.2d 810].)
- "Consideration is present when the promisee confers a benefit or suffers a prejudice. Although 'either alone is sufficient to constitute consideration,' the benefit or prejudice ' " 'must actually be bargained for as the exchange for the promise.' " ' 'Put another way, the benefit or prejudice must have induced the promisor's promise.' It is established that 'the compromise of disputes or claims asserted in good faith constitutes consideration for a new promise.' " (*Property California SCJLW One Corp. v. Leamy* (2018) 25 Cal.App.5th 1155, 1165 [236 Cal.Rptr.3d 500], internal citations omitted.)
- "[T]he presumption of consideration under [Civil Code] section 1614 affects the burden of producing evidence and not the burden of proof." (*Rancho Santa Fe Pharmacy, Inc. v. Seyfert* (1990) 219 Cal.App.3d 875, 884 [268 Cal.Rptr. 505].)
- "Being an affirmative defense, lack of consideration must be alleged in answer to the complaint." (*National Farm Workers Service Center, Inc. v. M. Caratan, Inc.* (1983) 146 Cal.App.3d 796, 808 [194 Cal.Rptr. 617].)
- " 'It matters not from whom the consideration moves or to whom it goes. If it is bargained for and given in exchange for the promise, the promise is not gratuitous.' " (*Flojo Internat., Inc. v. Lassleben* (1992) 4 Cal.App.4th 713, 719 [6 Cal.Rptr.2d 99], internal citation omitted.)
- "The failure to specify the amount or a formula for determining the amount of the bonus does not render the agreement too indefinite for enforcement. It is not essential that the contract specify the amount of the consideration or the means

of ascertaining it." (*Moncada v. West Coast Quartz Corp.* (2013) 221 Cal.App.4th 768, 778 [164 Cal.Rptr.3d 601].)

- "Contract formation is governed by objective manifestations, not subjective intent of any individual involved. The test is 'what the outward manifestations of consent would lead a reasonable person to believe.' " (*Roth v. Malson* (1998) 67 Cal.App.4th 552, 557 [79 Cal.Rptr.2d 226], internal citations omitted.)
- "The manifestation of assent to a contractual provision may be 'wholly or partly by written or spoken words or by other acts or by failure to act.' " (*Merced County Sheriff's Employees' Assn. v. County of Merced* (1987) 188 Cal.App.3d 662, 670 [233 Cal.Rptr. 519] (quoting Rest. 2d Contracts, § 19).)
- "A letter of intent can constitute a binding contract, depending on the expectations of the parties. These expectations may be inferred from the conduct of the parties and surrounding circumstances." (*California Food Service Corp., Inc. v. Great American Insurance Co.* (1982) 130 Cal.App.3d 892, 897 [182 Cal.Rptr. 67], internal citations omitted.)
- "If words are spoken under circumstances where it is obvious that neither party would be entitled to believe that the other intended a contract to result, there is no contract." (*Fowler v. Security-First National Bank* (1956) 146 Cal.App.2d 37, 47 [303 P.2d 565].)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 116 et seq.

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

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

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

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

303. Breach of Contract—Essential Factual Elements

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

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

[2. That [*name of plaintiff***] did all, or substantially all, of the significant things that the contract required [him/her/it] to do;]**

[or]

[2. That [*name of plaintiff***] was excused from having to [***specify things that plaintiff did not do, e.g., obtain a guarantor on the contract***];]**

[3. That [*specify occurrence of all conditions required by the contract for [name of defendant]'s performance, e.g., the property was rezoned for residential use***];]**

[or]

[3. That [*specify condition(s) that did not occur***] [was/were] [waived/excused];]**

[4. That [*name of defendant***] failed to do something that the contract required [him/her/it] to do;]**

[*or***]**

[4. That [*name of defendant***] did something that the contract prohibited [him/her/it] from doing;]**

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

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

New September 2003; Revised April 2004, June 2006, December 2010, June 2011, June 2013, June 2015, December 2016

Directions for Use

Read this instruction in conjunction with CACI No. 300, *Breach of Contract—Introduction*.

Optional elements 2 and 3 both involve conditions precedent. A "condition precedent" is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises. (*Stephens & Stephens XII, LLC v. Fireman's Fund Ins. Co.* (2014) 231 Cal.App.4th 1131, 1147 [180 Cal.Rptr.3d 683].) Element 2 involves the first kind of condition

precedent; an act that must be performed by one party before the other is required to perform. Include the second option if the plaintiff alleges that he or she was excused from having to perform some or all of the contractual conditions.

Not every breach of contract by the plaintiff will relieve the defendant of the obligation to perform. The breach must be *material;* element 2 captures materiality by requiring that the plaintiff have done the significant things that the contract required. Also, the two obligations must be *dependent*, meaning that the parties specifically bargained that the failure to perform the one relieves the obligation to perform the other. While materiality is generally a question of fact, whether covenants are dependent or independent is a matter of construing the agreement. (*Brown v. Grimes* (2011) 192 Cal.App.4th 265, 277–279 [120 Cal.Rptr.3d 893].) If there is no extrinsic evidence in aid of construction, the question is one of law for the court. (*Verdier v. Verdier* (1955) 133 Cal.App.2d 325, 333 [284 P.2d 94].) Therefore, element 2 should not be given unless the court has determined that dependent obligations are involved. If parol evidence is required and a dispute of facts is presented, additional instructions on the disputed facts will be necessary. (See *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 395 [75 Cal.Rptr.3d 333, 181 P.3d 142].)

Element 3 involves the second kind of condition precedent; an uncertain event that must happen before contractual duties are triggered. Include the second option if the plaintiff alleges that the defendant agreed to perform even though a condition did not occur. For reasons that the occurrence of a condition may have been excused, see the Restatement Second of Contracts, section 225, Comment b. See also CACI No. 321, *Existence of Condition Precedent Disputed*, CACI No. 322, *Occurrence of Agreed Condition Precedent*, and CACI No. 323, *Waiver of Condition Precedent*.

Element 6 states the test for causation in a breach of contract action: whether the breach was a substantial factor in causing the damages. (*US Ecology, Inc. v. State of California* (2005) 129 Cal.App.4th 887, 909 [28 Cal.Rptr.3d 894].) In the context of breach of contract, it has been said that the term "substantial factor" has no precise definition, but is something that is more than a slight, trivial, negligible, or theoretical factor in producing a particular result. (*Haley v. Casa Del Rey Homeowners Assn.* (2007) 153 Cal.App.4th 863, 871–872 [63 Cal.Rptr.3d 514]; see CACI No. 430, *Causation—Substantial Factor*, applicable to negligence actions.)

Equitable remedies are also available for breach. "As a general proposition, '[t]he jury trial is a matter of right in a civil action at law, but not in equity. [Citations.]' " (*C & K Engineering Contractors v. Amber Steel Co., Inc.* (1978) 23 Cal.3d 1, 8 [151 Cal.Rptr. 323, 587 P.2d 1136]; *Selby Constructors v. McCarthy* (1979) 91 Cal.App.3d 517, 524 [154 Cal.Rptr. 164].) However, juries may render advisory verdicts on these issues. (*Raedeke v. Gibraltar Savings & Loan Assn.* (1974) 10 Cal.3d 665, 670–671 [111 Cal.Rptr. 693, 517 P.2d 1157].)

Sources and Authority

- Contract Defined. Civil Code section 1549.

- "A contract is a voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing." (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)
- "To prevail on a cause of action for breach of contract, the plaintiff must prove (1) the contract, (2) the plaintiff's performance of the contract or excuse for nonperformance, (3) the defendant's breach, and (4) the resulting damage to the plaintiff." (*Richman v. Hartley* (2014) 224 Cal.App.4th 1182, 1186 [169 Cal.Rptr.3d 475].)
- "Implicit in the element of damage is that the defendant's breach *caused* the plaintiff's damage." (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352 [90 Cal.Rptr.3d 589], original italics.)
- "It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance. Similarly, where defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc., v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524], internal citation omitted.)
- "When a party's failure to perform a contractual obligation constitutes a material breach of the contract, the other party may be discharged from its duty to perform under the contract. Normally the question of whether a breach of an obligation is a material breach, so as to excuse performance by the other party, is a question of fact. Whether a partial breach of a contract is material depends on 'the importance or seriousness thereof and the probability of the injured party getting substantial performance.' 'A material breach of one aspect of a contract generally constitutes a material breach of the whole contract.' " (*Brown, supra*, 192 Cal.App.4th at pp. 277–278, internal citations omitted.)
- "The obligations of the parties to a contract are either dependent or independent. The parties' obligations are dependent when the performance by one party is a condition precedent to the other party's performance. In that event, one party is excused from its obligation to perform if the other party fails to perform. If the parties' obligations are independent, the breach by one party does not excuse the other party's performance. Instead, the nonbreaching party still must perform and its remedy is to seek damages from the other party based on its breach of the contract." (*Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1182–1183 [236 Cal.Rptr.3d 542], internal citations omitted.)
- "Whether specific contractual obligations are independent or dependent is a matter of contract interpretation based on the contract's plain language and the parties' intent. Dependent covenants or '[c]onditions precedent are not favored in the law [citations], and courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that effect.' " (*Colaco*, *supra*, 25 Cal.App.5th at p. 1183, internal citations omitted.)
- "The wrongful, i.e., the unjustified or unexcused, failure to perform a contract is

a *breach*. Where the nonperformance is legally justified, or excused, there may be a failure of consideration, but not a breach." (1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 847, original italics, internal citations omitted.) "Ordinarily, a breach is the result of an intentional act, but *negligent performance* may also constitute a breach, giving rise to alternative contract and tort actions." (*Ibid.*, original italics.)

- " ' "Where a party's breach by non-performance contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused." [Citation.]' " (*Stephens & Stephens XII, LLC, supra*, 231 Cal. App. 4th at p. 1144.)
- " 'Causation of damages in contract cases, as in tort cases, requires that the damages be proximately caused by the defendant's breach, and that their causal occurrence be at least reasonably certain.' A proximate cause of loss or damage is something that is a substantial factor in bringing about that loss or damage." (*U.S. Ecology, Inc., supra*, 129 Cal.App.4th at p. 909, internal citations omitted.)
- "An essential element of [breach of contract] claims is that a defendant's alleged misconduct was the cause in fact of the plaintiff's damage. [¶] The causation analysis involves two elements. ' "One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event." [Citation.]' The second element is proximate cause. ' "[P]roximate cause 'is ordinarily concerned, not with the fact of causation, but with the various considerations of policy that limit an actor's responsibility for the consequences of his conduct.' " ' " (*Tribeca Companies, LLC v. First American Title Ins. Co.* (2015) 239 Cal.App.4th 1088, 1102–1103 [192 Cal.Rptr.3d 354], footnote and internal citation omitted.)
- "Determining whether a defendant's misconduct was the cause in fact of a plaintiff's injury involves essentially the same inquiry in both contract and tort cases." (*Tribeca Companies, LLC, supra*, 239 Cal.App.4th at p. 1103.)
- "b. *Excuse*. The non-occurrence of a condition of a duty is said to be 'excused' when the condition need no longer occur in order for performance of the duty to become due. The non-occurrence of a condition may be excused on a variety of grounds. It may be excused by a subsequent promise, even without consideration, to perform the duty in spite of the non-occurrence of the condition. See the treatment of 'waiver' in § 84, and the treatment of discharge in §§ 273–85. It may be excused by acceptance of performance in spite of the non-occurrence of the condition, or by rejection following its non-occurrence accompanied by an inadequate statement of reasons. See §§ 246–48. It may be excused by a repudiation of the conditional duty or by a manifestation of an inability to perform it. See § 255; §§ 250–51. It may be excused by prevention or hindrance of its occurrence through a breach of the duty of good faith and fair dealing (§ 205). See § 239. And it may be excused by impracticability. See § 271. These and other grounds for excuse are dealt with in other chapters of this Restatement. This Chapter deals only with one general ground, excuse to

avoid forfeiture. See § 229." (Rest.2d of Contracts, § 225, comment b.)

Secondary Sources

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

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

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

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

321. Existence of Condition Precedent Disputed

[*Name of defendant***] claims that the contract with [***name of plaintiff***] provides that [he/she/it] was not required to [***insert duty***] unless [***insert condition precedent***].**

[*Name of defendant***] must prove that the parties agreed to this condition. If [***name of defendant***] proves this, then [***name of plaintiff***] must prove that [***insert condition precedent***].**

If [*name of plaintiff***] does not prove that [***insert condition precedent***], then [***name of defendant***] was not required to [***insert duty***].**

New September 2003

Directions for Use

This instruction should only be given if both the existence and the occurrence of a condition precedent are contested. If only the occurrence of a condition precedent is contested, use CACI No. 322, *Occurrence of Agreed Condition Precedent*.

Sources and Authority

- Conditional Obligation. Civil Code section 1434.
- Condition Precedent. Civil Code section 1436.
- "Under the law of contracts, parties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event." (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 313 [24 Cal.Rptr.2d 597, 862 P.2d 158].)
- "A conditional obligation is one in which 'the rights or duties of any party thereto depend upon the occurrence of an uncertain event.' '[P]arties may expressly agree that a right or duty is conditional upon the occurrence or nonoccurrence of an act or event.' A condition in a contract may be a condition precedent, concurrent, or subsequent. '[A] condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises.' " (*JMR Construction Corp. v. Environmental Assessment & Remediation Management, Inc.* (2015) 243 Cal.App.4th 571, 593 [198 Cal.Rptr.3d 47].)
- "The existence of a condition precedent normally depends upon the intent of the parties as determined from the words they have employed in the contract." (*Karpinski v. Smitty's Bar, Inc.* (2016) 246 Cal.App.4th 456, 464 [201 Cal.Rptr.3d 148].)
- "Dependent covenants or '[c]onditions precedent are not favored in the law [citations], and courts shall not construe a term of the contract so as to establish a condition precedent absent plain and unambiguous contract language to that

effect.' " (*Colaco v. Cavotec SA* (2018) 25 Cal.App.5th 1172, 1183 [236 Cal.Rptr.3d 542], internal citations omitted.)

- "[W]here defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)
- "When a contract establishes the satisfaction of one of the parties as a condition precedent, two tests are recognized: (1) The party is bound to make his decision according to the judicially discerned, objective standard of a reasonable person; (2) the party may make a subjective decision regardless of reasonableness, controlled only by the need for good faith. Which test applies in a given transaction is a matter of actual or judicially inferred intent. Absent an explicit contractual direction or one implied from the subject matter, the law prefers the objective, i.e., reasonable person, test." (*Guntert v. City of Stockton* (1974) 43 Cal.App.3d 203, 209 [117 Cal.Rptr. 601], internal citations omitted.)
- "[T]he parol evidence rule does not apply to conditions precedent." (*Karpinski, supra,* 246 Cal.App.4th at p. 464, fn 6.)

Secondary Sources

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, §§ 780–791

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, §§ 140.44, 140.101 (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, §§ 50.20–50.22 (Matthew Bender)

27 California Legal Forms, Ch. 75, *Formation of Contracts and Standard Contractual Provisions*, § 75.230 (Matthew Bender)

2 Matthew Bender Practice Guide: California Contract Litigation, Ch. 22, *Suing or Defending Action for Breach of Contract*, 22.19, 22.66

338. Affirmative Defense—Statute of Limitations

[*Name of defendant***] contends that [***name of plaintiff***]'s lawsuit was not filed within the time set by law. To succeed on this defense, [***name of defendant***] must prove that [***name of plaintiff***]'s claimed harm occurred before [***insert date two or four years before date of filing***].**

New December 2007

Directions for Use

This instruction is for use if the defendant claims that the plaintiff's action was not filed within the applicable four-year period for breach of a written contract (see Code Civ. Proc., § 337(1)) or two-year period for breach of an oral contract. (See Code Civ. Proc., § 339(1).) Do not use this instruction for breach of a California Uniform Commercial Code sales contract. (See Com. Code, § 2725.)

If the contract either shortens or extends the limitation period, use the applicable period from the contract instead of two years or four years.

If the plaintiff alleges that the delayed-discovery rule applies to avoid the limitation defense, CACI No. 455, *Statute of Limitations—Delayed Discovery,* may be adapted for use.

Sources and Authority

- Four-Year Statute of Limitations: Contract. Code of Civil Procedure section 337(a).
- Two-Year Statute of Limitations: Contract. Code of Civil Procedure section 339(1).
- "In general, California courts have permitted contracting parties to modify the length of the otherwise applicable California statute of limitations, whether the contract has extended or shortened the limitations period." (*Hambrecht & Quist Venture Partners v. Am. Medical Internat.* (1995) 38 Cal.App.4th 1532, 1547 [46 Cal.Rptr.2d 33].)
- "A contract cause of action does not accrue until the contract has been breached." (*Spear v. Cal. State Automobile Assn.* (1992) 2 Cal.4th 1035, 1042 [9 Cal.Rptr.2d 381, 831 P.2d 821].)
- "The claim accrues when the plaintiff discovers, or could have discovered through reasonable diligence, the injury and its cause." (*Angeles Chem. Co. v. Spencer & Jones* (1996) 44 Cal.App.4th 112, 119 [51 Cal.Rptr.2d 594].)
- "[T]he discovery rule may be applied to breaches [of contract] which can be, and are, committed in secret and, moreover, where the harm flowing from those breaches will not be reasonably discoverable by plaintiffs until a future time." (*Gryczman v. 4550 Pico Partners, Ltd.* (2003) 107 Cal.App.4th 1, 4–5 [131

Cal.Rptr.2d 680].)

Secondary Sources

3 Witkin, California Procedure (5th ed. 2008) Actions, §§ 508–548

5 Witkin, California Procedure (5th ed. 2008) Pleading, § 1072

1 Witkin, Summary of California Law (10th ed. 2005) Contracts, § 344

13 California Forms of Pleading and Practice, Ch. 140, *Contracts*, § 140.42[2] (Matthew Bender)

5 California Points and Authorities, Ch. 50, *Contracts*, § 50.120 et seq. (Matthew Bender)

Matthew Bender Practice Guide: California Contract Litigation, Ch. 4, *Determining Applicable Statute of Limitations and Effect on Potential Action*, 4.03 et seq.

400. Negligence—Essential Factual Elements

[*Name of plaintiff*] claims that [he/she] was harmed by [*name of defendant*]'s negligence. 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*] was harmed; and**
3. **That [*name of defendant*]'s negligence was a substantial factor in causing [*name of plaintiff*]'s harm.**

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

Directions for Use

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph.

The word "harm" is used throughout these instructions, instead of terms like "loss," "injury," and "damage," because "harm" is all-purpose and suffices in their place.

Sources and Authority

- General Duty to Exercise Due Care. Civil Code section 1714(a).
- "Although it is true that some exceptions have been made to the general principle that a person is liable for injuries caused by his failure to exercise reasonable care in the circumstances, it is clear that in the absence of statutory provision declaring an exception to the fundamental principle enunciated by section 1714 of the Civil Code, no such exception should be made unless clearly supported by public policy." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 112 [70 Cal.Rptr. 97, 443 P.2d 561].)
- " 'The elements of a cause of action for negligence are well established. They are "(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." ' " (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917 [50 Cal.Rptr.2d 309, 911 P.2d 496].)
- "Breach is the failure to meet the standard of care." (*Coyle v. Historic Mission Inn Corp.* (2018) 24 Cal.App.5th 627, 643 [234 Cal.Rptr.3d 330].)
- "The element of causation requires there to be a connection between the defendant's breach and the plaintiff's injury." (*Coyle*, *supra*, 24 Cal.App.5th at p. 645.)
- " 'In most cases, courts have fixed no standard of care for tort liability more precise than that of a reasonably prudent person under like circumstances.' This

is because '[e]ach case presents different conditions and situations. What would be ordinary care in one case might be negligence in another.' " (*Coyle*, *supra*, 24 Cal.App.5th at pp. 639–640, internal citation omitted.)

- "The first element, duty, 'may be imposed by law, be assumed by the defendant, or exist by virtue of a special relationship.' " (*Doe v. United States Youth Soccer Assn., Inc.* (2017) 8 Cal.App.5th 1118, 1128 [214 Cal.Rptr.3d 552].)
- "[T]he existence of a duty is a question of law for the court." (*Ky. Fried Chicken of Cal. v. Superior Court* (1997) 14 Cal.4th 814, 819 [59 Cal.Rptr.2d 756, 927 P.2d 1260].)
- "In the *Rowland* [*Rowland, supra*, 69 Cal.2d at p. 113] decision, this court identified several considerations that, when balanced together, may justify a departure from the fundamental principle embodied in Civil Code section 1714: 'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.' As we have also explained, however, in the absence of a statutory provision establishing an exception to the general rule of Civil Code section 1714, courts should create one only where 'clearly supported by public policy.' " (*Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 771 [122 Cal.Rptr.3d 313, 248 P.3d 1170], internal citations omitted.)
- "[T]he analysis of foreseeability for purposes of assessing the existence or scope of a duty is different, and more general, than it is for assessing whether any such duty was breached or whether a breach caused a plaintiff's injuries. '[I]n analyzing duty, the court's task ' " 'is not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the *category* of negligent conduct at issue is sufficiently likely to result in the *kind* of harm experienced that liability may appropriately be imposed on the negligent party.' " ' " 'The jury, by contrast, considers "foreseeability" in two more focused, fact-specific settings. First, the jury may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place. Second, foreseeability may be relevant to the jury's determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury.' " (*Staats v. Vintner's Golf Club, LLC* (2018) 25 Cal.App.5th 826, 837 [236 Cal.Rptr.3d 236], original italics, internal citation omitted.)
- "[T]he concept of foreseeability of risk of harm in determining whether a duty should be imposed is to be distinguished from the concept of ' "foreseeability" in two more focused, fact-specific settings' to be resolved by a trier of fact. 'First, the [trier of fact] may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent

in the first place. Second, foreseeability may be relevant to the [trier of fact's] determination of whether the defendant's negligence was a proximate or legal cause of the plaintiff's injury.' " (*Burns v. Neiman Marcus Group, Inc.* (2009) 173 Cal.App.4th 479, 488, fn. 8 [93 Cal.Rptr.3d 130], internal citation omitted.)

- "By making exceptions to Civil Code section 1714's general duty of ordinary care only when foreseeability and policy considerations justify a categorical no-duty rule, we preserve the crucial distinction between a determination that the defendant owed the plaintiff no duty of ordinary care, which is for the *court* to make, and a determination that the defendant did not breach the duty of ordinary care, which in a jury trial is for the *jury* to make. . . . While the court deciding duty assesses the foreseeability of injury from 'the category of negligent conduct at issue,' if the defendant did owe the plaintiff a duty of ordinary care the jury 'may consider the likelihood or foreseeability of injury in determining whether, in fact, the particular defendant's conduct was negligent in the first place.' An approach that instead focused the duty inquiry on case-specific facts would tend to 'eliminate the role of the jury in negligence cases, transforming the question of whether a defendant breached the duty of care under the facts of a particular case into a legal issue to be decided by the court . . . .' " (*Cabral, supra*, 51 Cal.4th at pp. 772–773, original italics, internal citations omitted.)
- "[W]hile foreseeability with respect to duty is determined by focusing on the general character of the event and inquiring whether such event is 'likely enough in the setting of modern life that a reasonably thoughtful [person] would take account of it in guiding practical conduct', foreseeability in evaluating negligence and causation requires a 'more focused, fact-specific' inquiry that takes into account a particular plaintiff's injuries and the particular defendant's conduct." (*Laabs v. Southern California Edison Company* (2009) 175 Cal.App.4th 1260, 1273 [97 Cal.Rptr.3d 241], internal citation omitted.)
- "[Defendant] relies on the rule that a person has no general duty to safeguard another from harm or to rescue an injured person. But that rule has no application where the person has caused another to be put in a position of peril of a kind from which the injuries occurred." (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 883 [174 Cal.Rptr.3d 339].)
- " 'Typically, in special relationships, "the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare. [Citation.]" [Citation.] A defendant who is found to have a "special relationship" with another may owe an affirmative duty to protect the other person from foreseeable harm, or to come to the aid of another in the face of ongoing harm or medical emergency.' " (*Carlsen, supra*, 227 Cal.App.4th at p. 893.)
- "Generally, a greater degree of care is owed to children because of their lack of capacity to appreciate risks and avoid danger. [Citation.] Consequently, California courts have frequently recognized special relationships between children and their adult caregivers that give rise to a duty to prevent harms

caused by the intentional or criminal conduct of third parties." (*Doe, supra,* 8 Cal.App.5th at p. 1129, internal citations omitted.)

- "[P]ostsecondary schools *do* have a special relationship with students while they are engaged in activities that are part of the school's curriculum or closely related to its delivery of educational services." (*The Regents of the University of California v. Superior Court* (2018) 4 Cal.5th 607, 624–625 [230 Cal.Rptr.3d 415, 413 P.3d 656], original italics.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1138, 1450–1460, 1484–1491

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.4–1.18

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.02, 1.12, Ch. 2, *Causation*, § 2.02, Ch. 3, *Proof of Negligence*, § 3.01 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.10 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, §§ 165.10, 165.20 (Matthew Bender)

425. "Gross Negligence" Explained

Gross negligence is the lack of any care or an extreme departure from what a reasonably careful person would do in the same situation to prevent harm to oneself or to others.

A person can be grossly negligent by acting or by failing to act.

New April 2008; Revised December 2015

Directions for Use

Give this instruction if a particular statute that is at issue in the case creates a distinction based on a standard of gross negligence. (See, e.g., Gov. Code, § 831.7(c)(1)(E) [immunity for public entity or employee to liability to participant in or spectator to hazardous recreational activity does not apply if act of gross negligence is proximate cause of injury].) Courts generally resort to this definition if gross negligence is at issue under a statute. (See, e.g., *Wood v. County of San Joaquin* (2003) 111 Cal.App.4th 960, 971 [4 Cal.Rptr.3d 340].)

Give this instruction with CACI No. 400, *Negligence—Essential Factual Elements*, but modify that instruction to refer to gross negligence.

This instruction may also be given if case law has created a distinction between gross and ordinary negligence. For example, under the doctrine of express assumption of risk, a signed waiver of liability may release liability for ordinary negligence only, not for gross negligence. (See *City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095]; see also CACI No. 451, *Affirmative Defense—Contractual Assumption of Risk*.) Once the defendant establishes the validity and applicability of the release, the plaintiff must prove gross negligence by a preponderance of the evidence. (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 732, 734 [183 Cal.Rptr.3d 234].) A lack of gross negligence can be found as a matter of law if the plaintiff's showing is insufficient to suggest a triable issue of fact. (See *Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 638–639 [184 Cal.Rptr.3d 155]; cf. *Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 555 [188 Cal.Rptr.3d 228] [whether conduct constitutes gross negligence is generally a question of fact, depending on the nature of the act and the surrounding circumstances shown by the evidence].)

Sources and Authority

- " 'Gross negligence' long has been defined in California and other jurisdictions as either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' " (*City of Santa Barbara, supra*, 41 Cal.4th at p. 754, internal citations omitted.)
- "By contrast, 'wanton' or 'reckless' misconduct (or ' "willful and wanton negligence" ') describes conduct by a person who may have no intent to cause

harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result." (*City of Santa Barbara, supra*, 41 Cal.4th at p. 754, fn. 4, internal citations omitted.)

- "California does not recognize a distinct cause of action for 'gross negligence' independent of a statutory basis." (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856 [120 Cal.Rptr.3d 90].)
- "Gross negligence is pleaded by alleging the traditional elements of negligence: duty, breach, causation, and damages. However, to set forth a claim for 'gross negligence' the plaintiff must allege extreme conduct on the part of the defendant." (*Rosencrans v. Dover Images, Ltd*. (2011) 192 Cal.App.4th 1072, 1082 [122 Cal.Rptr.3d 22], internal citation omitted.)
- "The theory that there are degrees of negligence has been generally criticized by legal writers, but a distinction has been made in this state between ordinary and gross negligence. Gross negligence has been said to mean the want of even scant care or an extreme departure from the ordinary standard of conduct." (*Van Meter v. Bent Constr. Co.* (1956) 46 Cal.2d 588, 594 [297 P.2d 644], internal citation omitted.)
- "Numerous California cases have discussed the doctrine of gross negligence. Invariably these cases have turned upon an interpretation of a statute which has used the words 'gross negligence' in the text." (*Cont'l Ins. Co. v. Am. Prot. Indus.* (1987) 197 Cal.App.3d 322, 329 [242 Cal.Rptr. 784].)
- "[I]n cases involving a waiver of liability for future negligence, courts have held that conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence, which would not be barred by a release agreement. Evidence of conduct that evinces an extreme departure from manufacturer's safety directions or an industry standard also could demonstrate gross negligence. Conversely, conduct demonstrating the failure to guard against, or warn of, a dangerous condition typically does not rise to the level of gross negligence." (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 881 [208 Cal.Rptr.3d 792], internal citations omitted.)
- "[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (*City of Santa Barbara, supra*, 41 Cal.4th at p. 777, original italics.)
- " 'Prosser on Torts (1941) page 260, also cited by the *Van Meter* court for its definition of gross negligence, reads as follows: "Gross Negligence. This is very great negligence, or the want of even scant care. It has been described as a failure to exercise even that care which a careless person would use. Many

courts, dissatisfied with a term so devoid of all real content, have interpreted it as requiring wilful misconduct, or recklessness, or such utter lack of all care as will be evidence of either—sometimes on the ground that this must have been the purpose of the legislature. But most courts have considered that 'gross negligence' falls short of a reckless disregard of consequences, and differs from ordinary negligence only in degree, and not in kind. *So far as it has any accepted meaning, it is merely an extreme departure from the ordinary standard of care.*" ' " (*Decker v. City of Imperial Beach* (1989) 209 Cal.App.3d 349, 358 [257 Cal.Rptr. 356], original italics, internal citations omitted.)

- "In assessing where on the spectrum a particular negligent act falls, ' "[t]he amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk. As the danger becomes greater, the actor is required to exercise caution commensurate with it." ' " (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 32 [236 Cal.Rptr.3d 682].)
- "Generally it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence [citation] but not always." (*Chavez v. 24 Hour Fitness USA, Inc.* (2015) 238 Cal.App.4th 632, 640 [189 Cal.Rptr.3d 449].)
- "The Legislature has enacted numerous statutes . . . which provide immunity to persons providing emergency assistance except when there is gross negligence. (See Bus. & Prof. Code, § 2727.5 [immunity for licensed nurse who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of nurse's employment unless the nurse is grossly negligent]; Bus. & Prof. Code, § 2395.5 [immunity for a licensed physician who serves on-call in a hospital emergency room who in good faith renders emergency obstetrical services unless the physician was grossly negligent, reckless, or committed willful misconduct]; Bus. & Prof. Code, § 2398 [immunity for licensed physician who in good faith and without compensation renders voluntary emergency medical assistance to a participant in a community college or high school athletic event for an injury suffered in the course of that event unless the physician was grossly negligent]; Bus. & Prof. Code, § 3706 [immunity for certified respiratory therapist who in good faith renders emergency care at the scene of an emergency occurring outside the place and course of employment unless the respiratory therapist was grossly negligent]; Bus. & Prof. Code, § 4840.6 [immunity for a registered animal health technician who in good faith renders emergency animal health care at the scene of an emergency unless the animal health technician was grossly negligent]; Civ. Code, § 1714.2 [immunity to a person who has completed a basic cardiopulmonary resuscitation course for cardiopulmonary resuscitation and emergency cardiac care who in good faith renders emergency cardiopulmonary resuscitation at the scene of an emergency unless the individual was grossly negligent]; Health & Saf. Code, § 1799.105 [immunity for poison control center personnel who in good faith provide emergency information and advice unless they are grossly negligent]; Health & Saf. Code, § 1799.106 [immunity for a

firefighter, police officer or other law enforcement officer who in good faith renders emergency medical services at the scene of an emergency unless the officer was grossly negligent]; Health & Saf. Code, § 1799.107 [immunity for public entity and emergency rescue personnel acting in good faith within the scope of their employment unless they were grossly negligent].)" (*Decker, supra*, 209 Cal.App.3d at pp. 356–357.)

- "The jury here was instructed: 'It is the duty of one who undertakes to perform the services of a police officer or paramedic to have the knowledge and skills ordinarily possessed and to exercise the care and skill ordinarily used in like cases by police officers or paramedics in the same or similar locality and under similar circumstances. A failure to perform such duty is negligence. [para.] The standard to be applied in this case is gross negligence. The term gross negligence means the failure to provide even scant care or an extreme departure from the ordinary standard of conduct.' " (*Wright v. City of L.A.* (1990) 219 Cal.App.3d 318, 343 [268 Cal.Rptr. 309] [construing "gross negligence" under Health & Saf. Code, § 1799.106, which provides that a police officer or paramedic who renders emergency medical services at the scene of an emergency shall only be liable in civil damages for acts or omissions performed in a grossly negligent manner or not performed in good faith].)

Secondary Sources

5 Witkin, Summary of California Law (10th ed. 2005) Torts, § 278

Advising and Defending Corporate Directors and Officers (Cont.Ed.Bar) § 3.13

1 Levy et al., California Torts, Ch. 1, *General Principles of Liability*, § 1.01 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, §§ 380.10, 380.171 (Matthew Bender)

430. Causation: Substantial Factor

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm.

[Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.]

New September 2003; Revised October 2004, June 2005, December 2005, December 2007, May 2018

Directions for Use

As phrased, this definition of "substantial factor" subsumes the "but for" test of causation, that is, "but for" the defendant's conduct, the plaintiff's harm would not have occurred. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1052 [1 Cal.Rptr.2d 913, 819 P.2d 872]; see Rest.2d Torts, § 431.) The optional last sentence makes this explicit, and in some cases it may be error not to give this sentence. (See *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 572–573 [34 Cal.Rptr.2d 607, 882 P.2d 298]; Rest.2d Torts, § 432(1).)

"Conduct," in this context, refers to the culpable acts or omissions on which a claim of legal fault is based, e.g., negligence, product defect, breach of contract, or dangerous condition of public property. This is in contrast to an event that is not a culpable act but that happens to occur in the chain of causation, e.g., that the plaintiff's alarm clock failed to go off, causing her to be at the location of the accident at a time when she otherwise would not have been there. The reference to "conduct" may be changed as appropriate to the facts of the case.

The "but for" test of the last optional sentence does not apply to concurrent independent causes, which are multiple forces operating at the same time and independently, each of which would have been sufficient by itself to bring about the same harm. (*Viner v. Sweet* (2003) 30 Cal.4th 1232, 1240 [135 Cal.Rptr.2d 629, 70 P.3d 1046]; *Barton v. Owen* (1977) 71 Cal.App.3d 484, 503–504 [139 Cal.Rptr. 494]; see Rest.2d Torts, § 432(2).) Accordingly, do not include the last sentence in a case involving concurrent independent causes. (See also *Major v. R.J. Reynolds Tobacco Co.* (2017) 14 Cal.App.5th 1179, 1198 [222 Cal.Rptr.3d 563] [court did not err in refusing to give last sentence of instruction in case involving exposure to carcinogens in cigarettes].)

In cases of multiple (concurrent dependent) causes, CACI No. 431, *Causation: Multiple Causes,* should also be given.

In a case in which the plaintiff's claim is that he or she contracted cancer from exposure to the defendant's asbestos-containing product, *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 977 [67 Cal.Rptr.2d 16, 941 P.2d 1203]

requires a different instruction regarding exposure to a particular product. Give CACI No. 435, *Causation for Asbestos-Related Cancer Claims*, and do not give this instruction. (Cf. *Petitpas v. Ford Motor Co.* (2017) 13 Cal.App.5th 261, 298–299 [220 Cal.Rptr.3d 185] [not error to give both CACI Nos. 430 and 435 in case with both product liability and premises liability defendants].)

Under this instruction, a remote or trivial factor is not a substantial factor. This sentence could cause confusion in an asbestos case. "Remote" often connotes a time limitation. Nothing in *Rutherford* suggests such a limitation; indeed asbestos cases are brought long after exposure due to the long-term latent nature of asbestos-related diseases. (See *City of Pasadena v. Superior Court (Jauregui)* (2017) 12 Cal.App.5th 1340, 1343–1344 [220 Cal.Rptr.3d 99] [cause of action for a latent injury or disease generally accrues when the plaintiff discovers or should reasonably have discovered he or she has suffered a compensable injury].)

Although the court in *Rutherford* did not use the word "trivial," it did state that "a force [that] plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor." (*Rutherford, supra,* 16 Cal.4th at p. 969.) While it may be argued that "trivial" and "infinitesimal" are synonyms, a very minor force that does cause harm *is* a substantial factor. This rule honors the principle of comparative fault. (*Bockrath v. Aldrich Chem. Co.* (1999) 21 Cal.4th 71, 79 [86 Cal.Rptr.2d 846, 980 P.2d 398].) In *Rutherford*, the jury allocated the defendant only 1.2 percent of comparative fault, and the court upheld this allocation. (See *Rutherford*, *supra*, 16 Cal.4th at p. 985.) Instructing the jury that a *de minimis* force (whether trivial or infinitesimal) is not a substantial factor could confuse the jury in allocating comparative fault at the lower end of the exposure spectrum.

Sources and Authority

- "The test for joint tort liability is set forth in section 431 of the Restatement of Torts 2d, which provides: 'The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and, (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.' Section 431 correctly states California law as to the issue of causation in tort cases." (*Wilson v. Blue Cross of So. Cal.* (1990) 222 Cal.App.3d 660, 671–672 [271 Cal.Rptr. 876].)
- "California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations. Under that standard, a cause in fact is something that is a substantial factor in bringing about the injury. The substantial factor standard generally produces the same results as does the 'but for' rule of causation which states that a defendant's conduct is a cause of the injury if the injury would not have occurred 'but for' that conduct. The substantial factor standard, however, has been embraced as a clearer rule of causation—one which subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or

concurrent causes in fact." (*Rutherford, supra,* 16 Cal.4th at pp. 968–969, internal citations omitted.)

- "The term 'substantial factor' has not been judicially defined with specificity, and indeed it has been observed that it is 'neither possible nor desirable to reduce it to any lower terms.' This court has suggested that a force which plays only an 'infinitesimal' or 'theoretical' part in bringing about injury, damage, or loss is not a substantial factor. Undue emphasis should not be placed on the term 'substantial.' For example, the substantial factor standard, formulated to aid plaintiffs as a broader rule of causality than the 'but for' test, has been invoked by defendants whose conduct is clearly a 'but for' cause of plaintiff's injury but is nevertheless urged as an insubstantial contribution to the injury. Misused in this way, the substantial factor test 'undermines the principles of comparative negligence, under which a party is responsible for his or her share of negligence and the harm caused thereby.' " (*Rutherford, supra,* 16 Cal.4th at pp. 968–969, internal citations omitted.)
- "The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical. Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in bringing about injury, damage, or loss is not a substantial factor', but a very minor force that does cause harm is a substantial factor. This rule honors the principle of comparative fault." (*Bockrath, supra,* 21 Cal.4th at p. 79, internal citations omitted.)
- "The text of Restatement Torts second section 432 demonstrates how the 'substantial factor' test subsumes the traditional 'but for' test of causation. Subsection (1) of section 432 provides: 'Except as stated in Subsection (2), the actor's negligent conduct *is not a substantial factor* in bringing about harm to another *if the harm would have been sustained even if the actor had not been negligent*.' . . . Subsection (2) states that if 'two forces are actively operating . . . and each of itself is sufficient to bring about harm to another, the actor's negligence may be found to be a substantial factor in bringing it about.' " (*Viner, supra,* 30 Cal.4th at p. 1240, original italics.)
- "Because the 'substantial factor' test of causation subsumes the 'but for' test, the 'but for' test has been phrased in terms of 'substantial factor,' as follows, in the context, as here, of a combination of causes dependent on one another: A defendant's negligent conduct may combine with another factor to cause harm; if a defendant's negligence was a substantial factor in causing the plaintiff's harm, then the defendant is responsible for the harm; a defendant cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing the plaintiff's harm; but conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct." (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 187 [164 Cal.Rptr.3d 309].)
- "A tort is a legal cause of injury only when it is a substantial factor in producing the injury. If the external force of a vehicle accident was so severe

that it would have caused identical injuries notwithstanding an abstract 'defect' in the vehicle's collision safety, the defect cannot be considered a substantial factor in bringing them about. [¶] The general causation instruction given by the trial court correctly advised that plaintiff could not recover for a design defect unless it was a 'substantial factor' in producing plaintiff's 'enhanced' injuries. However, this instruction dealt only by 'negative implication' with [defendant]'s theory that any such defect was not a 'substantial factor' in this case because this particular accident would have broken plaintiff's ankles in any event. As we have seen, [defendant] presented substantial evidence to that effect. [Defendant] was therefore entitled to its special instruction, and the trial court's refusal to give it was error." (*Soule, supra,* 8 Cal.4th at p. 572–573, original italics, footnote and internal citations omitted.)

- "The first element of legal cause is cause in fact . . . . The 'but for' rule has traditionally been applied to determine cause in fact. The Restatement formula uses the term *substantial factor* 'to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause.' " (*Mayes v. Bryan* (2006) 139 Cal.App.4th 1075, 1095 [44 Cal.Rptr.3d 14], internal citations omitted.)
- "If the accident would have happened anyway, whether the defendant was negligent or not, then his or her negligence was not a cause in fact, and of course cannot be the legal or responsible cause." (*Toste v. CalPortland Construction* (2016) 245 Cal.App.4th 362, 370 [199 Cal.Rptr.3d 522].)
- "We have recognized that proximate cause has two aspects. ' "One is *cause in fact*. An act is a cause in fact if it is a necessary antecedent of an event." ' This is sometimes referred to as 'but-for' causation. In cases where concurrent independent causes contribute to an injury, we apply the 'substantial factor' test of the Restatement Second of Torts, section 423, which subsumes traditional 'but for' causation. This case does not involve concurrent independent causes, so the 'but for' test governs questions of factual causation." (*State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339, 354 [188 Cal.Rptr.3d 309, 349 P.3d 1013], original italics, footnote omitted.)
- "On the issue . . . of causation, as on other issues essential to the cause of action for negligence, the plaintiff, in general, has the burden of proof. The plaintiff must introduce evidence which affords a reasonable basis for the conclusion that it is more likely than not that the conduct of the defendant was a cause in fact of the result. A mere possibility of such causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." (*Leyva v. Garcia* (2018) 20 Cal.App.5th 1095, 1104 [231 Cal.Rptr.3d 814].)
- " 'Whether a defendant's conduct actually caused an injury is a question of fact . . . that is ordinarily for the jury . . . .' '[C]ausation in fact is ultimately a matter of probability and common sense: "[A plaintiff] is not required to eliminate entirely all possibility that the defendant's conduct was not a cause. It

is enough that he introduces evidence from which reasonable [persons] may conclude that it is more probable that the event was caused by the defendant than that it was not. The fact of causation is incapable of mathematical proof, since no [person] can say with absolute certainty what would have occurred if the defendant had acted otherwise. If, as a matter of ordinary experience, a particular act or omission might be expected to produce a particular result, and if that result has in fact followed, the conclusion may be justified that the causal relation exists. In drawing that conclusion, the triers of fact are permitted to draw upon ordinary human experience as to the probabilities of the case." ' . . . ' "A mere possibility of . . . causation is not enough; and when the matter remains one of pure speculation or conjecture, or the probabilities are at best evenly balanced, it becomes the duty of the court to direct a verdict for the defendant." ' " (*Raven H. v. Gamette* (2007) 157 Cal.App.4th 1017, 1029–1030 [68 Cal.Rptr.3d 897], internal citations omitted.)

- "[E]vidence of causation 'must rise to the level of a reasonable probability based upon competent testimony. [Citations.] "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." [Citation.] The defendant's conduct is not the cause in fact of harm " 'where the evidence indicates that there is less than a probability, i.e., a 50-50 possibility or a mere chance,' " that the harm would have ensued.' " (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 312 [111 Cal.Rptr.3d 787].)
- "However the test is phrased, causation in fact is ultimately a matter of probability and common sense." (*Osborn v. Irwin Memorial Blood Bank* (1992) 5 Cal.App.4th 234, 253 [7 Cal.Rptr.2d 101], relying on Rest.2d Torts, § 433B, com. b.)
- "As a general matter, juries may decide issues of causation without hearing expert testimony. But '[w]here the complexity of the causation issue is beyond common experience, expert testimony is required to establish causation.' " (*Webster v. Claremont Yoga* (2018) 26 Cal.App.5th 284, 290 [236 Cal.Rptr.3d 802], internal citation omitted.)
- "The Supreme Court . . . set forth explicit guidelines for plaintiffs attempting to allege injury resulting from exposure to toxic materials: A plaintiff must 'allege that he was exposed to each of the toxic materials claimed to have caused a specific illness'; 'identify each product that allegedly caused the injury'; allege 'the toxins entered his body' 'as a result of the exposure'; allege that 'he suffers from a specific illness, and that each toxin that entered his body was a substantial factor in bringing about, prolonging, or aggravating that illness'; and, finally, allege that 'each toxin he absorbed was manufactured or supplied by a named defendant.' " (*Jones v. ConocoPhillips Co.* (2011) 198 Cal.App.4th 1187, 1194 [130 Cal.Rptr.3d 571], quoting *Bockrath, supra*, 21 Cal.4th at p. 80, footnote omitted.)
- "[M]ultiple sufficient causes exist not only when there are two causes each of which is sufficient to cause the harm, but also when there are more than two

causes, partial combinations of which are sufficient to cause the harm. As such, the trial court did not err in refusing to instruct the jury with the but-for test." (*Major*, *supra*, 14 Cal.App.5th at p. 1200.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1334–1341

California Tort Guide (Cont.Ed.Bar 3d ed.) §§ 1.13–1.15

1 Levy et al., California Torts, Ch. 2, *Causation,* § 2.02 (Matthew Bender)

4 California Trial Guide, Unit 90, *Closing Argument,* § 90.89 (Matthew Bender)

California Products Liability Actions, Ch. 2, *Liability for Defective Products,* § 2.22, Ch. 7, *Proof,* § 7.06 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.71 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence,* §§ 165.260–165.263 (Matthew Bender)

451. Affirmative Defense—Contractual Assumption of Risk

[*Name of defendant***] claims that [***name of plaintiff***] may not recover any damages because [he/she] agreed before the incident that [he/she] would not hold [***name of defendant***] responsible for any damages.**

If [*name of defendant***] proves that there was such an agreement and that it applies to [***name of plaintiff***]'s claim, then [***name of defendant***] is not responsible for [***name of plaintiff***]'s harm[, unless you find that [***name of defendant***] was grossly negligent or intentionally harmed [***name of plaintiff***]].**

[If you find that [*name of defendant***] was grossly negligent or intentionally harmed [***name of plaintiff***], then the agreement does not apply. You must then determine whether [he/she/it] is responsible for [***name of plaintiff***]'s harm based on the other instructions that I have given you.]**

New September 2003; Revised December 2011

Directions for Use

This instruction sets forth the affirmative defense of express or contractual assumption of risk. (See *Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 856 [120 Cal.Rptr.3d 90].) It will be given in very limited circumstances. Both the interpretation of a waiver agreement and application of its legal effect are generally resolved by the judge before trial. The existence of a duty is a question of law for the court (*Eriksson v. Nunnink* (2015) 233 Cal.App.4th 708, 719 [183 Cal.Rptr.3d 234]), as is the interpretation of a written instrument if the interpretation does not turn on the credibility of extrinsic evidence. (*Allabach v. Santa Clara County Fair Assn., Inc.* (1996) 46 Cal.App.4th 1007, 1011 [54 Cal.Rptr.2d 330].)

However, there may be contract law defenses (such as fraud, lack of consideration, duress, unconscionability) that could be asserted by the plaintiff to contest the validity of a waiver. If these defenses depend on disputed facts that must be considered by a jury, then this instruction should also be given.

Express assumption of risk does not relieve the defendant of liability if there was gross negligence or willful injury. (See Civ. Code, § 1668.) However, the doctrine of primary assumption of risk may then become relevant if an inherently dangerous sport or activity is involved. (See *Rosencrans v. Dover Images, Ltd.* (2011) 192 Cal.App.4th 1072, 1081 [122 Cal.Rptr.3d 22].)

If there are jury issues with regard to gross negligence, include the bracketed language on gross negligence. Also give CACI No. 425, *"Gross Negligence" Explained.* If the jury finds no gross negligence, then the action is barred by express assumption of risk unless there are issues of fact with regard to contract formation.

Sources and Authority

- Contract Releasing Party From Liability for Fraud or Willful Injury is Against Public Policy. Civil Code section 1668.
- "[P]arties may contract for the release of liability for future ordinary negligence so long as such contracts do not violate public policy. 'A valid release precludes liability for risks of injury within the scope of the release.' " (*Anderson v. Fitness Internat., LLC* (2016) 4 Cal.App.5th 867, 877 [208 Cal.Rptr.3d 792], internal citations omitted.)
- "With respect to the question of express waiver, the legal issue is *not* whether the particular risk of injury appellant suffered is inherent in the recreational activity to which the Release applies [citations], but simply *the scope of the Release*." (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 27 [236 Cal.Rptr.3d 682], original italics.)
- "Express assumption occurs when the plaintiff, in advance, expressly consents . . . to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone. . . . The result is that . . . being under no duty, [the defendant] cannot be charged with negligence." (*Saenz v. Whitewater Voyages, Inc.* (1990) 226 Cal.App.3d 758, 764 [276 Cal.Rptr. 672], internal citations omitted.)
- "While often referred to as a defense, a release of future liability is more appropriately characterized as an express assumption of the risk that negates the defendant's duty of care, an element of the plaintiff's case." (*Eriksson, supra*, 233 Cal.App.4th at p. 719.)
- "[C]ases involving express assumption of risk are concerned with instances in which, as the result of an express agreement, the defendant owes no duty to protect the plaintiff from an injury-causing risk. Thus in this respect express assumption of risk properly can be viewed as analogous to primary assumption of risk." (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308–309, fn. 4 [11 Cal.Rptr.2d 2, 834 P.2d 696].)
- " ' "It is only necessary that the act of negligence, which results in injury to the releaser, be reasonably related to the object or purpose for which the release is given." ' . . . 'An act of negligence is reasonably related to the object or purpose for which the release was given if it is included within the express scope of the release.' " (*Eriksson, supra*, 233 Cal.App.4th at p. 722.)
- "Although [decedent] could not release or waive her parents' subsequent wrongful death claims, it is well settled that a release of future liability or express assumption of the risk by the decedent may be asserted as a defense to such claims." (*Eriksson, supra*, 233 Cal.App.4th at p. 725.)
- "[E]xculpatory clause which affects the public interest cannot stand." (*Tunkl v. Regents of Univ. of California* (1963) 60 Cal.2d 92, 98 [32 Cal.Rptr. 33, 383 P.2d 441].)

- "In *Tunkl*, our high court identified six characteristics typical of contracts affecting the public interest: ' "[1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least any member coming within certain established standards. [4] As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. [5] In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents." ' Not all of these factors need to be present for an exculpatory contract to be voided as affecting the public interest." (*Hass v. RhodyCo Productions* (2018) 26 Cal.App.5th 11, 29 [236 Cal.Rptr.3d 682], internal citations omitted.)
- "The issue [of whether something is in the public interest] is tested *objectively*, by the activity's importance to the *general public*, not by its subjective importance to the particular plaintiff." (*Booth v. Santa Barbara Biplane Tours, LLC* (2008) 158 Cal.App.4th 1173, 1179–1180 [70 Cal.Rptr.3d 660], original italics.)
- "[P]ublic policy generally precludes enforcement of an agreement that would remove an obligation to adhere to even a *minimal* standard of care. Applying that general rule here, we hold that an agreement purporting to release liability for future gross negligence committed against a developmentally disabled child who participates in a recreational camp designed for the needs of such children violates public policy and is unenforceable." (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 777 [62 Cal.Rptr.3d 527, 161 P.3d 1095], original italics.)
- " ' "[A] purveyor of recreational activities owes a duty to a patron not to increase the risks inherent in the activity in which the patron has paid to engage." ' Thus, in cases involving a waiver of liability for future negligence, courts have held that conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence, which would not be barred by a release agreement." (*Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 359 [235 Cal.Rptr.3d 716].)
- " ' "A written release may exculpate a tortfeasor from future negligence or misconduct. [Citation.] To be effective, such a release '*must be clear, unambiguous, and explicit in expressing the intent of the subscribing parties*.' [Citation.] The release need not achieve perfection. [Citation.] Exculpatory

agreements in the recreational sports context do not implicate the public interest and therefore are not void as against public policy. [Citations.]" ' ' "An ambiguity exists when a party can identify an alternative, semantically reasonable, candidate of meaning of a writing. [Citations.]" ' " (*Huverserian v. Catalina Scuba Luv, Inc.* (2010) 184 Cal.App.4th 1462, 1467 [110 Cal.Rptr.3d 112], original italics, internal citations omitted.)

- "Unlike claims for ordinary negligence, products liability claims cannot be waived." (*Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 640 [184 Cal.Rptr.3d 155].)
- "Since there is no disputed issue of material fact concerning gross negligence, the release also bars [plaintiff]'s cause of action for breach of warranty." (*Grebing, supra*, 234 Cal.App.4th at p. 640.)
- "Generally, a person who signs an instrument may not avoid the impact of its terms on the ground that she failed to read it before signing. However, a release is invalid when it is procured by misrepresentation, overreaching, deception, or fraud. 'It has often been held that if the releaser was under a misapprehension, not due to his own neglect, as to the nature or scope of the release, and if this misapprehension was induced by the misconduct of the releasee, then the release, regardless of how comprehensively worded, is binding only to the extent actually intended by the releaser.' 'In cases providing the opportunity for overreaching, the releasee has a duty to act in good faith and the releaser must have a full understanding of his legal rights. [Citations.] Furthermore, it is the province of the jury to determine whether the circumstances afforded the opportunity for overreaching, whether the releasee engaged in overreaching and whether the releaser was misled. [Citation.]' A 'strong showing of misconduct' by the plaintiff is not necessary to demonstrate the existence of a triable issue of fact here; only a 'slight showing' is required." (*Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 563–564 [188 Cal.Rptr.3d 228], internal citations omitted.)
- "Plaintiffs assert that Jerid did not 'freely and knowingly' enter into the Release because (1) the [defendant's] employee represented the Release was a sign-in sheet; (2) the metal clip of the clipboard obscured the title of the document; (3) the Release was written in a small font; (4) [defendant] did not inform Jerid he was releasing his rights by signing the Release; (5) Jerid did not know he was signing a release; (6) Jerid did not receive a copy of the Release; and (7) Jerid was not given adequate time to read or understand the Release. [¶] We do not find plaintiffs' argument persuasive because . . . there was nothing preventing Jerid from reading the Release. There is nothing indicating that Jerid was prevented from (1) reading the Release while he sat at the booth, or (2) taking the Release, moving his truck out of the line, and reading the Release. In sum, plaintiffs' arguments do not persuade us that Jerid was denied a reasonable opportunity to discover the true terms of the contract." (*Rosencrans, supra*, 192 Cal.App.4th at pp. 1080–1081.)
- "Whether a contract provision is clear and unambiguous is a question of law,

not of fact." (*Madison v. Superior Court* (1988) 203 Cal.App.3d 589, 598 [250 Cal.Rptr. 299].)

- "By signing as [decedent]'s parent, [plaintiff] approved of the terms of the release and understood that her signature made the release 'irrevocable and binding.' Under these circumstances, the release could not be disaffirmed. [¶] Although [plaintiff]'s signature prevented the agreement from being disaffirmed, it does not make her a party to the release." (*Eriksson, supra*, 233 Cal.App.4th at p. 721.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1282, 1292–1294

California Tort Guide (Cont.Ed.Bar 3d ed.) § 1.44

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

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.171 (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.402 (Matthew Bender)

452. Sudden Emergency

[*Name of plaintiff/defendant***] claims that [he/she] was not negligent because [he/she] acted with reasonable care in an emergency situation. [***Name of plaintiff/defendant***] was not negligent if [he/she] proves all of the following:**

1. **That there was a sudden and unexpected emergency situation in which someone was in actual or apparent danger of immediate injury;**
2. **That [***name of plaintiff/defendant***] did not cause the emergency; and**
3. **That [***name of plaintiff/defendant***] acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer.**

New September 2003

Directions for Use

The instruction should not be given unless at least two courses of action are available to the party after the danger is perceived. (*Anderson v. Latimer* (1985) 166 Cal.App.3d 667, 675 [212 Cal.Rptr. 544].)

Additional instructions should be given if there are alternate theories of negligence.

Sources and Authority

- "The doctrine of imminent peril is available to either plaintiff or defendant, or, in a proper case, to both." (*Smith v. Johe* (1957) 154 Cal.App.2d 508, 511 [316 P.2d 688].)
- "Whether the conditions for application of the imminent peril doctrine exist is itself a question of fact to be submitted to the jury." (*Damele v. Mack Trucks, Inc.* (1990) 219 Cal.App.3d 29, 37 [267 Cal.Rptr. 197]; see also *Leo v. Dunham* (1953) 41 Cal.2d 712, 715 [264 P.2d 1].)
- "[A] person who, without negligence on his part, is suddenly and unexpectedly confronted with peril, arising from either the actual presence, or the appearance, of imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required of him in the exercise of ordinary care in calmer and more deliberate moments." (*Leo, supra,* 41 Cal.2d at p. 714.)
- "The doctrine of imminent peril is properly applied only in cases where an unexpected physical danger is presented so suddenly as to deprive the driver of his power of using reasonable judgment. [Citations.] A party will be denied the

benefit of the doctrine of imminent peril where that party's negligence causes or contributes to the creation of the perilous situation. [Citations.]" (*Shiver v. Laramee* (2018) 24 Cal.App.5th 395, 399, 234 Cal.Rptr.3d 256].)

- " 'The test is whether the actor took one of the courses of action which a standard man in that emergency might have taken, and such a course is not negligent even though it led to an injury which might have been prevented by adopting an alternative course of action.' [Citation.]" (*Schultz v. Mathias* (1970) 3 Cal.App.3d 904, 912–913 [83 Cal.Rptr. 888].)
- "The doctrine of imminent peril applies not only when a person perceives danger to himself, but also when he perceives an imminent danger to others." (*Damele, supra,* 219 Cal.App.3d at p. 36.)
- "[T]he mere appearance of an imminent peril to others—not an actual imminent peril—is all that is required." (*Damele, supra,* 219 Cal.App.3d at p. 37.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1282, 1292–1294

California Tort Guide (Cont.Ed.Bar 3d ed.) § 4.7

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, §§ 1.03, 1.11, 1.30 (Matthew Bender)

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

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.250 (Matthew Bender)

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

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[*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.

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

- Tolling for Equal Employment Opportunity Commission Investigation. Government Code section 12965(d)(1).
- "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.' " (*Aguilera v. Heiman*

(2009) 174 Cal.App.4th 590, 598 [95 Cal.Rptr.3d 18], internal citations omitted.)

- "Broadly speaking, the doctrine applies ' "[w]hen an injured person has several legal remedies and, reasonably and in good faith, pursues one." ' [Citation.] Thus, it may apply where one action stands to lessen the harm that is the subject of a potential 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." (*Wassmann v. South Orange County Community College Dist.* (2018) 24 Cal.App.5th 825, 853 [234 Cal.Rptr.3d 712].)
- "[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.)

- "Tolling the FEHA limitation period while the employee awaits the outcome of an EEOC investigation furthers several policy objectives: (1) the defendant receives timely notice of the claim; (2) the plaintiff is relieved of the obligation of pursuing simultaneous actions on the same set of facts; and (3) the costs of duplicate proceedings often are avoided or reduced." (*Mitchell v. State Dept. of Public Health* (2016) 1 Cal.App.5th 1000, 1008 [205 Cal.Rptr.3d 261].)
- " '[P]utative class members would be ill advised to rely on the mere filing of a class action complaint to toll their individual statute of limitations.' A trial court may, nonetheless, apply tolling to save untimely claims. But in doing so, the court must address 'two major policy considerations.' The first is 'protection of the class action device,' which requires the court to determine whether the denial of class certification was 'unforeseeable by class members,' or whether potential members, in anticipation of a negative ruling, had already filed ' "protective motions to intervene or to join in the event that a class was later found unsuitable," depriving class actions "of the efficiency and economy of litigation which is a principal purpose of the procedure." ' The second consideration is 'effectuation of the purposes of the statute of limitations,' and requires the court to determine whether commencement of the class suit ' "notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment." [Citation.] In these circumstances, . . . the purposes of the statute of limitations would not be violated by a decision to toll.' " (*Batze v. Safeway, Inc.* (2017) 10 Cal.App.5th 440, 482–483 [216 Cal.Rptr.3d 390], internal citations 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].)

- "Plaintiffs cite no authority, and we are aware of none, that would allow a plaintiff in one case to equitably toll the limitation period based on the filing of a stranger's lawsuit." (*Reid v. City of San Diego* (2018) 23 Cal.App.5th 901, 916 [234 Cal.Rptr.3d 636].)
- "Equitable tolling applies to claims under FEHA during the period in which the plaintiff exhausts administrative remedies or when the plaintiff voluntarily pursues an administrative remedy or nonmandatory grievance procedure, even if exhaustion of that remedy is not mandatory." (*Wassmann, supra,* 24 Cal.App.5th at pp. 853–854.)

Secondary Sources

4 Witkin, California Procedure (5th ed. 2008) Actions, § 760 et seq.

Turner 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)

500. Medical Negligence—Essential Factual Elements

Please see CACI No. 400, *Negligence—Essential Factual Elements*

New September 2003; Revised December 2011, December 2015

Directions for Use

In medical malpractice or professional negligence cases, the word "medical" or "professional" should be added before the word "negligence" in the first paragraph of CACI No. 400. From a theoretical standpoint, medical negligence is still considered negligence. (See *Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997–998 [35 Cal.Rptr.2d 685, 884 P.2d 142].)

Also give the appropriate standard-of-care instruction for the defendant's category of medical professional. (See CACI No. 501, *Standard of Care for Health Care Professionals*, CACI No. 502, *Standard of Care for Medical Specialists*, CACI No. 504, *Standard of Care for Nurses*, CACI No. 514, *Duty of Hospital.*)

It is not necessary to instruct that causation must be proven within a reasonable medical probability based upon competent expert testimony. The reference to "medical probability" in medical malpractice cases is no more than a recognition that the case involves the use of medical evidence. (*Uriell v. Regents of University of California* (2015) 234 Cal.App.4th 735, 746 [184 Cal.Rptr.3d 79].)

Sources and Authority

- "Professional Negligence" of Health Care Provider Defined. Code of Civil Procedure section 340.5, Civil Code sections 3333.1 and 3333.2.
- "The elements of a cause of action for medical malpractice are: (1) a duty to use such skill, prudence, and diligence as other members of the profession commonly possess and exercise; (2) a breach of the duty; (3) a proximate causal connection between the negligent conduct and the injury; and (4) resulting loss or damage." (*Lattimore v. Dickey* (2015) 239 Cal.App.4th 959, 968 [191 Cal.Rptr.3d 766].)
- "The court's use of standard jury instructions for the essential elements of negligence, including causation, was appropriate because medical negligence is fundamentally negligence." (*Uriell, supra*, 234 Cal.App.4th at p. 744 [citing Directions for Use to this instruction].)
- "Section 340.5 defines 'professional negligence' as 'a negligent act or omission by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury or wrongful death, provided that such services are *within the scope of services for which the provider is licensed* and which are not within any restriction imposed by the licensing agency or licensed hospital.' The term 'professional negligence' encompasses actions in which 'the injury for which damages are sought is

directly related to the professional services provided by the health care provider' or directly related to 'a matter that is an ordinary and usual part of medical professional services.' '[C]ourts have broadly construed "professional negligence" to mean negligence occurring during the rendering of services for which the health care provider is licensed.' " (*Arroyo v. Plosay* (2014) 225 Cal.App.4th 279, 297 [170 Cal.Rptr.3d 125], original italics, internal citations omitted.)

- "With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional 'circumstances' relevant to an overall assessment of what constitutes 'ordinary prudence' in a particular situation." (*Flowers*, *supra*, 8 Cal.4th at pp. 997–998.)
- "Since the standard of care remains constant in terms of 'ordinary prudence,' it is clear that denominating a cause of action as one for 'professional negligence' does not transmute its underlying character. For substantive purposes, it merely serves to establish the basis by which 'ordinary prudence' will be calculated and the defendant's conduct evaluated." (*Flowers, supra*, 8 Cal.4th at p. 998.)
- "The Medical Injury Compensation Reform Act (MICRA) contains numerous provisions effecting substantial changes in negligence actions against health care providers, including a limitation on noneconomic damages, elimination of the collateral source rule as well as preclusion of subrogation in most instances, and authorization for periodic payments of future damages in excess of $ 50,000. While in each instance the statutory scheme has altered a significant aspect of claims for medical malpractice, such as the measure of the defendant's liability for damages or the admissibility of evidence, the fundamental substance of such actions on the issues of duty, standard of care, breach, and causation remains unaffected." (*Flowers*, *supra*, 8 Cal.4th at p. 999.)
- "On causation, the plaintiff must establish 'it is more probable than not the negligent act was a cause-in-fact of the plaintiff's injury.' ' "A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action." ' '[C]ausation in actions arising from medical negligence must be proven within a reasonable medical probability based on competent expert testimony, i.e., something more than a "50-50 possibility." ' '[T]he evidence must be sufficient to allow the jury to infer that in the absence of the defendant's negligence, there was a reasonable medical probability the plaintiff would have obtained a better result.' " (*Belfiore-Braman v. Rotenberg* (2018) 25 Cal.App.5th 234, 247 [235 Cal.Rptr.3d 629], internal citations omitted.)
- "That there is a distinction between a reasonable medical 'probability' and a medical 'possibility' needs little discussion. There can be many possible 'causes,' indeed, an infinite number of circumstances which can produce an injury or disease. A possible cause only becomes 'probable' when, in the absence of other reasonable causal explanations, *it becomes more likely than not that the injury was a result of its action*. This is the outer limit of inference upon which an issue may be submitted to the jury." (*Jennings v. Palomar*

Pomerado Health Systems, Inc. (2003) 114 Cal.App.4th 1108, 1118 [8 Cal.Rptr.3d 363], original italics, internal citations omitted.)

- "The rationale advanced by the hospital is that . . . if the need for restraint is 'obvious to all,' the failure to restrain is ordinary negligence. . . . [T]his standard is incompatible with the subsequently enacted statutory definition of professional negligence, which focuses on whether the negligence occurs in the rendering of professional services, rather than whether a high or low level of skill is required. [Citation.]" (*Bellamy v. Appellate Dep't of the Superior Court* (1996) 50 Cal.App.4th 797, 806–807 [57 Cal.Rptr.2d 894].)
- "[E]ven in the absence of a physician-patient relationship, a physician has liability to an examinee for negligence or professional malpractice for injuries incurred during the examination itself." (*Mero v. Sadoff* (1995) 31 Cal.App.4th 1466, 1478 [37 Cal.Rptr.2d 769].)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 933–936, 938, 939

California Tort Guide (Cont.Ed.Bar 3d ed.) § 9.65

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, § 30.11, Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.01 (Matthew Bender)

17 California Forms of Pleading and Practice, Ch. 209, *Dentists*, § 209.15 (Matthew Bender)

27 California Forms of Pleading and Practice, Ch. 295, *Hospitals*, §§ 295.13, 295.43 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 415, *Physicians: Medical Malpractice*, § 415.11 (Matthew Bender)

17 California Points and Authorities, Ch. 175, *Physicians and Surgeons*, § 175.20 et seq. (Matthew Bender)

600. Standard of Care

[A/An] [*insert type of professional*] is negligent if [he/she] fails to use the skill and care that a reasonably careful [*insert type of professional*] would have used in similar circumstances. This level of skill, knowledge, and care is sometimes referred to as "the standard of care."

[You must determine the level of skill and care that a reasonably careful [*insert type of professional*] would use in similar circumstances based only on the testimony of the expert witnesses[, including [*name of defendant*],] who have testified in this case.]

New September 2003; Revised October 2004, December 2007

Directions for Use

Use this instruction for all professional negligence cases other than professional medical negligence, for which CACI No. 501, *Standard of Care for Health Care Professionals*, should be used. See CACI No. 400, *Negligence—Essential Factual Elements*, for an instruction on the plaintiff's burden of proof. The word "legal" or "professional" should be added before the word "negligence" in the first paragraph of CACI No. 400. (See *Sources and Authority* following CACI No. 500, *Medical Negligence—Essential Factual Elements*.)

Read the second paragraph if the standard of care must be established by expert testimony.

See CACI Nos. 219–221 on evaluating the credibility of expert witnesses.

If the defendant is a specialist in his or her field, this instruction should be modified to reflect that the defendant is held to the standard of care of a specialist. (*Wright v. Williams* (1975) 47 Cal.App.3d 802, 810 [121 Cal.Rptr. 194].) The standard of care for claims related to a specialist's expertise is determined by expert testimony. (*Id.* at pp. 810–811.)

Whether an attorney-client relationship exists is a question of law. (*Responsible Citizens v. Superior Court* (1993) 16 Cal.App.4th 1717, 1733 [20 Cal.Rptr.2d 756].) If the evidence bearing upon this decision is in conflict, preliminary factual determinations are necessary. (*Ibid.*) Special instructions may need to be crafted for that purpose.

Sources and Authority

- "The elements of a cause of action in tort for professional negligence are (1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the professional's

negligence." (*Budd v. Nixen* (1971) 6 Cal.3d 195, 200 [98 Cal.Rptr. 849, 491 P.2d 433].)

- "Plaintiffs' argument that CACI No. 600 altered their burden of proof is misguided in that it assumes that a 'professional' standard of care is inherently different than the standard in ordinary negligence cases. It is not. 'With respect to professionals, their specialized education and training do not serve to impose an increased duty of care but rather are considered additional "circumstances' relevant to an overall assessment of what constitutes "ordinary prudence" in a particular situation.' 'Since the standard of care remains constant in terms of "ordinary prudence," it is clear that denominating a cause of action as one for "professional negligence" does not transmute its underlying character. For substantive purposes, it merely serves to establish the basis by which "ordinary prudence" will be calculated and the defendant's conduct evaluated.' " (*LAOSD Asbestos Cases* (2016) 5 Cal.App.5th 1022, 1050 [211 Cal.Rptr.3d 261], internal citation omitted.)
- " 'In addressing breach of duty, "the crucial inquiry is whether [the attorney's] advice was so legally deficient when it was given that he [or she] may be found to have failed to use 'such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake.' . . ." . . .' " (*Blanks v. Seyfarth Shaw LLP* (2009) 171 Cal.App.4th 336, 357 [89 Cal.Rptr.3d 710].)
- "[I]f the allegedly negligent conduct does not cause damage, it generates no cause of action in tort." (*Moua v. Pittullo, Howington, Barker, Abernathy, LLP* (2014) 228 Cal.App.4th 107, 112–113 [174 Cal.Rptr.3d 662].)
- "[T]he issue of negligence in a legal malpractice case is ordinarily an issue of fact." (*Blanks, supra*, 171 Cal.App.4th at p. 376.)
- " '[T]he requirement that the plaintiff prove causation should not be confused with the method or means of doing so. Phrases such as "trial within a trial," "case within a case," . . . and "better deal" scenario describe methods of proving causation, not the causation requirement itself or the test for determining whether causation has been established.' " (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1091 [236 Cal.Rptr.3d 473].)
- "Plaintiffs argue that 'laying pipe is not a "profession." ' However, case law, statutes, and secondary sources suggest that the scope of those held to a 'professional' standard of care—a standard of care similar to others in their profession, as opposed to that of a 'reasonable person'—is broad enough to encompass a wide range of specialized skills. As a general matter, '[t]hose undertaking to render expert services in the practice of a profession or trade are required to have and apply the skill, knowledge and competence ordinarily possessed by their fellow practitioners under similar circumstances, and failure to do so subjects them to liability for negligence.' " (*LAOSD Asbestos Cases, supra*, 5 Cal.App.5th at p. 1050.)
- "It is well settled that an attorney is liable for malpractice when his negligent

investigation, advice, or conduct of the client's affairs results in loss of the client's meritorious claim." (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 900 [218 Cal.Rptr. 313, 705 P.2d 886].)

- "[A] lawyer holding himself out to the public and the profession as specializing in an area of the law must exercise the skill, prudence, and diligence exercised by other specialists of ordinary skill and capacity specializing in the same field." (*Wright, supra*, 47 Cal.App.3d at p. 810.)
- "To establish a [professional] malpractice claim, a plaintiff is required to present expert testimony establishing the appropriate standard of care in the relevant community. 'Standard of care " 'is a matter peculiarly within the knowledge of experts; it presents the basic issue in a malpractice action and can only be proved by their testimony [citations] . . . .' " [Citation.]' " (*Quigley v. McClellan* (2013) 214 Cal.App.4th 1276, 1283 [154 Cal.Rptr.3d 719], internal citations omitted.)
- " '. . . "[W]here the failure of attorney performance is so clear that a trier of fact may find professional negligence unassisted by expert testimony, then expert testimony is not required." In other words, if the attorney's negligence is readily apparent from the facts of the case, then the testimony of an expert may not be necessary.' " (*Stanley v. Richmond* (1995) 35 Cal.App.4th 1070, 1093 [41 Cal.Rptr.2d 768], internal citations omitted.)
- "Where . . . the malpractice action is brought against an attorney holding himself out as a legal specialist and the claim against him is related to his expertise as such, then only a person knowledgeable in the specialty can define the applicable duty of care and opine whether it was met." (*Wright, supra*, 47 Cal.App.3d at pp. 810–811, footnote and internal citations omitted.)
- "The standard is that of members of the profession 'in the same or a similar locality under similar circumstances' . . . . The duty encompasses both a knowledge of law and an obligation of diligent research and informed judgment." (*Wright, supra*, 47 Cal.App.3d at p. 809, internal citations omitted; but see *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 470–471 [71 Cal.Rptr.3d 707] [geographical location may be a factor to be considered, but by itself, does not provide a practical basis for measuring similar circumstances].)
- Failing to Act Competently. Rules of Professional Conduct, rule 3-110.

Secondary Sources

1 Witkin, California Procedure (5th ed. 2008) Attorneys, §§ 290–293

4 Witkin, California Procedure (5th ed. 2008) Pleadings, § 593

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 990, 991, 994–997

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 1-A, *Sources Of Regulation Of Practice Of Law In California-Overview*, ¶ 1:39 (The Rutter Group)

Vapnek, et al., California Practice Guide: Professional Responsibility, Ch. 6-D,

CACI No. 600

Professional Liability, ¶¶ 6:230–6:234 (The Rutter Group)

1 Levy et al., California Torts, Ch. 1, *Negligence: Duty and Breach*, § 1.31 (Matthew Bender)

3 Levy et al., California Torts, Ch. 30, *General Principles of Liability of Professionals*, §§ 30.12, 30.13, Ch. 32, *Liability of Attorneys*, § 32.13 (Matthew Bender)

7 California Forms of Pleading and Practice, Ch. 76, *Attorney Professional Liability*, §§ 76.50, 76.51 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.50 (Matthew Bender)

2A California Points and Authorities, Ch. 24A, *Attorneys at Law: Malpractice*, § 24A.20 et seq. (Matthew Bender)

1001. Basic Duty of Care

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

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

(a) The location of the property;

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

(c) The likelihood of harm;

(d) The probable seriousness of such harm;

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

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

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

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

New September 2003; Revised June 2010

Directions for Use

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

Under the doctrine of nondelegable duty, a property owner cannot escape liability for failure to maintain property in a safe condition by delegating the duty to an independent contractor. (*Brown v. George Pepperdine Foundation* (1943) 23 Cal.2d 256, 260 [143 P.2d 929].) For an instruction for use with regard to a landowner's liability for the acts of an independent contractor, see CACI No. 3713, *Nondelegable Duty*.

Sources and Authority

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

Cal.Rptr.2d 838], internal citation omitted.)

- "It is now well established that California law requires landowners to maintain land in their possession and control in a reasonably safe condition." (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 [25 Cal.Rptr.2d 137, 863 P.2d 207], internal citations omitted.)
- "To comply with this duty, a person who controls property must ' " ' "inspect [the premises] or take other proper means to ascertain their condition" ' " ' and, if a dangerous condition exists that would have been discovered by the exercise of reasonable care, has a duty to give adequate warning of or remedy it." (*Staats v. Vintner's Golf Club, LLC* (2018) 25 Cal.App.5th 826, 833 [236 Cal.Rptr.3d 236].)
- "[T]he measures an operator must take to comply with the duty to keep the premises in a reasonably safe condition depend on the circumstances, and the issue is a question for the jury unless the facts of the case are not reasonably in dispute." (*Staats*, *supra*, 25 Cal.App.5th at p. 840.)
- "An owner of real property is 'not the insurer of [a] visitor's personal safety . . . .' However, an owner is responsible ' "for an injury occasioned to another by [the owner's] want of ordinary care or skill in the management of his or her property. . . ." ' Accordingly, landowners are required 'to maintain land in their possession and control in a reasonably safe condition', and to use due care to eliminate dangerous conditions on their property." (*Taylor v. Trimble* (2017) 13 Cal.App.5th 934, 943–944 [220 Cal.Rptr.3d 741], internal citations omitted.)
- "[T]he issue concerning a landlord's duty is not the *existence* of the duty, but rather the *scope* of the duty under the particular facts of the case. Reference to the *scope* of the landlord's duty 'is intended to describe the specific steps a landlord must take in a given specific circumstance to maintain the property's safety to protect a tenant from a specific class of risk.' " (*Lawrence v. La Jolla Beach & Tennis Club, Inc.* (2014) 231 Cal.App.4th 11, 23 [179 Cal.Rptr.3d 758], original italics, internal citation omitted.)
- "The proper test to be applied to the liability of the possessor of land . . . is whether in the management of his property he has acted as a reasonable man in view of the probability of injury to others . . . ." (*Rowland v. Christian* (1968) 69 Cal.2d 108, 119 [70 Cal.Rptr. 97, 443 P.2d 561].)
- "It is well settled that a property owner is not liable for damages caused by a minor, trivial, or insignificant defect in his property. This principle is sometimes referred to as the 'trivial defect defense,' although it is not an affirmative defense but rather an aspect of duty that a plaintiff must plead and prove. . . . Moreover, what constitutes a minor defect may be a question of law." (*Cadam v. Somerset Gardens Townhouse HOA* (2011) 200 Cal.App.4th 383, 388–389 [132 Cal.Rptr.3d 617], internal citations omitted.)
- In this state, duties are no longer imposed on an occupier of land solely on the

basis of rigid classifications of trespasser, licensee, and invitee. The purpose of plaintiff's presence on the land is not determinative. We have recognized, however, that this purpose may have some bearing upon the liability issue. This purpose therefore must be considered along with other factors weighing for and against the imposition of a duty on the landowner." (*Ann M., supra*, 6 Cal.4th at pp. 674–675, internal citations omitted.)

- "As stated in *Beauchamp v. Los Gatos Golf Course* (1969) 273 Cal.App.2d 20, 25 [77 Cal.Rptr. 914], '[t]he term "invitee" has not been abandoned, nor have "trespasser" and "licensee." In the minds of the jury, whether a possessor of the premises has acted as a reasonable man toward a plaintiff, in view of the probability of injury to him, will tend to involve the circumstances under which he came upon defendant's land; and the probability of exposure of plaintiff and others of his class to the risk of injury; as well as whether the condition itself presented an unreasonable risk of harm, in view of the foreseeable use of the property.' Thus, the court concluded, and we agree, *Rowland* 'does not generally abrogate the decisions declaring the substantive duties of the possessor of land to invitees nor those establishing the correlative rights and duties of invitees.' (*Id.*, at p. 27.)" (*Williams v. Carl Karcher Enterprises, Inc.* (1986) 182 Cal.App.3d 479, 486–487 [227 Cal.Rptr. 465], overruled on other grounds in *Soule v. GM Corp.* (1994) 8 Cal.4th 548 [34 Cal.Rptr.2d 607, 882 P.2d 298].)
- "The distinction between artificial and natural conditions [has been] rejected." (*Sprecher v. Adamson Companies* (1981) 30 Cal.3d 358, 371 [178 Cal.Rptr. 783, 636 P.2d 1121].)
- "It must also be emphasized that the liability imposed is for negligence. The question is whether in the management of his property, the possessor of land has acted as a reasonable person under all the circumstances. The likelihood of injury to plaintiff, the probable seriousness of such injury, the burden of reducing or avoiding the risk, the location of the land, and the possessor's degree of control over the risk-creating condition are among the factors to be considered by the trier of fact in evaluating the reasonableness of a defendant's conduct." (*Sprecher, supra*, 30 Cal.3d at p. 372.)
- "[A] landowner's duty of care to avoid exposing others to a risk of injury is not limited to injuries that occur on premises owned or controlled by the landowner. Rather, the duty of care encompasses a duty to avoid exposing persons to risks of injury that occur off site if the landowner's property is maintained in such a manner as to expose persons to an unreasonable risk of injury offsite. (*Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 38 [180 Cal.Rptr.3d 474].)
- "The duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition, irrespective

of whether the contractor's negligence lies in his incompetence, carelessness, inattention or delay." (*Brown, supra*, 23 Cal.2d at p. 260.)

- "[A] defendant property owner's compliance with a law or safety regulation, in and of itself, does not establish that the owner has utilized due care. The owner's compliance with applicable safety regulations, while relevant to show due care, is not dispositive, if there are other circumstances requiring a higher degree of care." (*Lawrence, supra*, 231 Cal.App.4th at p. 31.)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1228

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-A, *Liability For Defective Conditions On Premises*, ¶ 6:1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-B, *Landlord Liability For Injuries From Acts Of Others*, ¶ 6:48 et seq. (The Rutter Group)

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

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

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

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

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

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

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

1011. Constructive Notice Regarding Dangerous Conditions on Property

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In determining whether [*name of defendant***] should have known of the condition that created the risk of harm, you must decide whether, under all the circumstances, the condition was of such a nature and existed long enough that [***name of defendant***] had sufficient time to discover it and, using reasonable care:**

1. **Repair the condition; or**
2. **Protect against harm from the condition; or**
3. **Adequately warn of the condition.**

[[*Name of defendant***] must make reasonable inspections of the property to discover unsafe conditions. If an inspection was not made within a reasonable time before the accident, this may show that the condition existed long enough so that [a store/[a/an] [***insert other commercial enterprise***]] owner using reasonable care would have discovered it.]**

New September 2003; Revised February 2007, October 2008

Directions for Use

This instruction is intended for use if there is an issue concerning the owner's constructive knowledge of a dangerous condition. It should be given with CACI No. 1003, *Unsafe Conditions*.

The bracketed second paragraph of this instruction is based on *Ortega v. Kmart* (2001) 26 Cal.4th 1200 [114 Cal.Rptr.2d 470, 36 P.3d 11]. *Ortega* involved a store. The court should determine whether the bracketed portion of this instruction applies to other types of property.

Sources and Authority

- "It is well established in California that although a store owner is not an insurer of the safety of its patrons, the owner does owe them a duty to exercise reasonable care in keeping the premises reasonably safe." (*Ortega, supra,* 26 Cal.4th at p. 1205, internal citation omitted.)
- "We conclude that a plaintiff may prove a dangerous condition existed for an unreasonable time with circumstantial evidence, and that . . . 'evidence that an inspection had not been made within a particular period of time prior to an accident may warrant an inference that the defective condition existed long enough so that a person exercising reasonable care would have discovered it.' " (*Ortega, supra,* 26 Cal.4th at p. 1210, internal citation omitted.)
- "A store owner exercises ordinary care by making reasonable inspections of the portions of the premises open to customers, and the care required is

commensurate with the risks involved." (*Ortega, supra,* 26 Cal.4th at p. 1205, internal citation omitted.)

- "Because the owner is not the insurer of the visitor's personal safety, the owner's actual or constructive knowledge of the dangerous condition is a key to establishing its liability." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)
- "Courts have also held that where the plaintiff relies on the failure to correct a dangerous condition to prove the owner's negligence, the plaintiff has the burden of showing that the owner had notice of the defect in sufficient time to correct it." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)
- "The plaintiff need not show actual knowledge where evidence suggests that the dangerous condition was present for a sufficient period of time to charge the owner with constructive knowledge of its existence." (*Ortega, supra,* 26 Cal.4th at p. 1206, internal citations omitted.)
- "We emphasize that allowing the inference does not change the rule that if a store owner has taken care in the discharge of its duty, by inspecting its premises in a reasonable manner, then no breach will be found even if a plaintiff does suffer injury." (*Ortega, supra,* 26 Cal.4th at p. 1211, internal citations omitted.)
- "We conclude that plaintiffs still have the burden of producing evidence that the dangerous condition existed for at least a sufficient time to support a finding that the defendant had constructive notice of the hazardous condition. We also conclude, however, that plaintiffs may demonstrate the storekeeper had constructive notice of the dangerous condition if they can show that the site had not been inspected within a reasonable period of time so that a person exercising due care would have discovered and corrected the hazard. In other words, if the plaintiffs can show an inspection was not made within a particular period of time prior to an accident, they may raise an inference the condition did exist long enough for the owner to have discovered it. It remains a question of fact for the jury whether, under all the circumstances, the defective condition existed long enough so that it would have been discovered and remedied by an owner in the exercise of reasonable care." (*Ortega, supra,* at pp. 1212–1213, internal citations omitted.)
- "To comply with this duty, a person who controls property must ' " ' "inspect [the premises] or take other proper means to ascertain their condition" ' " ' and, if a dangerous condition exists that would have been discovered by the exercise of reasonable care, has a duty to give adequate warning of or remedy it." (*Staats v. Vintner's Golf Club, LLC* (2018) 25 Cal.App.5th 826, 833 [236 Cal.Rptr.3d 236].)
- "Generally speaking, a property owner must have actual or constructive knowledge of a dangerous condition before liability will be imposed. In the ordinary slip and fall case, . . . the cause of the dangerous condition is not necessarily linked to an employee. Consequently, there is no issue of respondeat

superior. Where, however, 'the evidence is such that a reasonable inference can be drawn that the condition was created by employees of the [defendant], then [the defendant] is charged with notice of the dangerous condition.' " (*Getchell v. Rogers Jewelry* (2012) 203 Cal.App.4th 381, 385 [136 Cal.Rptr.3d 641], internal citation omitted.)

- "Although no two accidents happen in the same way, to be admissible for showing notice to a landowner of a dangerous condition, evidence of another similar accident must have occurred under substantially the same circumstances." (*Howard v. Omni Hotels Mgmt. Corp.* (2012) 203 Cal.App.4th 403, 432 [136 Cal.Rptr.3d 739].)

Secondary Sources

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-A, *Liability For Defective Conditions On Premises*, ¶ 6:1 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 6-B, *Landlord Liability For Injuries From Acts Of Others*, ¶ 6:48 et seq. (The Rutter Group)

1 Levy et al., California Torts, Ch. 15, *General Premises Liability*, § 15.04 (Matthew Bender)

11 California Real Estate Law and Practice, Ch. 381, *Tort Liability of Property Owners*, § 381.20 (Matthew Bender)

36 California Forms of Pleading and Practice, Ch. 421, *Premises Liability*, § 421.14 (Matthew Bender)

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

2021. Private Nuisance—Essential Factual Elements

[*Name of plaintiff***] claims that [***name of defendant***] interfered with [***name of plaintiff***]'s use and enjoyment of [his/her] land. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [owned/leased/occupied/controlled] the property;**
2. **That [***name of defendant***], by acting or failing to act, created a condition or permitted a condition to exist that [***insert one or more of the following:***]**

   [was harmful to health;] [or]

   [was indecent or offensive to the senses;] [or]

   [was an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property;] [or]

   [unlawfully obstructed the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway;] [or]

   [was [a/an] [fire hazard/*specify other potentially dangerous condition***] to [***name of plaintiff***]'s property;]**
3. **That [[***name of defendant***]'s conduct in acting or failing to act was [intentional and unreasonable/unintentional, but negligent or reckless]/[the condition that [***name of defendant***] created or permitted to exist was the result of an abnormally dangerous activity]];**
4. **That this condition substantially interfered with [***name of plaintiff***]'s use or enjoyment of [his/her] land;**
5. **That an ordinary person would reasonably be annoyed or disturbed by [***name of defendant***]'s conduct;**
6. **That [***name of plaintiff***] did not consent to [***name of defendant***]'s conduct;**
7. **That [***name of plaintiff***] was harmed;**
8. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm; and**
9. **That the seriousness of the harm outweighs the public benefit of**

[*name of defendant***]'s conduct.**

New September 2003; Revised February 2007, December 2011, December 2015, June 2016, May 2017, May 2018

Directions for Use

Private nuisance liability depends on some sort of conduct by the defendant that either directly and unreasonably interferes with the plaintiff's property or creates a condition that does so. (*Lussier v. San Lorenzo Valley Water Dist.* (1988) 206 Cal.App.3d 92, 100 [253 Cal.Rptr. 470].) Element 2 requires that the defendant have acted to create a condition or allowed a condition to exist by failing to act.

The act that causes the interference may be intentional and unreasonable. Or it may be unintentional but caused by negligent or reckless conduct. Or it may result from an abnormally dangerous activity for which there is strict liability. However, if the act is intentional but reasonable, or if it is entirely accidental, there is generally no liability. (*Lussier*, *supra*, 206 Cal.App.3d at p. 100.)

The intent required is only to do the act that interferes, not an intent to cause harm. (*Lussier*, *supra*, 206 Cal.App.3d at pp. 100, 106; see Rest.2d Torts, § 822.) For example, it is sufficient that one intend to chop down a tree; it is not necessary to intend that it fall on a neighbor's property.

If the condition results from an abnormally dangerous activity, it must be one for which there is strict liability. (*Lussier*, *supra*, 206 Cal.App.3d at p. 100; see Rest.2d Torts, § 822).

There may be an exception to the scienter requirement of element 3 for at least some harm caused by trees. There are cases holding that a property owner is strictly liable for damage caused by tree branches and roots that encroach on neighboring property. (See *Lussier, supra,* 206 Cal.App.3d at p.106, fn. 5; see also *Mattos v. Mattos* (1958) 162 Cal.App.2d 41, 43 [328 P.2d 269] [absolute liability of an owner to remove portions of his fallen trees that extend over and upon another's land]; cf. *City of Pasadena v. Superior Court* (2014) 228 Cal.App.4th 1228, 1236 [176 Cal.Rptr.3d 422] [plaintiff must prove negligent maintenance of trees that fell onto plaintiff's property in a windstorm].) Do not give element 3 if the court decides that there is strict liability for damage caused by encroaching or falling trees.

If the claim is that the defendant failed to abate a nuisance, negligence must be proved. (*City of Pasadena*, *supra*, 228 Cal.App.4th at p. 1236.)

Element 9 must be supplemented with CACI No. 2022, *Private Nuisance—Balancing-Test Factors—Seriousness of Harm and Public Benefit*. (See *Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 160–165 [184 Cal.Rptr.3d 26].) For instruction on control of property, see CACI No. 1002, *Extent of Control Over Premises Area*, in the Premises Liability series.

Sources and Authority

- "Nuisance" Defined. Civil Code section 3479.
- Acts Done Under Express Authority of Statute. Civil Code section 3482.
- "A nuisance is considered a 'public nuisance' when it 'affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.' A 'private nuisance' is defined to include any nuisance not covered by the definition of a public nuisance, and also includes some public nuisances. 'In other words, it is possible for a nuisance to be public and, from the perspective of individuals who suffer an interference with their use and enjoyment of land, to be private as well.' " (*Mendez v. Rancho Valencia Resort Partners, LLC* (2016) 3 Cal.App.5th 248, 261–262 [207 Cal.Rptr.3d 532], internal citations omitted.)
- "In distinction to trespass, liability for nuisance does not require proof of damage to the plaintiff's property; proof of interference with the plaintiff's use and enjoyment of that property is sufficient." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 937 [55 Cal.Rptr.2d 724, 920 P.2d 669].)
- "[T]he essence of a private nuisance is its interference with the use and enjoyment of land. The activity in issue must 'disturb or prevent the comfortable enjoyment of property,' such as smoke from an asphalt mixing plant, noise and odors from the operation of a refreshment stand, or the noise and vibration of machinery." (*Oliver v. AT&T Wireless Services* (1999) 76 Cal.App.4th 521, 534 [90 Cal.Rptr.2d 491], internal citations omitted.)
- "A nuisance is an interference with the interest in the private use and enjoyment of the land and does not require interference with the possession." (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1178 [227 Cal.Rptr.3d 390].)
- "[T]o proceed on a private nuisance theory the plaintiff must prove an injury specifically referable to the use and enjoyment of his or her land. The injury, however, need not be different in kind from that suffered by the general public." (*Koll-Irvine Center Property Owners Assn. v. County of Orange* (1994) 24 Cal.App.4th 1036, 1041 [29 Cal.Rptr.2d 664], internal citation omitted.)
- "So long as the interference is substantial and unreasonable, and such as would be offensive or inconvenient to the normal person, virtually any disturbance of the enjoyment of the property may amount to a nuisance; . . . ." (*Mendez, supra*, 3 Cal.App.5th at p. 262.)
- "The requirements of *substantial damage* and *unreasonableness* are not inconsequential. These requirements stem from the law's recognition that: ' "Life in organized society and especially in populous communities involves an unavoidable clash of individual interests. Practically all human activities unless carried on in a wilderness interfere to some extent with others or involve some risk of interference, and these interferences range from mere trifling annoyances to serious harms. It is an obvious truth that each individual in a community

must put up with a certain amount of annoyance, inconvenience and interference and must take a certain amount of risk in order that all may get on together. The very existence of organized society depends upon the principle of 'give and take, live and let live,' and *therefore the law of torts does not attempt to impose liability or shift the loss in every case in which one person's conduct has some detrimental effect on another*. Liability . . . is imposed in those cases in which the harm or risk to one is greater than he ought to be required to bear under the circumstances, at least without compensation." ' " (*Mendez, supra*, 3 Cal.App.5th at p. 263, original italics.)

- "The first additional requirement for recovery of damages on a nuisance theory is proof that the invasion of the plaintiff's interest in the use and enjoyment of the land was substantial, i.e., that it caused the plaintiff to suffer 'substantial actual damage.' The Restatement recognizes the same requirement as the need for proof of 'significant harm,' which it variously defines as 'harm of importance' and a 'real and appreciable invasion of the plaintiff's interests' and an invasion that is 'definitely offensive, seriously annoying or intolerable.' The degree of harm is to be judged by an objective standard, i.e., what effect would the invasion have on persons of normal health and sensibilities living in the same community? 'If normal persons in that locality would not be substantially annoyed or disturbed by the situation, then the invasion is not a significant one, even though the idiosyncrasies of the particular plaintiff may make it unendurable to him.' This is, of course, a question of fact that turns on the circumstances of each case." (*San Diego Gas & Electric Co., supra*, 13 Cal.4th at p. 938, internal citations omitted.)
- "The second additional requirement for nuisance is superficially similar but analytically distinct: 'The interference with the protected interest must not only be substantial, but it must also be unreasonable', i.e., it must be 'of such a nature, duration or amount as to constitute unreasonable interference with the use and enjoyment of the land.' The primary test for determining whether the invasion is unreasonable is whether the gravity of the harm outweighs the social utility of the defendant's conduct, taking a number of factors into account. Again the standard is objective: the question is not whether the particular plaintiff found the invasion unreasonable, but 'whether reasonable persons generally, looking at the whole situation impartially and objectively, would consider it unreasonable.' And again this is a question of fact: 'Fundamentally, the unreasonableness of intentional invasions is a problem of relative values to be determined by the trier of fact in each case in the light of all the circumstances of that case.' "(*San Diego Gas & Electric Co., supra*, 13 Cal.4th at pp. 938–939, internal citations omitted.)
- "Appellant first argues that the judgment is erroneous because there is no showing that any act or conduct of his caused the damage. It is true that there is neither showing nor finding of any negligent or wrongful act or omission of defendant proximately causing the falling of the trees. But no such showing is required. If the trees remained upright, with some of their branches extending

over or upon plaintiff's land, they clearly would constitute a nuisance, which defendant could be required to abate." (*Mattos*, *supra*, 162 Cal.App.2d at p. 42.)

- "Although the central idea of nuisance is the unreasonable invasion of this interest and not the particular type of conduct subjecting the actor to liability, liability nevertheless depends on some sort of conduct that either directly and unreasonably interferes with it or creates a condition that does so. 'The invasion may be intentional and unreasonable. It may be unintentional but caused by negligent or reckless conduct; or it may result from an abnormally dangerous activity for which there is strict liability. On any of these bases the defendant may be liable. On the other hand, the invasion may be intentional but reasonable; or it may be entirely accidental and not fall within any of the categories mentioned above. In these cases there is no liability.' " (*Lussier*, *supra*, 206 Cal.App.3d at p. 100, internal citations omitted.)
- "A finding of an actionable nuisance does not require a showing that the defendant acted unreasonably. As one treatise noted, '[c]onfusion has resulted from the fact that the intentional interference with the plaintiff's use of his property can be unreasonable even when the defendant's conduct is reasonable. This is simply because a reasonable person could conclude that the plaintiff's loss resulting from the intentional interference ought to be allocated to the defendant.' " (*Wilson v. Southern California Edison Co.* (2018) 21 Cal.App.5th 786, 804 [230 Cal.Rptr.3d 595], quoting Prosser & Keeton (5th ed. 1984) Torts § 88.)
- "We do not intend to suggest, however, that one is strictly liable for damages that arise when a natural condition of one's land interferes with another's free use and enjoyment of his property. Such a rule would, quite anomalously, equate natural conditions with dangerous animals, ultrahazardous activities, or defective products, for which strict liability is reserved." (*Lussier*, *supra*, 206 Cal.App.3d at pp. 101–102.)
- "Clearly, a claim of nuisance based on our example is easier to prove than one based on negligent conduct, for in the former, a plaintiff need only show that the defendant committed the acts that caused injury, whereas in the latter, a plaintiff must establish a duty to act and prove that the defendant's failure to act reasonably in the face of a known danger breached that duty and caused damages." (*Lussier*, *supra*, 206 Cal.App.3d at p. 106.)
- "We note, however, a unique line of cases, starting with *Grandona v. Lovdal* (1886) 70 Cal. 161 [11 P. 623], which holds that to the extent that the branches and roots of trees encroach upon another's land and cause or threaten damage, they may constitute a nuisance. Superficially, these cases appear to impose nuisance liability in the absence of wrongful conduct." (*Lussier*, *supra*, 206 Cal.App.3d at p. 102, fn. 5 [but questioning validity of such a rule], internal citations omitted.)
- "The fact that the defendants' alleged misconduct consists of omission rather than affirmative actions does not preclude nuisance liability." (*Birke v. Oakwood*

Worldwide (2009) 169 Cal.App.4th 1540, 1552 [87 Cal.Rptr.3d 602], internal citations omitted.)

- "A nuisance may be either a negligent or an intentional tort." (*Stoiber v. Honeychuck* (1980) 101 Cal.App.3d 903, 920 [162 Cal.Rptr. 194], internal citation omitted.)
- "Nuisance liability is not necessarily based on negligence, thus, 'one may be liable for a nuisance even in the absence of negligence. [Citations.]' However, ' " 'where liability for the nuisance is predicated on the omission of the owner of the premises to abate it, rather than on his having created it, then negligence is said to be involved. . . .' [Citations.]' " (*City of Pasadena*, *supra*, 228 Cal.App.4th at p. 1236, internal citations omitted.)
- "We acknowledge that to recover on a nuisance claim the harm the plaintiff suffers need not be a physical injury. Thus, the absence of evidence in this case to establish that [plaintiff] 's physical injuries were caused by the stray voltage would not preclude recovery on her nuisance claim." (*Wilson, supra*, 234 Cal.App.4th at p. 159, internal citations omitted.)
- "[M]ere apprehension of injury from a dangerous condition may constitute a nuisance where it interferes with the comfortable enjoyment of property. . . ." (*McIvor v. Mercer-Fraser Co.* (1946) 76 Cal.App.2d 247, 254 [172 P.2d 758].)
- "It is the general rule that the unreasonable, unwarrantable or unlawful use by a person of his own property so as to interfere with the rights of others is a nuisance [citation]. In fact, any unwarranted activity which causes substantial injury to the property of another or obstructs its reasonable use and enjoyment is a nuisance which may be abated. And, even a lawful use of one's property may constitute a nuisance if it is part of a general scheme to annoy a neighbor and if the main purpose of the use is to prevent the neighbor from reasonable enjoyment of his own property [citation]." (*McBride*, *supra*, 18 Cal.App.5th at p. 1180.)
- " 'Occupancy goes to the holding, possessing or residing in or on something.' 'The rights which attend occupancy may be, arguably, many.' ' "Invasion of the right of private occupancy" resembles the definition of nuisance, an " 'interference with the interest in the private use and enjoyment of the land.' " [Citations.] 'The typical and familiar nuisance claim involves an activity or condition which causes damage or other interference with the enjoyment of adjoining or neighboring land.' ' " (*Albert v. Truck Ins. Exchange* (2018) 23 Cal.App.5th 367, 380 [232 Cal.Rptr.3d 774, internal citations omitted.)
- "An invasion of the right of private occupancy does not have to be a physical invasion of the land; a nonphysical invasion of real property rights can interfere with the use and enjoyment of real property." (*Albert*, *supra*, 23 Cal.App.5th at p. 380.)
- "A fire hazard, at least when coupled with other conditions, can be found to be a public nuisance and abated." (*People v. Oliver* (1948) 86 Cal.App.2d 885, 889 [195 P.2d 926].)

- "[T]he exculpatory effect of Civil Code section 3482 has been circumscribed by decisions of this court. . . . ' "A statutory sanction cannot be pleaded in justification of acts which by the general rules of law constitute a nuisance, unless the acts complained of are authorized by the express terms of the statute under which the justification is made, or by the plainest and most necessary implication from the powers expressly conferred, so that it can be fairly stated that the Legislature contemplated the doing of the very act which occasions the injury.' " " (*Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 291 [142 Cal.Rptr. 429, 572 P.2d 43], internal citation omitted.)

Secondary Sources

13 Witkin, Summary of California Law (11th ed. 2017) Equity, § 174

2 Levy et al., California Torts, Ch. 17, *Nuisance and Trespass*, §§ 17.01–17.05 (Matthew Bender)

34 California Forms of Pleading and Practice, Ch. 391, *Nuisance*, § 391.13 (Matthew Bender)

16 California Points and Authorities, Ch. 167, *Nuisance*, § 167.20 (Matthew Bender)

California Civil Practice: Torts §§ 17:1, 17:2, 17:4 (Thomson Reuters)

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

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[*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, that is, 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, December 2015

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.

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.

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

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].)
- " 'The proper focus is on the facts alleged in the complaint, rather than the alleged theories for recovery. . . . "The ultimate question is whether the facts alleged 'fairly apprise' the insurer that the suit is upon a covered claim." ' " (*Albert v. Truck Ins. Exchange* (2018) 23 Cal. App. 5th 367, 378 [232 Cal.Rptr.3d 774].)
- "A duty to defend can be extinguished only prospectively and not retrospectively." (*Navigators Specialty Ins. Co. v. Moorefield Construction, Inc.* (2016) 6 Cal.App.5th 1258, 1284 [212 Cal.Rptr.3d 231].)
- "[F]acts known to the insurer and extrinsic to the third party complaint can generate a duty to defend, even though the face of the complaint does not reflect a potential for liability under the policy. [Citation.] This is so because current pleading rules liberally allow amendment; the third party plaintiff cannot

be the arbiter of coverage." (*Tidwell Enterprises, Inc. v. Financial Pacific Ins. Co., Inc.* (2016) 6 Cal.App.5th 100, 106 [210 Cal.Rptr.3d 634].)

- "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].)
- " '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.)
- "When a complaint states multiple claims, some of which are potentially covered by the insurance policy and some of which are not, it is a mixed action. In these cases, 'the insurer has a duty to defend as to the claims that are at least potentially covered, having been paid premiums by the insured therefor, but does not have a duty to defend as to those that are not, not having been paid therefor.' However, in a ' "mixed" action, the insurer has a duty to defend the action in its entirety.' Thereafter, the insurance company is entitled to seek reimbursement for the cost of defending the claims that are not potentially covered by the policy." (*Gonzalez v. Fire Ins. Exchange* (2015) 234 Cal.App.4th 1220, 1231 [184 Cal.Rptr.3d 394], 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, ¶ 7:614 (The Rutter Group).)

Secondary Sources

2 Witkin, Summary of California Law (11th ed. 2017) Insurance, §§ 427, 428

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)

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

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

1. **That [***name of defendant***] was [an employer/[***other covered entity***]];**
2. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/ applied to [***name of defendant***] for a job/[***describe other covered relationship to defendant***]];**
3. **[That [***name of defendant***] [discharged/refused to hire/[***other adverse employment action***]] [***name of plaintiff***];]**

   [or]

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

   [or]

   [That [*name of plaintiff***] was constructively discharged;]**
4. **That [***name of plaintiff***]'s [***protected status—for example, race, gender, or age***] was a substantial motivating reason for [***name of defendant***]'s [decision to [discharge/refuse to hire/[***other adverse employment action***]] [***name of plaintiff***]/conduct];**
5. **That [***name of plaintiff***] was harmed; and**
6. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised April 2009, June 2011, June 2012, June 2013

Directions for Use

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

If element 1 is given, the court may need to instruct the jury on the statutory definition of "employer" under the FEHA. Other covered entities under the FEHA

include labor organizations, employment agencies, and apprenticeship training programs. (See Gov. Code, § 12940(a)–(d).)

Read the first option for element 3 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 3 and also give CACI No. 2510, *"Constructive Discharge" Explained*. Select "conduct" in element 4 if either the second or third option is included for element 3.

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

Element 4 requires that discrimination based on a protected classification 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*.) Modify element 4 if plaintiff was not actually a member of the protected class, but alleges discrimination because he or she was perceived to be a member, or associated with someone who was or was perceived to be a member, of the protected class. (See Gov. Code, § 12926(o).)

For damages instructions, see applicable instructions on tort damages.

Sources and Authority

- Discrimination Prohibited Under Fair Employment and Housing Act. Government Code section 12940(a).
- Perception and Association. Government Code section 12926(o).
- "[C]onceptually the theory of '[disparate] treatment' . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin." (*Mixon v. Fair Employment and Housing Com.* (1987) 192 Cal.App.3d 1306, 1317 [237 Cal.Rptr. 884], quoting *Teamsters v. United States* (1977) 431 U.S. 324, 335–336, fn. 15 [97 S.Ct. 1843, 52 L.Ed.2d 396].)
- "California has adopted the three-stage burden-shifting test for discrimination claims set forth in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 [93 S.Ct. 1817, 36 L.Ed. 2d 668]. 'This so-called *McDonnell Douglas* test reflects the principle that direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially. Thus, by successive steps of increasingly narrow focus, the test allows discrimination to be inferred from facts that create a reasonable likelihood of bias and are not satisfactorily explained.' " (*Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 307 [115 Cal.Rptr.3d 453], internal citations omitted.)

- "The *McDonnell Douglas* framework was designed as 'an analytical tool for use by the trial judge in applying the law, not a concept to be understood and applied by the jury in the factfinding process.' " (*Abed v. Western Dental Services, Inc.* (2018) 23 Cal.App.5th 726, 737 [233 Cal.Rptr.3d 242].)
- "At trial, the *McDonnell Douglas* test places on the plaintiff the initial burden to establish a prima facie case of discrimination. This step is designed to eliminate at the outset the most patently meritless claims, as where the plaintiff is not a member of the protected class or was clearly unqualified, or where the job he sought was withdrawn and never filled. While the plaintiff's prima facie burden is 'not onerous', he must at least show ' "actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were 'based on a [prohibited] discriminatory criterion . . . .' . . . ." . . .' " (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354–355 [100 Cal.Rptr.2d 352, 8 P.3d 1089], internal citations omitted.)
- "If, at trial, the plaintiff establishes a prima facie case, a presumption of discrimination arises. This presumption, though 'rebuttable,' is 'legally mandatory.' Thus, in a trial, '[i]f the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.' [¶] Accordingly, at this trial stage, the burden shifts to the employer to rebut the presumption by producing admissible evidence, sufficient to 'raise[] a genuine issue of fact' and to 'justify a judgment for the [employer],' that its action was taken for a legitimate, nondiscriminatory reason. [¶] If the employer sustains this burden, the presumption of discrimination disappears. The plaintiff must then have the opportunity to attack the employer's proffered reasons as pretexts for discrimination, or to offer any other evidence of discriminatory motive. In an appropriate case, evidence of dishonest reasons, considered together with the elements of the prima facie case, may permit a finding of prohibited bias. The ultimate burden of persuasion on the issue of actual discrimination remains with the plaintiff." (*Guz*, *supra*, 24 Cal.4th at pp. 355–356, internal citations omitted.)
- "The trial court decides the first two stages of the *McDonnell Douglas* test as questions of law. If the plaintiff and defendant satisfy their respective burdens, the presumption of discrimination disappears and the question whether the defendant unlawfully discriminated against the plaintiff is submitted to the jury to decide whether it believes the defendant's or the plaintiff's explanation." (*Swanson v. Morongo Unified School Dist.* (2014) 232 Cal.App.4th 954, 965 [181 Cal.Rptr.3d 553].)
- "To succeed on a disparate treatment claim at trial, the plaintiff has the initial burden of establishing a prima facie case of discrimination, to wit, a set of circumstances that, if unexplained, permit an inference that it is more likely than not the employer intentionally treated the employee less favorably than others on prohibited grounds. Based on the inherent difficulties of showing intentional discrimination, courts have generally adopted a multifactor test to

determine if a plaintiff was subject to disparate treatment. The plaintiff must generally show that: he or she was a member of a protected class; was qualified for the position he sought; suffered an adverse employment action, and there were circumstances suggesting that the employer acted with a discriminatory motive. [¶] On a defense motion for summary judgment against a disparate treatment claim, the defendant must show either that one of these elements cannot be established or that there were one or more legitimate, nondiscriminatory reasons underlying the adverse employment action." (*Jones v. Department of Corrections* (2007) 152 Cal.App.4th 1367, 1379 [62 Cal.Rptr.3d 200], internal citations omitted.)

- "Although '[t]he specific elements of a prima facie case may vary depending on the particular facts,' the plaintiff in a failure-to-hire case '[g]enerally . . . must provide evidence that (1) he [or she] was a member of a protected class, (2) he [or she] was qualified for the position he [or she] sought . . . , (3) he [or she] suffered an adverse employment action, such as . . . denial of an available job, and (4) some other circumstance suggests discriminatory motive,' such as that the position remained open and the employer continued to solicit applications for it." (*Abed, supra,* 23 Cal.App.5th at p. 736.)
- "Although we recognize that in most cases, a plaintiff who did not apply for a position will be unable to prove a claim of discriminatory failure to hire, a job application is not an *element* of the claim." (*Abed, supra,* 23 Cal.App.5th at p. 740, original italics.)
- "Employers who lie about the existence of open positions are not immune from liability under the FEHA simply because they are effective in keeping protected persons from applying." (*Abed, supra,* 23 Cal.App.5th at p. 741.)
- "[Defendant] still could shift the burden to [plaintiff] by presenting admissible evidence showing a legitimate, nondiscriminatory reason for terminating her. 'It is the employer's honest belief in the stated reasons for firing an employee and not the objective truth or falsity of the underlying facts that is at issue in a discrimination case.' . . . '[I]f nondiscriminatory, [the employer's] true reasons need not necessarily have been wise or correct. . . . While the objective soundness of an employer's proffered reasons supports their credibility . . . , the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*. Thus, "legitimate" reasons . . . in this context are reasons that are *facially unrelated to prohibited bias*, and which, if true, would thus preclude a finding *of discrimination*. . . .' " (*Wills v. Superior Court* (2011) 195 Cal.App.4th 143, 170–171 [125 Cal.Rptr.3d 1], original italics, internal citations omitted.)
- "The burden therefore shifted to [plaintiff] to present evidence showing the [defendant] engaged in intentional discrimination. To meet her burden, [plaintiff] had to present evidence showing (1) the [defendant]'s stated reason for not renewing her contract was untrue or pretextual; (2) the [defendant] acted with a discriminatory animus in not renewing her contract; or (3) a combination of the two." (*Swanson, supra*, 232 Cal.App.4th at p. 966.)

- "Evidence that an employer's proffered reasons were pretextual does not necessarily establish that the employer intentionally discriminated: ' " '[I]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.' " ' However, evidence of pretext is important: ' "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." ' " (*Diego v. City of Los Angeles* (2017) 15 Cal.App.5th 338, 350–351 [223 Cal.Rptr.3d 173], internal citations omitted.)
- "While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a 'causal connection' between the employee's protected status and the adverse employment decision." (*Mixon, supra*, 192 Cal.App.3d at p. 1319.)
- "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.)
- "In cases involving a comparison of the plaintiff's qualifications and those of the successful candidate, we must assume that a reasonable juror who might disagree with the employer's decision, but would find the question close, would not usually infer discrimination on the basis of a comparison of qualifications alone. In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. [Citation.] But this does not mean that a reasonable juror would in every case defer to the employer's assessment. If that were so, no job discrimination case could ever go to trial. If a factfinder can conclude that a reasonable employer would have found the plaintiff to be *significantly better* qualified for the job, but this employer did not, the factfinder can legitimately infer that the employer consciously selected a less-qualified candidate—something that employers do not usually do, unless some other strong consideration, such as discrimination, enters into the picture." (*Reeves v.*

MV Transportation, Inc. (2010) 186 Cal.App.4th 666, 674–675 [111 Cal.Rptr.3d 896], original italics.)

- "While not all cases hold that 'the disparity in candidates' qualifications "must be so apparent as to jump off the page and slap us in the face to support a finding of pretext" ' the precedents do consistently require that the disparity be substantial to support an inference of discrimination." (*Reeves*, *supra*, 186 Cal.App.4th at p. 675, internal citation omitted.)
- "[Defendant] contends that a trial court must assess the relative strength and nature of the evidence presented on summary judgment in determining if the plaintiff has 'created only a weak issue of fact.' However, [defendant] overlooks that a review of all of the evidence is essential to that assessment. The stray remarks doctrine, as advocated by [defendant], goes further. It allows a court to weigh and assess the remarks in isolation, and to disregard the potentially damaging nature of discriminatory remarks simply because they are made by 'nondecisionmakers, or [made] by decisionmakers unrelated to the decisional process.' [Defendant] also argues that ambiguous remarks are stray, irrelevant, prejudicial, and inadmissible. However, 'the task of disambiguating ambiguous utterances is for trial, not for summary judgment.' Determining the weight of discriminatory or ambiguous remarks is a role reserved for the jury. The stray remarks doctrine allows the trial court to remove this role from the jury." (*Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 540–541 [113 Cal.Rptr.3d 327, 235 P.3d 988], internal citations omitted; see also Gov. Code, § 12923(c) [Legislature affirms the decision in *Reid v. Google, Inc.* in its rejection of the "stray remarks doctrine"].)
- "[D]iscriminatory remarks can be relevant in determining whether intentional discrimination occurred: 'Although stray remarks may not have strong probative value when viewed in isolation, they may corroborate direct evidence of discrimination or gain significance in conjunction with other circumstantial evidence. Certainly, who made the comments, when they were made in relation to the adverse employment decision, and in what context they were made are all factors that should be considered." (*Husman v. Toyota Motor Credit Corp.* (2017) 12 Cal.App.5th 1168, 1190–1191 [220 Cal.Rptr.3d 42].)
- "Because of the similarity between state and federal employment discrimination laws, California courts look to pertinent federal precedent when applying our own statutes." (*Guz, supra*, 24 Cal.4th at p. 354.)
- "We have held 'that, in a civil action under the FEHA, all relief generally available in noncontractual actions . . . may be obtained.' This includes injunctive relief." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132 [87 Cal.Rptr.2d 132, 980 P.2d 846], internal citations omitted.)
- "The FEHA does not itself authorize punitive damages. It is, however, settled that California's punitive damages statute, Civil Code section 3294, applies to actions brought under the FEHA . . . ." (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1147–1148 [74 Cal.Rptr.2d 510], internal citations omitted.)

CACI No. 2500

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1017–1021

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

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

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

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

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

2528. Failure to Prevent Harassment by Nonemployee (Gov. Code, § 12940(j))

[*Name of plaintiff***] claims that [***name of defendant***] failed to take reasonable steps to prevent harassment based on [his/her] [***describe protected status, e.g., race, gender, or age***] by a nonemployee. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] [was an employee of [***name of defendant***]/ applied to [***name of defendant***] for a job/was an unpaid [intern/ volunteer] for [***name of defendant***]/was a person providing services under a contract with [***name of defendant***]];**
2. **That while in the course of employment, [***name of plaintiff***] was subjected to harassment based on [his/her] [***e.g., race***] by [***name***], who was not an employee of [***name of defendant***];**
3. **That [***name of defendant***] knew or should have known that the nonemployee's conduct placed employees at risk of harassment;**
4. **That [***name of defendant***] failed to take immediate and appropriate [preventive/corrective] action;**
5. **That the ability to take [preventive/corrective] action was within the control of [***name of defendant***];**
6. **That [***name of plaintiff***] was harmed; and**
7. **That [***name of defendant***]'s failure to take immediate and appropriate steps to [prevent/put an end to] the harassment was a substantial factor in causing [***name of plaintiff***]'s harm.**

New November 2018; Revised January 2019

Directions for Use

Give this instruction on a claim against the employer for failure to prevent harassment by a nonemployee. The FEHA protects not only employees, but also applicants, unpaid interns or volunteers, and persons providing services under a contract (element 1). (Gov. Code, § 12940(j)(1).) Modify references to employment in elements 2 and 3 as necessary if the plaintiff's status is other than an employee. Note that unlike claims for failure to prevent acts of a co-employee (see Gov. Code, § 12940(k)), only harassment is covered. (Gov. Code, § 12940(j)(1).) If there is such a thing as discrimination or retaliation by a nonemployee, there is no employer duty to prevent it under the FEHA.

The employer's duty is to "take immediate and appropriate corrective action." (Gov. Code § 12940(j)(1).) In contrast, for the employer's failure to prevent acts of

an employee, the duty is to "take *all* reasonable steps necessary to prevent discrimination and harassment from occurring." (Gov. Code, § 12940(k).)

Whether the employer must prevent or later correct the harassing situation would seem to depend on the facts of the case. If the issue is to stop harassment from recurring after becoming aware of it, the employer's duty would be to "correct" the problem. If the issue is to address a developing problem before the harassment occurs, the duty would be to "prevent" it. Choose the appropriate words in elements 4, 5, and 7 depending on the facts.

Sources and Authority

- Prevention of Harassment by a Nonemployee. Government Code section 12940(j)(1).
- Prevention of Discrimination and Harassment. Government Code section 12940(k).
- "The FEHA provides: 'An employer may . . . be responsible for the acts of nonemployees, with respect to sexual harassment of employees . . . , where the employer, or its agents or supervisors, knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility that the employer may have with respect to the conduct of those nonemployees shall be considered.' . . . ' A plaintiff cannot state a claim for failure to prevent harassment unless the plaintiff first states a claim for harassment." (*M.F. v. Pacific Pearl Hotel Management LLC* (2017) 16 Cal.App.5th 693, 700-701 [224 Cal.Rptr.3d 542].)
- "Once an employer is informed of the sexual harassment, the employer must take adequate remedial measures. The measures need to include immediate corrective action that is reasonably calculated to (1) end the current harassment and (2) to deter future harassment. [Citation.] The employer's obligation to take prompt corrective action requires (1) that temporary steps be taken to deal with the situation while the employer determines whether the complaint is justified and (2) that permanent remedial steps be implemented by the employer to prevent future harassment . . . ." (*M.F., supra,* 16 Cal.App.5th at p. 701.)
- "[T]he language of section 12940, subdivision (j)(1), does not limit its application to a particular fact pattern. Rather, the language of the statute provides for liability whenever an employer (1) knows or should know of sexual harassment by a nonemployee and (2) fails to take immediate and appropriate remedial action (3) within its control. (*M.F., supra,* 16 Cal.App.5th at p. 702.)
- "[W]hether an employer sufficiently complied with its mandate to 'take immediate and appropriate corrective action' is a question of fact." (*M.F., supra,* 16 Cal.App.5th at p. 703, internal citation omitted.)
- "The more egregious the abuse and the more serious the threat of which the employer has notice, the more the employer will be required under a standard

of reasonable care to take steps for the protection of likely future victims." (*M.F., supra,* 16 Cal.App.5th at p. 701.)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Agency, §§ 363, 370

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 1019, 1028, 1035

2740. Violation of Equal Pay Act—Essential Factual Elements (Lab. Code, § 1197.5)

[*Name of plaintiff***] claims that [he/she] was paid at a wage rate that is less than the rate paid to employees of [the opposite sex/another race/another ethnicity]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] was paid less than the rate paid to [a] person[s] of [the opposite sex/another race/another ethnicity] working for [***name of defendant***];**
2. **That [***name of plaintiff***] was performing substantially similar work as the other person[s], considering the overall combination of skill, effort, and responsibility required; and**
3. **That [***name of plaintiff***] was working under similar working conditions as the other person[s].**

New May 2018; Revised January 2019

Directions for Use

The California Equal Pay Act prohibits paying employees at lower wage rates than rates paid to employees of the opposite sex or a different race or ethnicity for substantially similar work. (Lab. Code, § 1197.5(a), (b).) An employee receiving less than the wage to which he or she is entitled may bring a civil action to recover the balance of the wages, including interest, and an equal amount as liquidated damages. Costs and attorney fees may also be awarded. (Lab. Code, § 1197.5(h).)

There are a number of defenses that the employer may assert to defend what appears to be an improper pay differential. (Lab. Code, § 1197.5(a), (b).) See CACI No. 2741, *Affirmative Defense—Different Pay Justified,* and CACI No. 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity*, for instructions on the employer's affirmative defenses. (See Lab. Code, § 1197.5(a)(1), (b)(1).)

Sources and Authority

- Right to Equal Pay Based on Gender, Race, or Ethnicity. Labor Code section 1197.5(a), (b).
- Private Right of Action to Enforce Equal Pay Claim. Labor Code section 1197.5(h).
- "This section was intended to codify the principle that an employee is entitled to equal pay for equal work without regard to gender." (*Jones v. Tracy School Dist.* (1980) 27 Cal.3d 99, 104 [165 Cal.Rptr. 100, 611 P.2d 441].)
- "To establish her prima facie case, [plaintiff] had to show not only that she is paid lower wages than a male comparator for equal work, but that she has

selected the proper comparator. 'The EPA does not require perfect diversity between the comparison classes, but at a certain point, when the challenged policy effects [*sic*] both male and female employees equally, there can be no EPA violation. [Citation.] [A plaintiff] cannot make a comparison of one classification composed of males and females with another classification of employees also composed of males and females.' " (*Hall v. County of Los Angeles* (2007) 148 Cal.App.4th 318, 324–325 [55 Cal.Rptr.3d 732].)

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination,* ¶ 11:1075 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws*, § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, Employment Law: *Wage and Hour Disputes,* § 250.14 (Matthew Bender)

2741. Affirmative Defense—Different Pay Justified

[*Name of defendant***] claims that [he/she/it] was justified in paying [***name of plaintiff***] a wage rate that was less than the rate paid to employees of [the opposite sex/another race/another ethnicity]. To establish this defense, [***name of defendant***] must prove all of the following:**

1. **That the wage differential was based on one or more of the following factors:**
   - **[a. A seniority system;]**
   - **[b. A merit system;]**
   - **[c. A system that measures earnings by quantity or quality of production;]**
   - **[d. (***Specify alleged bona fide factor(s) other than sex, race, or ethnicity, such as education, training, or experience.***).]**
2. **That each factor was applied reasonably; and**
3. **That the factor[s] that [***name of defendant***] relied on account[s] for the entire wage differential.**

Prior salary does not justify any disparity in current compensation.

New May 2018; Revised January 2019

Directions for Use

The California Equal Pay Act presents four factors that an employer may offer to justify a pay differential that results in an apparent pay disparity based on gender, race, or ethnicity. Factors a, b, and c in element 1 are specific.

If factor d is selected, the jury must also be instructed with CACI No. 2742, *Bona Fide Factor Other Than Sex, Race, or Ethnicity,* which establishes what bona fide factors other than sex, race, or ethnicity may justify a pay differential. (See Lab. Code, § 1197.5(a)(1), (b)(1).) Choose the factor or factors that the employer asserts as justification.

Sources and Authority

- Factors Justifying Pay Differential. Labor Code section 1197.5(a)(1), (b)(1).

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination,* ¶ 11:1075 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal*

Employment Opportunity Laws, § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes,* § 250.14 (Matthew Bender)

2742. Bona Fide Factor Other Than Sex, Race, or Ethnicity

[*Name of defendant***] claims that [***specify bona fide factor other than sex, race, or ethnicity***] is a legitimate factor other than [sex/race/ethnicity] that justifies paying [***name of plaintiff***] at a wage rate that is less than the rate paid to employees of [the opposite sex/another race/another ethnicity].**

[*Specify factor***] is a factor that justifies the pay differential only if [***name of defendant***] proves all of the following:**

1. **That the factor is not based on or derived from a [sex/race/ethnicity]-based differential in compensation;**
2. **That the factor is job related with respect to [***name of plaintiff***]'s position; and**
3. **That the factor is consistent with a business necessity.**

A "business necessity" means an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is supposed to serve.

This defense does not apply, however, if [*name of plaintiff***] proves that an alternative business practice exists that would serve the same business purpose without producing the pay differential.**

New May 2018

Directions for Use

This instruction must be given along with CACI No. 2741, *Affirmative Defense—Different Pay Justified,* if factor d of element 1 of CACI No. 2741 is chosen: a bona fide factor other than sex, race, or ethnicity, such as education, training, or experience. This factor applies only if the employer demonstrates that the factor is not based on or derived from a sex, race, or ethnicity-based differential in compensation, is job-related with respect to the position in question, and is consistent with a business necessity. "Business necessity" means an overriding legitimate business purpose such that the factor effectively fulfills the business purpose it is supposed to serve. This defense does not apply if the employee demonstrates that an alternative business practice exists that would serve the same business purpose without producing the wage differential. (See Lab. Code, § 1197.5(a)(1)(D), (b)(1)(D).)

Sources and Authority

- Bona Fide Factor Other Than Sex, Race, or Ethnicity. Labor Code section 1197.5(a)(1)(D), (b)(1)(D).

Secondary Sources

3 Witkin, Summary of California Law (11th ed. 2017) Agency and Employment, §§ 355 et seq., 430, 431

Chin, et al., California Practice Guide: Employment Litigation, Ch. 11-G, *Compensation—Wage Discrimination,* ¶ 11:1077.10 et seq. (The Rutter Group)

3 Wilcox, California Employment Law, Ch. 43, *Civil Actions Under Equal Employment Opportunity Laws,* § 43.02 (Matthew Bender)

21 California Forms of Pleading and Practice, Ch. 250, *Employment Law: Wage and Hour Disputes,* § 250.14 (Matthew Bender)

3000. Violation of Federal Civil Rights—In General—Essential Factual Elements (42 U.S.C. § 1983)

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

1. **That [*name of defendant*] [intentionally/[*other applicable state of mind*]] [*insert wrongful act*];**
2. **That [*name of defendant*] was acting or purporting to act in the performance of [his/her] official duties;**
3. **That [*name of defendant*]'s conduct violated [*name of plaintiff*]'s right [*insert right, e.g., "of privacy"*];**
4. **That [*name of plaintiff*] was harmed; and**
5. **That [*name of defendant*]'s [*insert wrongful act*] was a substantial factor in causing [*name of plaintiff*]'s harm.**

New September 2003

Directions for Use

In element 1, the standard is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases involve conduct carried out with "deliberate indifference," and Fourth Amendment claims do not necessarily involve intentional conduct. The "official duties" referred to in element 2 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 a jury issue, so it has been omitted to shorten the wording of element 2. This instruction is intended for claims not covered by any of the following more specific instructions regarding the elements that the plaintiff must prove.

Sources and Authority

- Civil Action for Deprivation of Rights. Title 42 United States Code section 1983.
- "A § 1983 claim creates a species of tort liability, with damages determined 'according to principles derived from the common law of torts.' " (*Mendez v. Cty. of L.A.* (9th Cir. 2018) 897 F.3d 1067, 1074.)
- "As we have said many times, § 1983 'is not itself a source of substantive rights,' but merely provides 'a method for vindicating federal rights elsewhere conferred.' " (*Graham v. Connor* (1989) 490 U.S. 386, 393–394 [109 S.Ct. 1865, 104 L.Ed.2d 443], internal citation omitted.)
- "42 U.S.C. § 1983 creates a cause of action against a person who, acting under

color of state law, deprives another of rights guaranteed under the Constitution. Section 1983 does not create any substantive rights; rather it is the vehicle whereby plaintiffs can challenge actions by governmental officials." (*Jones v. Williams* (9th Cir. 2002) 297 F.3d 930, 934.)

- "By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law." (*Catsouras v. Department of California Highway Patrol* (2010) 181 Cal.App.4th 856, 890 [104 Cal.Rptr.3d 352].)
- "Section 1983 can also be used to enforce federal statutes. For a statutory provision to be privately enforceable, however, it must create an individual right." (*Henry A. v. Willden* (9th Cir. 2012) 678 F.3d 991, 1005, internal citation omitted.)
- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)
- "The jury was properly instructed on [plaintiff]'s burden of proof and the particular elements of the section 1983 claim. (CACI No. 3000.)" (*King v. State of California* (2015) 242 Cal.App.4th 265, 280 [195 Cal.Rptr.3d 286].)
- " 'State courts look to federal law to determine what conduct will support an action under section 1983. The first inquiry in any section 1983 suit is to identify the precise constitutional violation with which the defendant is charged.' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 203 [73 Cal.Rptr.2d 571], internal citations omitted.)
- " 'Qualified immunity is an affirmative defense against section 1983 claims. Its purpose is to shield public officials "from undue interference with their duties and from potentially disabling threats of liability." The defense provides immunity from suit, not merely from liability. Its purpose is to spare defendants the burden of going forward with trial.' Because it is an immunity from suit, not just a mere defense to liability, it is important to resolve immunity questions at the earliest possible stage in litigation. Immunity should ordinarily be resolved by the court, not a jury." (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 342 [54 Cal.Rptr.2d 772], internal citations omitted.)
- "[D]efendants cannot be held liable for a constitutional violation under 42 U.S.C. § 1983 unless they were integral participants in the unlawful conduct. We have held that defendants can be liable for 'integral participation' even if the actions of each defendant do not 'rise to the level of a constitutional violation.' " (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1241, internal citation omitted.)
- "Constitutional torts employ the same measure of damages as common law torts and are not augmented 'based on the abstract "value" or "importance" of

constitutional rights . . . .' Plaintiffs have the burden of proving compensatory damages in section 1983 cases, and the amount of damages depends 'largely upon the credibility of the plaintiffs' testimony concerning their injuries.' " (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 321 [103 Cal.Rptr.2d 339], internal citations omitted.)

- "[E]ntitlement to compensatory damages in a civil rights action is not a matter of discretion: 'Compensatory damages . . . are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss.' " (*Hazle v. Crofoot* (9th Cir. 2013) 727 F.3d 983, 992.)
- "[T]he state defendants' explanation of the jury's zero-damages award as allocating all of [plaintiff]'s injury to absent persons reflects the erroneous view that not only could zero damages be awarded to [plaintiff], but that [plaintiff]'s damages were capable of apportionment. [Plaintiff] independently challenges the jury instruction and verdict form that allowed the jury to decide this question, contending that the district judge should have concluded, as a matter of law, that [plaintiff] was entitled to compensatory damages and that defendants were jointly and severally liable for his injuries. He is correct. The district judge erred in putting the question of apportionment to the jury in the first place, because the question of whether an injury is capable of apportionment is a legal one to be decided by the judge, not the jury." (*Hazle, supra*, 727 F.3d at pp. 994–995.)
- "An individual acts under color of state law when he or she exercises power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " (*Naffe v. Frey* (9th Cir. 2015) 789 F.3d 1030, 1036.)
- "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.)
- "A state employee who is off duty nevertheless acts under color of state law when (1) the employee 'purport[s] to or pretend[s] to act under color of law,' (2) his 'pretense of acting in the performance of his duties . . . had the purpose and effect of influencing the behavior of others,' and (3) the harm inflicted on plaintiff 'related in some meaningful way either to the officer's governmental status or to the performance of his duties,' " (*Naffe, supra*, 789 F.3d at p. 1037, internal citations omitted.)
- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless,

sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)

- " 'While generally not applicable to private parties, a § 1983 action can lie against a private party when "he is a willful participant in joint action with the State or its agents." ' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 396 [218 Cal.Rptr.3d 38].)
- "The Ninth Circuit has articulated four tests for determining whether a private person acted under color of law: (1) the public function test, (2) the joint action test, (3) the government nexus test, and (4) the government coercion or compulsion test. 'Satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists.' ' "[N]o one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government." ' " (*Julian, supra,* 11 Cal.App.5th at p. 396.)

Secondary Sources

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, §§ 888, 892 et seq.

2 Civil Rights Actions, Ch. 7, *Deprivation of Rights Under Color of State Law—General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶¶ 7.05–7.07, Ch. 17, *Deprivation of Rights Under Color of State Law—General Principles (Civil Rights Act of 1871, 42 U.S.C. § 1983)*, ¶ 17.02 (Matthew Bender)

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

1 Matthew Bender Practice Guide: Federal Pretrial Civil Procedure in California, Ch. 8, *Answers and Responsive Motions Under Rule 12*, 8.40

3023. Unreasonable Search—Search Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] carried out an unreasonable search of [his/her] [person/home/automobile/office/[***insert other***]] because [he/she] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] searched [***name of plaintiff***]'s [person/home/automobile/office/[***insert other***]];**
2. **That [***name of defendant***] did not have a warrant;**
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 search was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Renumbered from CACI No. 3003 December 2012

Directions for Use

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

Sources and Authority

- "The Fourth Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " (*Conway v. Pasadena Humane Society* (1996) 45 Cal.App.4th 163, 171 [52 Cal.Rptr.2d 777], internal citation omitted.)
- "A Fourth Amendment 'search' occurs when a government agent 'obtains information by physically intruding on a constitutionally protected area,' or infringes upon a 'reasonable expectation of privacy,' As we have explained, . . . 'when the government "physically occupie[s] private property for the purpose of obtaining information," a Fourth Amendment search occurs, regardless whether the intrusion violated any reasonable expectation of privacy. Only where the search *did not* involve a physical trespass do courts need to consult *Katz*'s reasonable-expectation-of-privacy test.' " (*Whalen v. McMullen* (9th Cir. 2018)

907 F.3d 1139, 1146–1147, original italics, internal citations omitted.)

- "[F]or the purposes of § 1983, a properly issued warrant makes an officer's otherwise unreasonable entry non-tortious—that is, not a trespass. Absent a warrant or consent or exigent circumstances, an officer must not enter; it is the entry that constitutes the breach of duty under the Fourth Amendment. As a result, the relevant counterfactual for the causation analysis is not what would have happened had the officers procured a warrant, but rather, what would have happened had the officers not unlawfully entered the residence." (*Mendez v. Cty. of L.A.* (9th Cir. 2018) 897 F.3d 1067, 1076.)
- "[T]here is no talismanic distinction, for Fourth Amendment purposes, between a warrantless 'entry' and a warrantless 'search.' 'The two intrusions share this fundamental characteristic: the breach of the entrance to an individual's home.' " (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 874.)
- " 'The Fourth Amendment prohibits only unreasonable searches . . . . [¶] The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.' " (*Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834], internal citation omitted.)
- " '[I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.' 'And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?' An officer's good faith is not enough." (*King v. State of California* (2015) 242 Cal.App.4th 265, 283 [195 Cal.Rptr.3d 286], internal citations omitted.)
- "Thus, the fact that the officers' reasonable suspicion of wrongdoing is not particularized to each member of a group of individuals present at the same location does not automatically mean that a search of the people in the group is unlawful. Rather, the trier of fact must decide whether the search was reasonable in light of the circumstances." (*Lyall v. City of Los Angeles* (9th Cir. 2015) 807 F.3d 1178, 1194.)
- " 'It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant.' Thus, a warrantless entry into a residence is presumptively unreasonable and therefore unlawful. Government officials 'bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.' " (*Conway, supra,* 45 Cal.App.4th at p. 172, internal citations omitted.)

- " '[I]t is a "basic principle of Fourth Amendment law" ' that warrantless searches of the home or the curtilage surrounding the home 'are presumptively unreasonable.' " (*Bonivert*, *supra*, 883 F.3d at p. 873.)
- "The Fourth Amendment shields not only actual owners, but also anyone with sufficient possessory rights over the property searched. . . . To be shielded by the Fourth Amendment, a person needs 'some joint control and supervision of the place searched,' not merely permission to be there." (*Lyall, supra*, 807 F.3d at pp. 1186–1187.)
- "[T]he Fourth Amendment's 'prohibition on unreasonable searches and seizures applies to searches conducted by public school officials.' " (*Scott v. Cty. of San Bernardino* (9th Cir. 2018) 903 F.3d 943, 948.)
- "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.)
- "[P]rivate parties ordinarily are not subject to suit under section 1983, unless, sifting the circumstances of the particular case, the state has so significantly involved itself in the private conduct that the private parties may fairly be termed state actors. Among the factors considered are whether the state subsidized or heavily regulated the conduct, or compelled or encouraged the particular conduct, whether the private actor was performing a function which normally is performed exclusively by the state, and whether there was a symbiotic relationship rendering the conduct joint state action." (*Robbins v. Hamburger Home for Girls* (1995) 32 Cal.App.4th 671, 683 [38 Cal.Rptr.2d 534], internal citations omitted.)
- "Private parties act under color of state law if they willfully participate in joint action with state officials to deprive others of constitutional rights. Private parties involved in such a conspiracy may be liable under section 1983." (*United Steelworkers of America v. Phelps Dodge Corp.* (9th Cir. 1989) 865 F.2d 1539, 1540, internal citations omitted.)

Secondary Sources

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

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

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

3025. Affirmative Defense—Consent to Search

[*Name of defendant***] claims that the search was reasonable and that a search warrant was not required because [***name of plaintiff/third person***] consented to the search. To succeed, [***name of defendant***] must prove both of the following:**

1. **That [[***name of plaintiff***]/[***name of third person***], who controlled or reasonably appeared to have control of the area,] knowingly and voluntarily consented to the search; and**
2. **That the search was reasonable under all of the circumstances.**

[[*Name of third person***]'s consent is insufficient if [***name of plaintiff***] was physically present and expressly refused to consent to the search.]**

In deciding whether the search was reasonable, you should consider, among other factors, the following:

(a) The extent of the particular intrusion;

(b) The place in which the search was conducted; [and]

(c) The manner in which the search was conducted; [and]

(d) [*insert other applicable factor(s)***].**

New September 2003; Revised April 2009; Renumbered from CACI No. 3005 December 2012

Directions for Use

Give the optional paragraph after element 2 if the defendant relied on the consent of someone other than the plaintiff to initiate the search. (See *Georgia v. Randolph* (2006) 547 U.S. 103, 106 [126 S.Ct. 1515, 164 L.Ed.2d 208].)

Sources and Authority

- "The Fourth Amendment generally prohibits the warrantless entry of a person's home, whether to make an arrest or to search for specific objects. The prohibition does not apply, however, to situations in which voluntary consent has been obtained, either from the individual whose property is searched or from a third party who possesses common authority over the premises." (*Illinois v. Rodriguez* (1990) 497 U.S. 177, 181 [110 S.Ct. 2793, 111 L.Ed.2d 148], internal citations omitted.)
- " '[C]ommon authority' rests 'on mutual use of the property by persons generally having joint access or control for most purposes . . . .' The burden of establishing that common authority rests upon the State." (*Illinois v. Rodriguez, supra,* 497 U.S. at p. 181, internal citation omitted.)
- "The Fourth Amendment recognizes a valid warrantless entry and search of

premises when police obtain the voluntary consent of an occupant who shares, or is reasonably believed to share, authority over the area in common with a co-occupant who later objects to the use of evidence so obtained. The question here is whether such an evidentiary seizure is likewise lawful with the permission of one occupant when the other, who later seeks to suppress the evidence, is present at the scene and expressly refuses to consent. We hold that, in the circumstances here at issue, a physically present co-occupant's stated refusal to permit entry prevails, rendering the warrantless search unreasonable and invalid as to him." (*Georgia, supra,* 547 U.S. at p. 106, internal citations omitted.)

- "Where consent is relied upon to justify the lawfulness of a search, the government 'has the burden of proving that the consent was, in fact, freely and voluntarily given.' 'The issue of whether or not consent to search was freely and voluntarily given is one of fact to be determined on the basis of the totality of the circumstances.' " (*U.S. v. Henry* (9th Cir. 1980) 615 F.2d 1223, 1230, internal citations omitted.)
- "Whether consent was voluntarily given 'is to be determined from the totality of all the circumstances.' We consider the following factors to assess whether the consent was voluntary: (1) whether the person was in custody; (2) whether the officers had their guns drawn; (3) whether a Miranda warning had been given; (4) whether the person was told that he had the right not to consent; and (5) whether the person was told that a search warrant could be obtained. Although no one factor is determinative in the equation, 'many of this court's decisions upholding consent as voluntary are supported by at least several of the factors.' " (*U.S. v. Reid* (9th Cir. 2000) 226 F.3d 1020, 1026–1027, internal citations omitted.)
- "According to [defendant], 'express refusal means verbal refusal.' We disagree, as this interpretation finds no support in either common sense or the case law." (*Bonivert v. City of Clarkston* (9th Cir. 2018) 883 F.3d 865, 875.)
- "In determining whether a person consented to an intrusion into her home, we distinguish between 'undercover' entries, where a person invites a government agent who is concealing that he is a government agent into her home, and 'ruse' entries, where a known government agent misrepresents his purpose in seeking entry. The former does not violate the Fourth Amendment, as long as the undercover agent does not exceed the scope of his invitation while inside the home. But '[a] ruse entry when the suspect is informed that the person seeking entry is a government agent but is misinformed as to the purpose for which the agent seeks entry cannot be justified by consent.' " (*Whalen v. McMullen* (9th Cir. 2018) 907 F.3d 1139, 1146–1147, internal citations omitted.)
- "Because he entered the home while using a ruse and not while undercover, it is immaterial that he stayed within [plaintiff]'s presence in the home and did not conduct a broader search. He did not have consent to be in the home for the purposes of his visit." (*Whalen*, *supra*, 907 F.3d at p. 1150.)

Secondary Sources

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

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

3051. Unlawful Removal of Child From Parental Custody Without a Warrant—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] wrongfully removed [***name of plaintiff***]'s child from [his/her] parental custody because [***name of defendant***] did not have a warrant. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of defendant***] removed [***name of plaintiff***]'s child from [his/her] parental custody without a warrant;**
2. **That [***name of defendant***] was performing or purporting to perform [his/her] official duties;**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of defendant***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New June 2016

Directions for Use

This instruction is a variation on CACI No. 3021, *Unlawful Arrest by Peace Officer Without a Warrant—Essential Factual Elements*, and CACI No. 3023, *Unreasonable Search—Search Without a Warrant—Essential Factual Elements*, in which the warrantless act is the removal of a child from parental custody rather than an arrest or search. This instruction asserts a parent's due process right to familial association under the Fourteenth Amendment. It may be modified to assert or include the child's right under the Fourth Amendment to be free of a warrantless seizure. (See *Arce v. Childrens Hospital Los Angeles* (2012) 211 Cal.App.4th 1455, 1473–1474 [150 Cal.Rptr.3d 735].)

Warrantless removal is a constitutional violation unless the authorities possess information at the time of the seizure that establishes reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury. (*Arce, supra*, 211 Cal.App.4th at p. 1473.) The committee believes that the defendant bears the burden of proving imminent danger. (See Evid. Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting."]; cf. *Welsh v. Wisconsin* (1984) 466 U.S. 740, 750 [104 S.Ct. 2091, 80 L.Ed.2d 732] ["Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries."].) CACI No. 3026, *Affirmative Defense—Exigent Circumstances* (to a warrantless search), may be modified to respond to this claim.

If the removal of the child was without a warrant and without exigent circumstances, but later found to be justified by the court, damages are limited to those caused by the procedural defect, not the removal. (See *Watson v. City of San Jose* (9th Cir. 2015) 800 F.3d 1135, 1139.)

Sources and Authority

- " ' "Parents and children have a well-elaborated constitutional right to live together without governmental interference.' [Citation.] 'The Fourteenth Amendment guarantees that parents will not be separated from their children without due process of law except in emergencies." This 'right to family association' requires '[g]overnment officials . . . to obtain prior judicial authorization before intruding on a parent's custody of her child unless they possess information at the time of the seizure that establishes "reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury." [Citation.]' " (*Arce, supra*, 211 Cal.App.4th at p. 1473, internal citations omitted.)
- " 'The Fourth Amendment also protects children from removal from their homes [without prior judicial authorization] absent such a showing. [Citation.] Officials, including social workers, who remove a child from its home without a warrant must have reasonable cause to believe that the child is likely to experience serious bodily harm in the time that would be required to obtain a warrant.' Because 'the same legal standard applies in evaluating Fourth and Fourteenth Amendment claims for the removal of children," we may "analyze [the claims] together.' " (*Arce, supra*, 211 Cal.App.4th at pp. 1473–1474.)
- "While the constitutional source of the parent's and the child's rights differ, the tests under the Fourteenth Amendment and the Fourth Amendment for when a child may be seized without a warrant are the same. The Constitution requires an official separating a child from its parents to obtain a court order unless the official has reasonable cause to believe the child is in 'imminent danger of serious bodily injury.' Seizure of a child is reasonable also where the official obtains parental consent." (*Jones v. County of L.A.* (9th Cir. 2015) 802 F.3d 990, 1000, internal citations omitted.)
- "This requirement 'balance[s], on the one hand, the need to protect children from abuse and neglect and, on the other, the preservation of the essential privacy and liberty interests that families are guaranteed under both the Fourth and Fourteenth Amendments of our Constitution.' " (*Demaree v. Pederson* (9th Cir. 2018) 880 F.3d 1066, 1074.)
- "[W]hether an official had 'reasonable cause to believe exigent circumstances existed in a given situation . . . [is a] "question[] of fact to be determined by a jury." [Citation.]' " (*Arce, supra*, 211 Cal.App.4th at p. 1475.)
- "Under the Fourth Amendment, government officials are ordinarily required to obtain prior judicial authorization before removing a child from the custody of her parent. However, officials may seize a child without a warrant 'if the

information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.' " (*Kirkpatrick v. Cnty. of Washoe* (9th Cir. 2016) 843 F.3d 784, 790 (en banc).)

- "[I]t does not matter whether the warrant could be obtained in hours or days. What matters is whether there is an identifiable risk of serious harm or abuse *during whatever the delay period is*." (*Demaree*, *supra*, 880 F.3d at p. 1079, original italics.)
- "The parental right secured by the Fourteenth Amendment 'is not reserved for parents with full legal and physical custody.' At the same time, however, '[p]arental rights do not spring full-blown from the biological connection between parent and child.' Judicially enforceable interests arising under the Fourteenth Amendment 'require relationships more enduring,' which reflect some assumption 'of parental responsibility.' It is '[w]hen an unwed father demonstrates a full commitment to the responsibilities of parenthood by coming forward to participate in the rearing of his child,' that 'his interest in personal contact with his child acquires substantial protection under the due process clause.' Until then, a person with only potential parental rights enjoys a liberty interest in the companionship, care, and custody of his children that is 'unambiguously lesser in magnitude.' " (*Kirkpatrick, supra*, 843 F.3d at p. 789.)
- "[A] child is seized for purposes of the Fourth and Fourteenth Amendments when a representative of the state takes action causing a child to be detained at a hospital as part of a child abuse investigation, such that a reasonable person in the same position as the child's parent would believe that she cannot take her child home." (*Jones, supra*, 802 F.3d at p. 1001.)
- "An official 'cannot seize children suspected of being abused or neglected unless reasonable avenues of investigation are first pursued.' Further, because the 'scope of the intrusion' must be 'reasonably necessary to avert' a specific injury, the intrusion cannot be longer than necessary to avert the injury." (*Keates v. Koile* (9th Cir. 2018) 883 F.3d 1228, 1237, internal citations omitted.)
- "[A] jury is needed to determine what a reasonable parent in the [plaintiffs'] position would have believed and whether [defendant]'s conduct amounted to a seizure." (*Jones, supra*, 802 F.3d at p. 1002.)
- "In sum, although we do not dispute that Shaken Baby Syndrome is a serious, life-threatening injury, we disagree with the County defendants' assertion that a child may be detained without prior judicial authorization based solely on the fact that he or she has suffered a serious injury. Rather, the case law demonstrates that the warrantless detention of a child is improper unless there is "specific, articulable evidence" that the child would be placed at imminent risk of serious harm absent an immediate interference with parental custodial rights." (*Arce, supra*, 211 Cal.App.4th at p. 1481.)
- "[I]n cases where 'a deprivation is justified but procedures are deficient,

whatever distress a person feels may be attributable to the justified deprivation rather than to deficiencies in procedure.' In such cases, . . . a plaintiff must 'convince the trier of fact that he actually suffered distress because of the denial of procedural due process itself.' " (*Watson, supra*, 800 F.3d at p. 1139, internal citation omitted; see *Carey v. Piphus* (1978) 435 U.S. 247, 263 [98 S.Ct. 1042, 55 L.Ed.2d 252].)

- "Lack of health insurance . . . does not provide a reasonable cause to believe a child is in imminent danger." (*Keates*, *supra*, 883 F.3d at p. 1237.)
- "[B]arring a reasonable concern that material physical evidence might dissipate . . . or that some urgent medical problem exists requiring immediate medical attention, the state is required to notify parents and to obtain judicial approval before children are subjected to investigatory physical examinations." (*Mann v. Cty. of San Diego* (9th Cir. 2018) 907 F.3d 1154, 1161.)

Secondary Sources

3 Civil Rights Actions, Ch. 12B, *Deprivation of Rights Under Color of State Law—Family Relations*, ¶ 12B.03 (Matthew Bender)

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

3 California Points and Authorities, Ch. 35A, *Civil Rights: Equal Protection*, § 35A.29 et seq. (Matthew Bender)

3053. Retaliation for Exercise of Free Speech Rights—Essential Factual Elements (42 U.S.C. § 1983)

[*Name of plaintiff***] claims that [***name of defendant***] retaliated against [him/her] because [he/she] exercised [his/her] right to speak as a private citizen about a matter of public concern. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That [***name of plaintiff***] was speaking as a private citizen and not as a public employee when [he/she] [***describe speech alleged to be protected by the First Amendment, e.g., criticized the mayor at a city council meeting***];]**
2. **That [***name of defendant***] [***specify retaliatory acts, e.g., terminated plaintiff's employment***];**
3. **That [***name of plaintiff***]'s [***e.g., speech to the city council***] was a substantial motivating reason for [***name of defendant***]'s decision to [***e.g., terminate plaintiff's employment***];**
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 [*name of plaintiff***] proves all of the above, [***name of defendant***] is not liable if [he/she/it] proves either of the following:**

6. **That [***name of defendant***] had an adequate employment-based justification for treating [***name of plaintiff***] differently from any other member of the general public; or**
7. **That [***name of defendant***] would have [***specify adverse action, e.g., terminated plaintiff's employment***] anyway for other legitimate reasons, even if [he/she/it] also retaliated based on [***name of plaintiff***]'s protected conduct.**

In deciding whether [*name of plaintiff***] was speaking as a public citizen or a public employee (element 1), you should consider whether [his/her] [***e.g., speech***] was within [his/her] job responsibilities. [However, the listing of a given task in an employee's written job description is neither necessary nor sufficient alone to demonstrate that conducting the task is part of the employee's professional duties.]**

New November 2017

Directions for Use

This instruction is for use in a claim by a public employee who alleges that he or

she suffered an adverse employment action in retaliation for his or her private speech on an issue of public concern. Speech made by public employees in their official capacity is not insulated from employer discipline by the First Amendment but speech made in one's private capacity as a citizen is. (*Garcetti v. Ceballos* (2006) 547 U.S. 410, 421 [126 S. Ct. 1951, 164 L. Ed. 2d 689].)

Element 1, whether the employee was speaking as a private citizen or as a public employee, and element 6, whether the public employer had an adequate justification for the adverse action, are ultimately determined as a matter of law, but may involve disputed facts. (*Eng v. Cooley* (9th Cir. 2009) 552 F.3d 1062, 1071.) If there are no disputed facts, these elements should not be given. They may be modified to express the particular factual issues that the jury must resolve.

Give the bracketed optional sentence in the last paragraph if the defendant has placed the plaintiff's formal written job description in evidence. (See *Garcetti, supra,* 547 U.S. at p. 424.)

Note that there are two causation elements. The protected speech must have caused the employer's adverse action (element 3), and the adverse action must have caused the employee harm (element 5). This second causation element will rarely be disputed in a termination case. For optional language if the employer claims that there was no adverse action, see CACI No. 2505, *Retaliation—Essential Factual Elements* (under California's Fair Employment and Housing Act). See also CACI No. 2509, *"Adverse Employment Action" Explained* (under FEHA).

Sources and Authority

- " '[C]itizens do not surrender their First Amendment rights by accepting public employment.' Moreover, '[t]here is considerable value . . . in encouraging, rather than inhibiting, speech by public employees,' because 'government employees are often in the best position to know what ails the agencies for which they work.' At the same time, '[g]overnment employers, like private employers, need a significant degree of control over their employees' words and actions.' Accordingly, government employees may be subject to some restraints on their speech 'that would be unconstitutional if applied to the general public.' " (*Moonin v. Tice* (9th Cir. 2017) 868 F.3d 853, 860–861, internal citations omitted.)
- "First Amendment retaliation claims are governed by the framework in *Eng*. See 552 F.3d at 1070–72. [Plaintiff] must show that (1) he spoke on a matter of public concern, (2) he spoke as a private citizen rather than a public employee, and (3) the relevant speech was a substantial or motivating factor in the adverse employment action. Upon that showing, the State must demonstrate that (4) it had an adequate justification for treating [plaintiff] differently from other members of the general public, or (5) it would have taken the adverse employment action even absent the protected speech. '[A]ll the factors are necessary, in the sense that failure to meet any one of them is fatal to the plaintiff's case.' " (*Kennedy v. Bremerton Sch. Dist.* (9th Cir. 2017) 869 F.3d 813, 822, internal citations omitted.)

CACI No. 3053

- "*Pickering* [*Pickering v. Bd. of Educ.* (1968) 391 U.S. 563 [88 S.Ct. 1731, 20 L.Ed.2d 811]] and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern. If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public. This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations." (*Garcetti, supra,* 547 U.S. at p. 418, internal citations omitted.)
- "In the forty years since *Pickering,* First Amendment retaliation law has evolved dramatically, if sometimes inconsistently. Unraveling *Pickering's* tangled history reveals a sequential five-step series of questions: (1) whether the plaintiff spoke on a matter of public concern; (2) whether the plaintiff spoke as a private citizen or public employee; (3) whether the plaintiff's protected speech was a substantial or motivating factor in the adverse employment action; (4) whether the state had an adequate justification for treating the employee differently from other members of the general public; and (5) whether the state would have taken the adverse employment action even absent the protected speech. Analysis of these questions, further complicated by restraints on our interlocutory appellate jurisdiction, involves a complex array of factual and legal inquiries requiring detailed explanation." (*Eng, supra,* 552 F.3d at p. 1070.)
- "The public concern inquiry is purely a question of law . . . ." (*Eng, supra,* 552 F.3d at p. 1070.)
- "Whether an individual speaks as a public employee is a mixed question of fact and law. 'First, a factual determination must be made as to the "scope and content of a plaintiff's job responsibilities." ' 'Second, the "ultimate constitutional significance" of those facts must be determined as a matter of law.' " (*Barone v. City of Springfield* (9th Cir. 2018) 902 F.3d 1091, 1099, internal citations omitted.)
- "An employee does not speak as a citizen merely because the employee directs speech towards the public, or speaks in the presence of the public, particularly when an employee's job duties include interacting with the public." (*Barone*, *supra*, 902 F.3d at p. 1100.)
- "[T]he parties in this case do not dispute that [plaintiff] wrote his disposition memo pursuant to his employment duties. We thus have no occasion to articulate a comprehensive framework for defining the scope of an employee's duties in cases where there is room for serious debate. We reject, however, the

suggestion that employers can restrict employees' rights by creating excessively broad job descriptions. The proper inquiry is a practical one. Formal job descriptions often bear little resemblance to the duties an employee actually is expected to perform, and the listing of a given task in an employee's written job description is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee's professional duties for First Amendment purposes." (*Garcetti, supra,* 547 U.S. at p. 424.)

- "[I]n synthesizing relevant Ninth Circuit precedent since *Garcetti*, an en banc panel of this Court in *Dahlia v. Rodriguez,* 735 F.3d 1060, 1074–76 (9th Cir. 2013), announced three guiding principles for undertaking the practical factual inquiry of whether an employee's speech is insulated from employer discipline under the First Amendment. . . . The guiding principles are: [¶] 1. 'First, particularly in a highly hierarchical employment setting such as law enforcement, whether or not the employee confined his communications to his chain of command is a relevant, if not necessarily dispositive, factor in determining whether he spoke pursuant to his official duties. When a public employee communicates with individuals or entities outside of his chain of command, it is unlikely that he is speaking pursuant to his duties.' [¶] 2. 'Second, the subject matter of the communication is also of course highly relevant to the ultimate determination whether the speech is protected by the First Amendment . . . When an employee prepares a routine report, pursuant to normal departmental procedure, about a particular incident or occurrence, the employee's preparation of that report is typically within his job duties . . . . By contrast, if a public employee raises within the department broad concerns about corruption or systemic abuse, it is unlikely that such complaints can reasonably be classified as being within the job duties of an average public employee, except when the employee's regular job duties involve investigating such conduct.' [¶] 3. 'Third, we conclude that when a public employee speaks in direct contravention to his supervisor's orders, that speech may often fall outside of the speaker's professional duties. Indeed, the fact that an employee is threatened or harassed by his superiors for engaging in a particular type of speech provides strong evidence that the act of speech was not, as a 'practical' matter, within the employee's job duties notwithstanding any suggestions to the contrary in the employee's formal job description.' " (*Brandon v. Maricopa County* (9th Cir. 2017) 849 F.3d 837, 843–844, internal citations omitted.)
- "Initially, in this case, the burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'—or, to put it in other words, that it was a 'motivating factor' in the [defendant]'s decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the [defendant] had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's re-employment even in the absence of the protected conduct." (*Mt. Healthy City*

Sch. Dist. Bd. of Educ. v. Doyle (1977) 429 U.S. 274, 287 [97 S.Ct. 568, 50 L.Ed.2d 471].)

- "Although the *Pickering* balancing inquiry is ultimately a legal question, like the private citizen inquiry, its resolution often entails underlying factual disputes. Thus we must once again assume any underlying disputes will be resolved in favor of the plaintiff to determine, as a matter of law, whether the state has 'adequate justification' to restrict the employee's speech. If the allegations, viewed in light most favorable to the plaintiff, indicate adequate justification, qualified immunity should be granted." (*Eng, supra,* 552 F.3d at pp. 1071–1072, internal citations omitted.)
- "Although the *Pickering* framework is most often applied in the retaliation context, a similar analysis is used when assessing prospective restrictions on government employee speech. Where a 'wholesale deterrent to a broad category of expression' rather than 'a post hoc analysis of one employee's speech and its impact on that employee's public responsibilities' is at issue, the Court weighs the impact of the ban as a whole—both on the employees whose speech may be curtailed and on the public interested in what they might say—against the restricted speech's ' "necessary impact on the actual operation" of the Government,' '[U]nlike an adverse action taken in response to actual speech,' a prospective restriction 'chills potential speech before it happens.' The government therefore must shoulder a heavier burden when it seeks to justify an ex ante speech restriction as opposed to 'an isolated disciplinary action.' " (*Moonin, supra,* 868 F.3d at p. 861, internal citations omitted.)

Secondary Sources

7 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 563

8 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law §§ 894, 895

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

3065. Sexual Harassment in Defined Relationship—Essential Factual Elements (Civ. Code, § 51.9)

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

1. **[That [***name of plaintiff***] had a [business/service/ [or] professional relationship] with [***name of defendant***];]**

   [*or***]**

   [That [*name of defendant***] held [himself/herself] out as being able to help [***name of plaintiff***] establish a [business/service/ [or] professional relationship] with [[***name of defendant***]/[or] [***name of third party***]];]**

2. **[That [***name of defendant***] made [sexual advances/ solicitations/ sexual requests/demands for sexual compliance/[***insert other actionable conduct***]] to [***name of plaintiff***];]**

   [or]

   [That [*name of defendant***] engaged in [verbal/visual/physical] conduct of a [sexual nature/hostile nature based on gender];]**

3. **That [***name of defendant***]'s conduct was unwelcome and also pervasive or severe; and**

4. **That [***name of plaintiff***] has suffered or will suffer [economic loss or disadvantage/personal injury/the violation of a statutory or constitutional right] as a result of [***name of defendant***]'s conduct.**

New September 2003; Revised April 2008; Renumbered from CACI No. 3024 December 2012; Revised January 2019

Directions for Use

Select the appropriate option for element 1 depending on the nature of the relationship between the parties. Select either or both options for element 2 depending on the defendant's conduct. For a nonexclusive list of relationships covered, see Civil Code section 51.9(a)(1).

See also CACI No. 2524, *"Severe or Pervasive" Explained.*

Sources and Authority

- Sexual Harassment in Defined Relationship. Civil Code section 51.9.
- "[The] history of the [1999] amendments to Civil Code section 51.9 leaves no doubt of the Legislature's intent to conform the requirements governing liability

for sexual harassment in professional relationships outside the workplace to those of the federal law's Title VII and California's FEHA, both of which pertain to liability for sexual harassment in the workplace. Under both laws, an employee plaintiff who cannot prove a demand for sexual favors in return for a job benefit (that is, quid pro quo harassment) must show that the sexually harassing conduct was so pervasive or severe as to alter the conditions of employment. With respect to liability under section 51.9, which covers a wide variety of business relationships outside the workplace, the relevant inquiry is whether the alleged sexually harassing conduct was sufficiently pervasive or severe as to alter the conditions of the business relationship. This inquiry must necessarily take into account the nature and context of the particular business relationship." (*Hughes v. Pair* (2009) 46 Cal.4th 1035, 1048 [95 Cal.Rptr.3d 636, 209 P.3d 963].)

Secondary Sources

8 Witkin, Summary of California Law (10th ed. 2005) Constitutional Law § 896

1 California Landlord-Tenant Practice, Ch. 3, *Liability for Sexual Harassment* (Cont.Ed.Bar 2d ed.) § 3.70A

1 Wrongful Employment Termination Practice, Ch. 3, *When Plaintiff is Not Employee, Applicant, or Independent Contractor* (Cont.Ed.Bar 2d ed.) § 3.12

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, § 115.36, Ch. 116, *Civil Rights: Discrimination in Business Establishments*, §§ 116.35, 116.90, Ch. 117, *Civil Rights: Housing Discrimination*, § 117.32 (Matthew Bender)

1 Westley et al., Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 2, *Creation of Tenancy*, 2.13 (Matthew Bender)

3066. Bane Act—Essential Factual Elements (Civ. Code, § 52.1)

[*Name of plaintiff***] claims that [***name of defendant***] intentionally interfered with [or attempted to interfere with] [his/her] civil rights by threats, intimidation, or coercion. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **[That by threats, intimidation or coercion, [***name of defendant***] caused [***name of plaintiff***] to reasonably believe that if [he/she] exercised [his/her] right [***insert right, e.g., "to vote"***], [***name of defendant***] would commit violence against [[him/her]/ [or] [his/her] property] and that [***name of defendant***] had the apparent ability to carry out the threats;]**

   [*or***]**

   [That [*name of defendant***] acted violently against [[***name of plaintiff***]/ [and] [***name of plaintiff***]'s property] [to prevent [him/her] from exercising [his/her] right [***e.g., to vote***]/to retaliate against [***name of plaintiff***] for having exercised [his/her] right [***e.g., to vote***]];]**

[2. That [*name of defendant***] intended to deprive [***name of plaintiff***] of [his/her] enjoyment of the interests protected by the right [***e.g., to vote***];]**

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

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

New September 2003; Renumbered from CACI No. 3025 and Revised December 2012, November 2018

Directions for Use

Select the first option for element 1 if the defendant's conduct involved threats of violence. (See Civ. Code, § 52.1(k).) Select the second option if the conduct involved actual violence.

The Bane Act provides that speech alone is not sufficient to constitute a violation unless it involves a credible threat of violence. (Civ. Code, § 52.1(k).) This limitation would appear to foreclose a claim based on threats, intimidation, or coercion involving a nonviolent consequence. (See *Cabesuela v. Browning-Ferris Industries* (1998) 68 Cal.App.4th 101, 111 [80 Cal.Rptr.2d 60] [to state a cause of action under Bane Act there must first be violence or intimidation by threat of violence].) For example, it would not be a violation to threaten to report someone to immigration if the person exercises a right granted under labor law. No case has

been found, however, that applies the speech limitation to foreclose such a claim, and several courts have suggested that this point is not fully settled. (See *Shoyoye v. County of Los Angeles* (2012) 203 Cal.App.4th 947, 959 [137 Cal.Rptr.3d 839] [we "need not decide that every plaintiff must allege violence or threats of violence in order to maintain an action under section 52.1"]; *City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 408 [39 Cal.Rptr.3d 1] [also noting issue but finding it unnecessary to address].) To assert such a claim, modify element 1, option 1 to allege coercion based on a nonviolent threat with severe consequences.

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code section 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subsection of Section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the reference to section 52 in subsection (b) of the Bane Act would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52.

Under the Unruh Act, if only the statutory minimum damages of $4,000 is sought, it is not necessary to prove harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195] [Section 52 provides for minimum statutory damages for every violation of section 51, regardless of the plaintiff's actual damages]; see also Civ. Code, § 52(h) ["actual damages" means special and general damages].) Presumably, the same rule applies under the Bane Act as the statutory minimum of section 52(a) should be recoverable Therefore, omit elements 2 and 3 unless actual damages are sought. If actual damages are sought, combine CACI No. 3067, *Unruh Civil Rights Act—Damages*, and CACI No. 3068, *Ralph Act—Damages and Penalty*, to recover damages under both subsections (a) and (b) of section 52.

It has been the rule that in a wrongful detention case, the coercion required to support a Bane Act claim must be coercion independent from that inherent in the wrongful detention itself. (*Bender v. County of Los Angeles* (2013) 217 Cal.App.4th 968, 981 [159 Cal.Rptr.3d 204].) One court, however, did not apply this rule in a wrongful arrest case. The court instead held that the "threat, intimidation or coercion" element requires a specific intent to violate protected rights. (*Cornell v. City & County of San Francisco* (2017) 17 Cal.App.5th 766, 790–804 [225 Cal.Rptr.3d 356].) Element 2 expresses this requirement.

Sources and Authority

- Bane Act. Civil Code section 52.1.
- Remedies Under Bane Act. Civil Code section 52.
- "The Bane Act permits an individual to pursue a civil action for damages where another person 'interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this

state.' 'The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., "threat[], intimidation or coercion"), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.' " (*King v. State of California* (2015) 242 Cal.App.4th 265, 294 [195 Cal.Rptr.3d 286], internal citation omitted.)

- "[S]ection 52.1, was enacted a decade [after the Ralph Act] as part of Assembly Bill No. 63 (1987–1988 Reg. Sess.) (Assembly Bill No. 63) and is known as the Tom Bane Civil Rights Act. It was intended to supplement the Ralph Civil Rights Act as an additional legislative effort to deter violence. The stated purpose of the bill was 'to fill in the gaps left by the Ralph Act' by allowing an individual to seek relief to prevent the violence from occurring before it was committed and providing for the filing of criminal charges." (*Stamps v. Superior Court* (2006) 136 Cal.App.4th 1441, 1447 [39 Cal.Rptr.3d 706], internal citation omitted.)
- "The Legislature enacted section 52.1 to stem a tide of hate crimes." (*Jones v. Kmart Corp.* (1998) 17 Cal.4th 329, 338 [70 Cal.Rptr.2d 844, 949 P.2d 941], internal citation omitted.)
- "[T]o state a cause of action under section 52.1 there must first be violence or intimidation by threat of violence. Second, the violence or threatened violence must be due to plaintiff's membership in one of the specified classifications set forth in Civil Code section 51.7 or a group similarly protected by constitution or statute from hate crimes." (*Gabrielle A. v. County of Orange* (2017) 10 Cal.App.5th 1268, 1290 [217 Cal.Rptr.3d 275].)
- "The plaintiff must show 'the defendant interfered with or attempted to interfere with the plaintiff's legal right by threatening or committing violent acts.' " (*Julian v. Mission Community Hospital* (2017) 11 Cal.App.5th 360, 395 [218 Cal.Rptr.3d 38].)
- "However, the statutory language does not limit its application to hate crimes. Notably, the statute does not require a plaintiff to allege the defendant acted with discriminatory animus or intent based upon the plaintiff's membership in a protected class of persons." (*Shoyoye, supra*, 203 Cal.App.4th at p. 956.)
- "The phrase 'under color of law' indicates, without doubt, that the Legislature intended to include law enforcement officers within the scope of Section 52.1 if the requisites of the statute are otherwise met." (*Cornell, supra,* 17 Cal.App.5th at p. 800.)
- "Civil Code section 52.1, the Bane Act civil counterpart of [Penal Code] section 422.6, recognizes a private right of action for damages and injunctive relief for interference with civil rights." (*In re M.S.* (1995) 10 Cal.4th 698, 715 [42 Cal.Rptr.2d 355, 896 P.2d 1365].)
- "[T]he Bane Act requires that the challenged conduct be intentional." (*Simmons v. Superior Court* (2016) 7 Cal.App.5th 1113, 1125 [212 Cal.Rptr.3d 884].)

CACI No. 3066

- "[S]ection 52.1 does require an attempted or completed act of interference with a legal right, accompanied by a form of coercion." (*Jones, supra,* 17 Cal.4th at p. 334.)
- "The statutory framework of section 52.1 indicates that the Legislature meant the statute to address interference with constitutional rights involving more egregious conduct than mere negligence." (*Shoyoye, supra*, 203 Cal.App.4th at p. 958.)
- Section 52.1 is not a remedy to be used against private citizens for violations of rights that apply only to the state or its agents. (*Jones, supra*, 17 Cal.4th at p. 337 [right to be free from unreasonable search and seizure].)
- " '[W]here coercion is inherent in the constitutional violation alleged, . . . the statutory requirement of "threats, intimidation, or coercion" is not met. The statute requires a showing of coercion independent from the coercion inherent in the wrongful detention itself.' " (*Simmons, supra,* 7 Cal.App.5th at p. 1126.)
- Assembly Bill 2719 (Stats. 2000, ch. 98) abrogated the holding of *Boccato v. City of Hermosa Beach* (1994) 29 Cal.App.4th 1797 [35 Cal.Rptr.2d 282], which held that a plaintiff was required to be a member of a specified protected class in order to bring an action under section 52.1: "It is the intent of the Legislature in enacting this act to clarify that an action brought pursuant to Section 52.1 of the Civil Code does not require the individual whose rights are secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of California, to be a member of a protected class identified by its race, color, religion, or sex, among other things."
- "Subdivision (j) of Civil Code section 52.1 provides that speech alone is insufficient to support such an action, except upon a showing that the speech itself threatens violence against a specific person or group of persons, the person or group of persons against whom the speech is directed 'reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence has the apparent ability to carry out the threat.' . . . The presence of the express 'reasonable fear' element, in addition to the 'apparent ability' element, in Civil Code section 52.1, governing civil actions for damages, most likely reflects the Legislature's determination [that] a defendant's civil liability should depend on the harm actually suffered by the victim." (*In re M.S., supra,* 10 Cal.4th at p. 715, internal citation omitted.)
- "[Q]ualified immunity of the kind applied to actions brought under section 1983 does not apply to actions brought under Civil Code section 52.1." (*Venegas v. County of Los Angeles* (2007) 153 Cal.App.4th 1230, 1246 [63 Cal.Rptr.3d 741].)
- "[A] wrongful detention that is 'accompanied by the requisite threats, intimidation, or coercion'—'coercion independent from the coercion inherent in the wrongful detention itself' that is 'deliberate or spiteful'—is a violation of

the Bane Act." (*Bender, supra*, 217 Cal.App.4th at p. 981, internal citations omitted.)

- "Here, there clearly *was* a showing of coercion separate and apart from the coercion inherent in an unlawful arrest. [Defendant officer] wrongfully detained and arrested plaintiff, because he had no probable cause to believe plaintiff had committed any crime. But, in addition, [defendant officer] deliberately and unnecessarily beat and pepper sprayed the unresisting, already handcuffed plaintiff. That conduct was not the coercion that is inherent in a wrongful arrest." (*Bender, supra*, 217 Cal.App.4th at p. 979, original italics.)
- "We acknowledge that some courts have read *Shoyoye* as having announced 'independen[ce] from [inherent coercion]' as a requisite element of all Section 52.1 claims alleging search-and-seizure violations, but we think those courts misread the statute as well as the import of *Venegas*. By its plain terms, Section 52.1 proscribes any 'interfere[nce] with' or attempted 'interfere[nce] with' protected rights carried out 'by threat, intimidation or coercion.' Nothing in the text of the statute requires that the offending 'threat, intimidation or coercion' be 'independent' from the constitutional violation alleged." (*Cornell, supra,* 17 Cal.App.5th at pp. 799–800.)
- "[W]here, as here, an unlawful arrest is properly pleaded and proved, the egregiousness required by Section 52.1 is tested by whether the circumstances indicate the arresting officer had a specific intent to violate the arrestee's right to freedom from unreasonable seizure, not by whether the evidence shows something beyond the coercion 'inherent' in the wrongful detention." (*Cornell, supra,* 17 Cal.App.5th at pp. 801–802.)
- "[T]his test ' "essentially sets forth two requirements for a finding of 'specific intent' . . . The first is a purely legal determination. Is the . . . right at issue clearly delineated and plainly applicable under the circumstances of the case? If the trial judge concludes that it is, then the jury must make the second, factual, determination. Did the defendant commit the act in question with the particular purpose of depriving the citizen victim of his enjoyment of the interests protected by that . . . right? If both requirements are met, even if the defendant did not in fact recognize the [unlawfulness] of his act, he will be adjudged as a matter of law to have acted [with the requisite specific intent]—i.e., 'in reckless disregard of constitutional [or statutory] prohibitions or guarantees.' " ' " (*Cornell, supra,* 17 Cal.App.5th at p. 803.)
- "Civil Code section 52.1 does not address the immunity established by section 844.6 [public entity immunity for injury to prisoners]. Nothing in Civil Code section 52.1 indicates an intent to abrogate this specific immunity provision. The immunity that it creates therefore applies to [plaintiff]'s Bane Act claim." (*Towery v. State of California* (2017) 14 Cal.App.5th 226, 234 [221 Cal.Rptr.3d 692].)

Secondary Sources

10 Witkin, Summary of California Law (11th ed. 2017) Constitutional Law, § 989

et seq.

Cheng, et al., Calif. Fair Housing and Public Accommodations § 9:38 (The Rutter Group) (The Bane Act)

California Civil Practice: Civil Rights Litigation, §§ 3:1–3:15 (Thomson Reuters)

2 Wilcox, California Employment Law, Ch. 40, *Overview of Equal Employment Opportunity Laws*, § 40.12[2] (Matthew Bender)

11 California Forms of Pleading and Practice, Ch. 117A, *Civil Rights: Interference With Civil Rights by Threats, Intimidation, Coercion, or Violence*, § 117A.11 (Matthew Bender)

3 California Points and Authorities, Ch. 35, *Civil Rights: Unruh Civil Rights Act*, §§ 35.01, 35.20 et seq. (Matthew Bender)

We answer the questions submitted to us as follows:

1. **Did [***name of defendant***] make threats of violence against [[***name of plaintiff***]/ [or] [***name of plaintiff***]'s property]?**

   _____ **Yes** _____ **No**

   [*or*]

1. **Did [***name of defendant***] act violently against [[***name of plaintiff***]/ [and] [***name of plaintiff***]'s property]?**

   _____ **Yes** _____ **No**

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

2. **Did [***name of defendant***]'s threats cause [***name of plaintiff***] to reasonably believe that if [he/she] exercised [his/her] right [***insert right, e.g., "to vote"***] [***name of defendant***] would commit violence against [[him/her]/ [or] [his/her] property] and that [***name of defendant***] had the apparent ability to carry out the threat?**

   _____ **Yes** _____ **No**

   [*or*]

2. **Did [***name of defendant***] commit these acts of violence to [prevent [name of plaintiff] from exercising [his/her] right [***insert right, e.g., "to vote"***]/retaliate against [***name of plaintiff***] for having exercised [his/her] right [***insert right***]]?**

   _____ **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 conduct a substantial factor in causing harm to [***name of plaintiff***]?**

   _____ **Yes** _____ **No**

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

4. **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 $_____

[Answer question 5.

5. What amount do you award as punitive damages?

$_____]

Signed: _____
Presiding Juror

Dated: _____

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

New September 2003; Revised April 2007, December 2010; Renumbered from CACI No. VF-3015 and Revised December 2012, December 2016

Directions for Use

This verdict form is based on CACI No. 3066, *Bane Act—Essential Factual Elements.*

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.

Give the first option for elements 1 and 2 if the defendant has threatened violence.

Give the second option if the defendant actually committed violence.

Civil Code section 52(a) provides for damages up to three times actual damages but a minimum of $4,000 for violations of Civil Code section 51 (Unruh Act), 51.5, and 51.6. Civil Code section 52(b) provides for punitive damages for violations of Civil Code sections 51.7 (Ralph Act) and 51.9. Neither subsection of Section 52 mentions the Bane Act or Civil Code section 52.1. Nevertheless, the Bane Act refers to section 52. (See Civ. Code, § 52.1(c).) This reference would seem to indicate that damages may be recovered under both subsections (a) and (b) of section 52. The court should compute the damages under section 52(a) by multiplying actual damages by three, and awarding $4,000 if the amount is less. Questions 5 addresses punitive damages under section 52(b).

If no actual damages are sought, the $4,000 statutory minimum damages may be awarded without proof of harm and causation. (See *Koire v. Metro Car Wash* (1985) 40 Cal.3d 24, 33 [219 Cal.Rptr. 133, 707 P.2d 195].) In this case, only questions 1 and 2 need be answered.

If specificity is not required, users do not have to itemize all the damages listed in question 4 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

If the jury is being given the discretion under Civil Code section 3288 to award prejudgment interest (see *Bullis v. Security Pac. Nat'l Bank* (1978) 21 Cal.3d 801, 814 [148 Cal.Rptr. 22, 582 P.2d 109]), give CACI No. 3935, *Prejudgment Interest*. This verdict form may need to be augmented for the jury to make any factual findings that are required in order to calculate the amount of prejudgment interest.

3112. "Dependent Adult" Explained (Welf. & Inst. Code, § 15610.23)

A "dependent adult" is a person, regardless of whether or not the person lives independently, who is between the ages of 18 and 64 years and who [*insert one of the following:***]**

> **[has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights. This includes persons who have physical or developmental disabilities or whose physical or mental abilities have diminished because of age.]**
>
> **[***or***]**
>
> **[is admitted as an inpatient to [a/an] [***insert 24-hour health facility***].]**

New September 2003; Revised January 2019

Directions for Use

Read the alternative that is most appropriate to the facts of the case.

Sources and Authority

- "Dependent Adult" Defined. Welfare and Institutions Code section 15610.23.
- "Developmentally Disabled Person" Defined. Welfare and Institutions Code section 15610.25.

Secondary Sources

California Elder Law Litigation (Cont.Ed.Bar) § 6.22

1 California Forms of Pleading and Practice, Ch. 5, *Abuse of Minors and Elderly*, § 5.31 (Matthew Bender)

3712. Joint Ventures

Each of the members of a joint venture, and the joint venture itself, are responsible for the wrongful conduct of a member acting in furtherance of the venture.

You must decide whether a joint venture was created in this case. A joint venture exists if all of the following have been proved:

1. **Two or more persons or business entities combine their property, skill, or knowledge with the intent to carry out a single business undertaking;**
2. **Each has an ownership interest in the business;**
3. **They have joint control over the business, even if they agree to delegate control; and**
4. **They agree to share the profits and losses of the business.**

A joint venture can be formed by a written or an oral agreement or by an agreement implied by the parties' conduct.

New September 2003; Revised June 2011, December 2011

Directions for Use

This instruction can be modified for cases involving unincorporated associations by substituting the term "unincorporated association" for "joint venture."

If the venture has no commercial purpose, this instruction may be modified by deleting elements 2 and 4, which do not apply to a noncommercial enterprise. Also modify elements 1 and 3 to substitute another word for "business" depending on the kind of activity involved. (See *Shook v. Beals* (1950) 96 Cal.App.2d 963, 969–970 [217 P.2d 56]; see also *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853, 872 [32 Cal.Rptr.3d 351].)

Sources and Authority

- "A joint venture is 'an undertaking by two or more persons jointly to carry out a single business enterprise for profit.' " (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 482 [286 Cal.Rptr. 40, 816 P.2d 892], internal citations omitted.)
- "A joint venture has been defined in various ways, but most frequently perhaps as an association of two or more persons who combine their property, skill or knowledge to carry out a single business enterprise for profit." (*Holtz v. United Plumbing and Heating Co.* (1957) 49 Cal.2d 501, 506 [319 P.2d 617].)
- " 'There are three basic elements of a joint venture: the members must have joint control over the venture (even though they may delegate it), they must share the profits of the undertaking, and the members must each have an

ownership interest in the enterprise.' Where a joint venture is established, the parties to the venture are vicariously liable for the torts of the other in furtherance of the venture." (*Cochrum v. Costa Victoria Healthcare, LLC* (2018) 25 Cal.App.5th 1034, 1053 [236 Cal.Rptr.3d 457], internal citation omitted.)

- " 'Whether a joint venture actually exists depends on the intention of the parties . . . . [¶] . . . [¶] [W]here evidence is in dispute the existence or nonexistence of a joint venture is a question of fact to be determined by the jury. [Citation.]' " (*Unruh-Haxton v. Regents of University of California* (2008) 162 Cal.App.4th 343, 370 [76 Cal.Rptr.3d 146], internal citations omitted.)
- " 'A joint venture exists when there is "an agreement between the parties under which they have a community of interest, that is, a joint interest, in a common business undertaking, an understanding as to the sharing of profits and losses, and a right of joint control [citing this instruction]." ' " (*Simmons v. Ware* (2013) 213 Cal.App.4th 1035, 1053 [153 Cal.Rptr.3d 178], internal citation omitted.)
- "We turn next to the element of joint control. 'An essential element of a partnership or joint venture is the right of joint participation in the management and control of the business. [Citation.] Absent such right, the mere fact that one party is to receive benefits in consideration of services rendered or for capital contribution does not, as a matter of law, make him a partner or joint venturer. [Citations.]' " (*Simmons, supra*, 213 Cal.App.4th at p. 1056.)
- "The law requires little formality in the creation of a joint venture and the agreement is not invalid because it may be indefinite with respect to its details." (*Boyd v. Bevilacqua* (1966) 247 Cal.App.2d 272, 285 [55 Cal.Rptr. 610].)
- "The distinction between joint ventures and partnerships is not sharply drawn. A joint venture usually involves a single business transaction, whereas a partnership may involve 'a continuing business for an indefinite or fixed period of time.' Yet a joint venture may be of longer duration and greater complexity than a partnership. From a legal standpoint, both relationships are virtually the same. Accordingly, the courts freely apply partnership law to joint ventures when appropriate." (*Weiner, supra,* 54 Cal.3d at p. 482, internal citations omitted.)
- "The incidents of a joint venture are in all important respects the same as those of a partnership. One such incident of partnership is that all partners are jointly and severally liable for partnership obligations, irrespective of their individual partnership interests. Because joint and several liability arises from the partnership or joint venture, Civil Code section 1431.2 [Proposition 51] is not applicable." (*Myrick v. Mastagni* (2010) 185 Cal.App.4th 1082, 1091 [111 Cal.Rptr.3d 165], internal citations omitted.)
- "Normally, . . . a partnership or joint venture is liable to an injured third party for the torts of a partner or venturer acting in furtherance of the enterprise." (*Orosco v. Sun-Diamond Corp.* (1997) 51 Cal.App.4th 1659, 1670 [60 Cal.Rptr.2d 179, 186].)

- "The joint enterprise theory, while rarely invoked outside the automobile accident context, is well established and recognized in this state as an exception to the general rule that imputed liability for the negligence of another will not be recognized." (*Christensen v. Superior Court* (1991) 54 Cal.3d 868, 893 [2 Cal.Rptr.2d 79, 820 P.2d 181], internal citation omitted.)
- "The term 'joint enterprise' may cause some confusion because it is 'sometimes used to define a noncommercial undertaking entered into by associates with equal voice in directing the conduct of the enterprise . . . .' However, when it is 'used to describe a business or commercial undertaking[,] it has been used interchangeably with the term "joint venture" and courts have not drawn any significant legal distinction between the two.' " (*Jeld-Wen, Inc., supra*, 131 Cal.App.4th at p. 872, internal citation omitted.)
- "In the annotations [to Restatement of the Law of Torts, section 491], many California cases are cited holding that to have a joint venture there must be ' "a community of interest in objects and equal right to direct and govern movements and conduct of each other with respect thereto. Each must have voice and right to be heard in its control and management" . . .' " (*Shook, supra*, 96 Cal.App.2d at pp. 969–970.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1235

1 Levy et al., California Torts, Ch. 8, *Vicarious Liability*, § 8.07 (Matthew Bender)

8 California Forms of Pleading and Practice, Ch. 82, *Automobiles: Causes of Actions*, § 82.16 (Matthew Bender)

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.132 (Matthew Bender)

35 California Forms of Pleading and Practice, Ch. 401, *Partnerships: Actions Between General Partners and Partnership*, § 401.11 (Matthew Bender)

17 California Points and Authorities, Ch. 170, *Partnerships*, § 170.222 (Matthew Bender)

1 California Civil Practice: Torts §§ 3:38–3:39 (Thomson Reuters West)

3903A. Medical Expenses—Past and Future (Economic Damage)

[*Insert number, e.g.*, "1."**] [Past] [and] [future] medical expenses.**

[To recover damages for past medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] has received.]**

[To recover damages for future medical expenses, [*name of plaintiff***] must prove the reasonable cost of reasonably necessary medical care that [he/she] is reasonably certain to need in the future.]**

New September 2003

Sources and Authority

- " 'In tort actions, medical expenses fall generally into the category of economic damages, representing actual pecuniary loss caused by the defendant's wrong.' 'A person who undergoes necessary medical treatment for tortiously caused injuries suffers an economic loss by taking on liability for the costs of treatment. Hence, any reasonable charges for treatment the injured person has paid or, having incurred, still owes the medical provider are recoverable as economic damages.' " (*Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225, 237 [238 Cal.Rptr.3d 809].)
- "[A] person injured by another's tortious conduct is entitled to recover the reasonable value of medical care and services reasonably required and attributable to the tort." (*Hanif v. Housing Authority of Yolo County* (1988) 200 Cal.App.3d 635, 640 [246 Cal.Rptr. 192], internal citations omitted; see also *Helfend v. Southern Cal Rapid Transit Dist.* (1970) 2 Cal.3d 1, 6 [84 Cal.Rptr. 173, 465 P.2d 61 [collateral source rule].)
- "The jury in this case was properly instructed with CACI No. 3903A, which directs the jury to determine 'the reasonable cost of reasonably necessary medical care that [plaintiff] is reasonably certain to need in the future.' " (*Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050 [208 Cal.Rptr.3d 363]; see also *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163, 183 [217 Cal.Rptr.3d 519] [CACI 3903A is an accurate statement of the law].)
- "The jury was properly instructed in this case to determine 'the reasonable cost of reasonably necessary medical care that [plaintiff] has received' and 'the reasonable cost of reasonably necessary medical care that [plaintiff] is reasonably certain to need in the future.' But as a consequence of the discrepancy in recent decades between the amount patients are typically billed by health care providers and the lower amounts usually paid in satisfaction of the charges (whether by a health insurer or otherwise), controversy has arisen as to how to measure the reasonable costs of medical care in a variety of factual

scenarios." (*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1328 [188 Cal.Rptr.3d 820].)

- "[A] plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less. California decisions have focused on 'reasonable value' in the context of *limiting* recovery to reasonable expenditures, not expanding recovery beyond the plaintiff's actual loss or liability. To be recoverable, a medical expense must be both incurred *and* reasonable." (*Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, 555 [129 Cal.Rptr.3d 325, 257 P.3d 1130], original italics, internal citations omitted.)
- "[A]n injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial. In so holding, we in no way abrogate or modify the collateral source rule as it has been recognized in California; we merely conclude the negotiated rate differential—the discount medical providers offer the insurer—is not a benefit provided to the plaintiff in compensation for his or her injuries and therefore does not come within the rule." (*Howell, supra*, 52 Cal.4th at p. 566.)
- "[W]hen a medical care provider has, by agreement with the plaintiff's private health insurer, accepted as full payment for the plaintiff's care an amount less than the provider's full bill, evidence of that amount is relevant to prove the plaintiff's damages for past medical expenses and, assuming it satisfies other rules of evidence, is admissible at trial. Evidence that such payments were made in whole or in part by an insurer remains, however, generally inadmissible under the evidentiary aspect of the collateral source rule. Where the provider has, by prior agreement, accepted less than a billed amount as full payment, evidence of the full billed amount is not itself relevant on the issue of past medical expenses." (*Howell, supra*, 52 Cal.4th at p. 567, internal citation omitted.)
- "*Howell* offered no bright-line rule on how to determine 'reasonable value' when uninsured plaintiffs have incurred (but not paid) medical bills. [Defendant] is correct that the concept of market or exchange value was endorsed by *Howell* as the proper way to think about the 'reasonable value' of medical services. But she is incorrect to the extent she suggests (1) [Plaintiff] is necessarily in the same market as insured health care recipients or wealthy health care recipients who can pay cash; or (2) *Howell* prescribes a particular method for determining the 'reasonable value' of medical services." (*Bermudez, supra*, 237 Cal.App.4th at p. 1330.)
- "In sum, the measure of medical damages is the lesser of (1) the amount paid or incurred, and (2) the reasonable value of the medical services provided. In practical terms, the measure of damages in insured plaintiff cases will likely be the amount paid to settle the claim in full. It is theoretically possible to prove

the reasonable value of services is lower than the rate negotiated by an insurer. But nothing in the available case law suggests this will be a particularly fruitful avenue for tort defendants. Conversely, the measure of damages for uninsured plaintiffs who have not paid their medical bills will usually turn on a wide-ranging inquiry into the reasonable value of medical services provided, because uninsured plaintiffs will typically incur standard, nondiscounted charges that will be challenged as unreasonable by defendants." (*Bermudez, supra*, 237 Cal.App.4th at pp. 1330–1331.)

- "Here, we are confronted with an insured plaintiff who has chosen to treat with doctors and medical facility providers outside his insurance plan. We hold that such a plaintiff shall be considered uninsured, as opposed to insured, for the purpose of determining economic damages." (*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266, 1269 [232 Cal.Rptr.3d 404].)
- "[T]he inquiry into reasonable value for the medical services provided to an uninsured plaintiff is not necessarily limited to the billed amounts where a defendant seeks to introduce evidence that a lesser payment has been made to the provider by a factor . . . . In such cases, the inquiry requires some additional evidence showing a nexus between the amount paid by the factor and the reasonable value of the medical services." (*Uspenskaya v. Meline* (2015) 241 Cal.App.4th 996, 1007 [194 Cal.Rptr.3d 364].)
- "Where a medical provider has (1) rendered medical services to a plaintiff, (2) issued a bill for those services, and (3) subsequently written off a portion of the bill gratuitously, the amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule." (*Sanchez v. Strickland* (2011) 200 Cal.App.4th 758, 769 [133 Cal.Rptr.3d 342].)
- "[T]he collateral source rule is not violated when a defendant is allowed to offer evidence of the market value of future medical benefits." (*Cuevas, supra,* 11 Cal.App.5th at p. 180.)
- "It is established that '[t]he reasonable value of nursing services required by the defendant's tortious conduct may be recovered from the defendant even though the services were rendered by members of the injured person's family and without an agreement or expectation of payment. Where services in the way of attendance and nursing are rendered by a member of the plaintiff's family, the amount for which the defendant is liable is the amount for which reasonably competent nursing and attendance by others could have been obtained. The fact that the injured party had a legal right to the nursing services (as in the case of a spouse) does not, as a general rule, prevent recovery of their value . . . .' " (*Hanif, supra*, 200 Cal.App.3d at pp. 644–645, internal citations omitted.)
- "Two points about the sufficiency of evidence to support a judgment can fairly be taken from *Howell*. First, the amount paid to settle in full an insured plaintiff's medical bills is likely substantial evidence on its own of the reasonable value of the services provided. Second, consistent with pre-*Howell* law, initial medical bills are generally insufficient on their own as a basis for

determining the reasonable value of medical services. Ensuing cases have held that a plaintiff who relies solely on evidence of unpaid medical charges will not meet his burden of proving the reasonable value of medical damages with substantial evidence." (*Bermudez, supra*, 237 Cal.App.4th at p. 1335, internal citations omitted.)

- Nor is it necessary that the amount of the award equal the alleged medical expenses for it has long been the rule that the costs alone of medical treatment and hospitalization do not govern the recovery of such expenses. It must be shown additionally that the services were attributable to the accident, that they were necessary, and that the charges for such services were reasonable." (*Dimmick v. Alvarez* (1961) 196 Cal.App.2d 211, 216 [16 Cal.Rptr. 308].)
- "The intervention of a third party in purchasing a medical lien does not prevent a plaintiff from recovering the amounts billed by the medical provider for care and treatment, as long as the plaintiff legitimately incurs those expenses and remains liable for their payment. Nor does the rule [that a plaintiff in a tort action cannot recover more than the amount of medical expenses he or she paid or incurred, even if the reasonable value of those services might be a greater sum] forbid the jury from considering the amounts billed by the provider as evidence of the reasonable value of the services." (*Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, 1291 [62 Cal.Rptr.3d 309]; see also *Moore v. Mercer* (2016) 4 Cal.App.5th 424, 436 [209 Cal.Rptr.3d 101] ["Nothing in *Howell* suggests a need to revisit the issues we addressed in *Katiuzhinsky"*].)
- "The fact that a hospital or doctor, for administrative or economic convenience, decides to sell a debt to a third party at a discount does not reduce the value of the services provided in the first place." (*Uspenskaya, supra*, 241 Cal.App.4th at p. 1003.)
- "Because the provider may no longer assert a lien for the full cost of its services, the Medicaid beneficiary may only recover the amount payable under Medicaid as his or her medical expenses in an action against a third party tortfeasor." (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 827 [135 Cal.Rptr.2d 1, 69 P.3d 927], internal citation omitted.)
- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)
- "It is for the jury to determine the probabilities as to whether future detriment is reasonably certain to occur in any particular case. [Citation.] It is 'not required' for a doctor to 'testify that he [is] reasonably certain that the plaintiff would be disabled in the future. All that is required to establish future disability is that from all the evidence, including the expert testimony, if there be any, it satisfactorily appears that such disability will occur with reasonable certainty. [Citations.]' [Citation.] The fact that the amount of future damages may be

difficult to measure or subject to various possible contingencies does not bar recovery." (*J.P., supra*, 232 Cal.App.4th at pp. 341–342.)

- "[W]hile an injured plaintiff is entitled to recover the reasonable value of medical services that are reasonably certain to be necessary in the future, evidence of the full amount billed for past medical services cannot support an expert opinion on the reasonable value of future medical services. It does not appear, however, that [expert] used the full amount billed for past medical services in making the calculations for her life care plan. We observe 'the "requirement of certainty . . . cannot be strictly applied where prospective damages are sought, because probabilities are really the basis for the award." ' At the time of trial, the precise medical costs a plaintiff will incur in the future are not known. Nor is it known how a plaintiff will necessarily pay for such expenses. It is unknown, for example, what, if any, insurance a plaintiff will have at any given time or what rate an insurer will have negotiated with any given medical provider for a particular service at the time and location the plaintiff will require the medical care. The fact finder is entrusted with the tasks of evaluating the probabilities based on the evidence presented and arriving at a reasonable result." (*Cuevas, supra,* 11 Cal.App.5th at p. 182, internal citations omitted.)
- "[I]t seems particularly appropriate for the trial court to perform its traditional gatekeeper role as to the admissibility of evidence and, pursuant to Evidence Code section 352, to determine whether evidence that is minimally probative should be admitted or whether it will require an undue consumption of time to try the collateral issues that evidence of what a third party paid for an account receivable and lien will necessarily raise." (*Moore, supra*, 4 Cal.App.5th at p. 443.)
- "[E]vidence which might be admissible in one case might not be admissible in another. '[T]he facts and circumstances of the particular case dictate what evidence is relevant to show the reasonable market value of the services at issue . . . .' " (*Moore, supra*, 4 Cal.App.5th at p. 442.)

Secondary Sources

9 Witkin, Summary of California Law (11th ed. 2017) Torts, § 1846 et seq.

Haning et al., California Practice Guide: Personal Injury, Ch. 3-A, *Damages: Introduction*, ¶¶ 3:1–3:19.4 (The Rutter Group)

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶¶ 3:33–3:233 (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.19–1.31

4 Levy et al., California Torts, Ch. 52, *Medical Expenses and Economic Loss*, §§ 52.01, 52.03 (Matthew Bender)

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

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.192 (Matthew

Bender)

1 California Civil Practice: Torts § 5:12 (Thomson Reuters)

3903E. Loss of Ability to Provide Household Services (Economic Damage)

[*Insert number, e.g.,* "5."**] The loss of [***name of plaintiff***]'s ability to provide household services.**

To recover damages for the loss of the ability to provide household services, [*name of plaintiff***] must prove the reasonable value of the services [he/she] would have been reasonably certain to provide to [his/her] household if the injury had not occurred.**

New September 2003

Sources and Authority

- "The first category consists of the reasonable value of nursing and other services that Decedent would have provided to his wife prior to his death, but was unable to provide due to his illness (replacement care). Again, [defendant] does not contest the recoverability of such damages here. Nor did it below. Such damages are recoverable. 'Generally, household services damages represent the detriment suffered when injury prevents a person from contributing some or all of his or her customary services to the family unit.' " (*Williams v. The Pep Boys Manny Moe & Jack of California* (2018) 27 Cal.App.5th 225, 238 [238 Cal.Rptr.3d 809] [citing this instruction].)
- "The justification for awarding this type of damage as part of the loss of future earnings award is that the plaintiff should be compensated for the value of the services he would have performed during the lost years which, because of the injury, will now have to be performed by someone else." (*Overly v. Ingalls Shipbuilding, Inc.* (1999) 74 Cal.App.4th 164, 171, fn. 5 [87 Cal.Rptr.2d 626], internal citation omitted.)
- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

Secondary Sources

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.64–1.66

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

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

3905A. Physical Pain, Mental Suffering, and Emotional Distress (Noneconomic Damage)

[*Insert number, e.g.,* "1."**] [Past] [and] [future] [physical pain/mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress/[***insert other damages***]].**

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

[To recover for future [*insert item of pain and suffering***], [***name of plaintiff***] must prove that [he/she] is reasonably certain to suffer that harm.**

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

New September 2003; Revised April 2008, December 2009, December 2011

Directions for Use

Insert the bracketed terms that best describe the damages claimed by the plaintiff.

If future noneconomic damages are sought, include the last two paragraphs. Do not instruct the jury to further reduce the award to present cash value. (See CACI No. 3904A, *Present Cash Value*, and CACI No. 3904B, *Use of Present-Value Tables*.) The amount that the jury is to award should already encompass the idea of today's dollars for tomorrow's loss. (See *Salgado v. County of L.A.* (1998) 19 Cal.4th 629, 646–647 [80 Cal.Rptr.2d 46, 967 P.2d 585].) Include the last sentence only if the plaintiff is claiming both future economic and noneconomic damages.

Sources and Authority

- "In general, courts have not attempted to draw distinctions between the elements of 'pain' on the one hand, and 'suffering' on the other; rather, the unitary concept of 'pain and suffering' has served as a convenient label under which a plaintiff may recover not only for physical pain but for fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal. Admittedly these terms refer to subjective states, representing a detriment which can be translated into monetary loss only with great difficulty. But the detriment, nevertheless, is a genuine one that requires compensation, and the issue generally must be resolved by the

'impartial conscience and judgment of jurors who may be expected to act reasonably, intelligently and in harmony with the evidence.' " (*Capelouto v. Kaiser Foundation Hospitals* (1972) 7 Cal.3d 889, 892–893 [103 Cal.Rptr. 856, 500 P.2d 880], internal citations and footnote omitted.)

- "[N]oneconomic damages do not consist of only emotional distress and pain and suffering. They also consist of such items as invasion of a person's bodily integrity (i.e., the fact of the injury itself), disfigurement, disability, impaired enjoyment of life, susceptibility to future harm or injury, and a shortened life expectancy." (*Bigler-Engler v. Breg, Inc.* (2017) 7 Cal.App.5th 276, 300 [213 Cal.Rptr.3d 82].)
- " ' " '[T]here is no fixed or absolute standard by which to compute the monetary value of emotional distress,' " ' and a ' "jury is entrusted with vast discretion in determining the amount of damages to be awarded . . . ." [Citation.]' " (*Plotnik v. Meihaus* (2012) 208 Cal.App.4th 1590, 1602 [146 Cal.Rptr.3d 585].
- "Compensatory damages may be awarded for bodily harm without proof of pecuniary loss. The fact that there is no market price calculus available to measure the amount of appropriate compensation does not render such a tortious injury noncompensable. 'For harm to body, feelings or reputation, compensatory damages reasonably proportioned to the intensity and duration of the harm can be awarded without proof of amount other than evidence of the nature of the harm. There is no direct correspondence between money and harm to the body, feelings or reputation. There is no market price for a scar or for loss of hearing since the damages are not measured by the amount for which one would be willing to suffer the harm. The discretion of the judge or jury determines the amount of recovery, the only standard being such an amount as a reasonable person would estimate as fair compensation.' " (*Duarte v. Zachariah* (1994) 22 Cal.App.4th 1652, 1664–1665 [28 Cal.Rptr.2d 88], internal citations omitted.)
- "The general rule of damages in tort is that the injured party may recover for all detriment caused whether it could have been anticipated or not. In accordance with the general rule, it is settled in this state that mental suffering constitutes an aggravation of damages when it naturally ensues from the act complained of, and in this connection mental suffering includes nervousness, grief, anxiety, worry, shock, humiliation and indignity as well as physical pain." (*Crisci v. The Security Insurance Co. of New Haven, Connecticut* (1967) 66 Cal.2d 425, 433 [58 Cal.Rptr. 13, 426 P.2d 173], internal citations omitted.)
- "We note that there may be certain cases where testimony of an expert witness would be necessary to support all or part of an emotional distress damages claim. For example, expert testimony would be required to the extent a plaintiff's damages are alleged to have arisen from a psychiatric or psychological disorder caused or made worse by a defendant's actions and the subject matter is beyond common experience. We are not addressing such a case here. In this case, the emotional distress damages arose from feelings of

anxiety, pressure, betrayal, shock, and fear of others to which [plaintiff] herself could and did testify. Expert testimony was not required." (*Knutson v. Foster* (2018) 25 Cal.App.5th 1075, 1099 [236 Cal.Rptr.3d 473].)

- "The law in this state is that the testimony of a single person, *including the plaintiff,* may be sufficient to support an award of emotional distress damages." (*Knutson*, *supra*, 25 Cal.App.5th at p. 1096, original italics.)
- "[W]here a plaintiff has undergone surgery in which a herniated disc is removed and a metallic plate inserted, and the jury has expressly found that defendant's negligence was a cause of plaintiff's injury, the failure to award any damages for pain and suffering results in a damage award that is inadequate as a matter of law." (*Dodson v. J. Pacific, Inc.* (2007) 154 Cal.App.4th 931, 933 [64 Cal.Rptr.3d 920].)
- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)
- "To avoid confusion regarding the jury's task in future cases, we conclude that when future noneconomic damages are sought, the jury should be instructed expressly that they are to assume that an award of future damages is a present value sum, i.e., they are to determine the amount in current dollars paid at the time of judgment that will compensate a plaintiff for future pain and suffering. In the absence of such instruction, unless the record clearly establishes otherwise, awards of future damages will be considered to be stated in terms of their present or current value." (*Salgado, supra,* 19 Cal.4th at pp. 646–647.)
- "[R]ecovery for emotional distress caused by injury to property is permitted only where there is a preexisting relationship between the parties or an intentional tort." (*Ragland v. U.S. Bank National Assn.* (2012) 209 Cal.App.4th 182, 203 [147 Cal.Rptr.3d 41].)
- "[W]e uphold both the economic and emotional distress damages plaintiffs recovered for trespass to personal property arising from [defendant]'s act of intentionally striking [plaintiff's dog] with a bat." (*Plotnik*, *supra*, 208 Cal.App.4th at p. 1608 [under claim for trespass to chattels].)
- "Furthermore, 'the *negligent* infliction of emotional distress—anxiety, worry, discomfort—is compensable without physical injury in cases involving the tortious interference with *property rights* [citations].' Thus, if [defendant]'s failure to repair the premises constitutes a tort grounded on negligence, appellant is entitled to prove his damages for emotional distress because the failure to repair must be deemed to constitute an injury to his tenancy interest (right to habitable premises), which is a species of property." (*Erlach v. Sierra Asset Servicing, LLC* (2014) 226 Cal.App.4th 1281, 1299 [173 Cal.Rptr.3d 159], original italics, internal citation omitted.)
- "[U]nless the defendant has assumed a duty to plaintiff in which the emotional

condition of the plaintiff is an object, recovery is available only if the emotional distress arises out of the defendant's breach of some other legal duty and the emotional distress is proximately caused by that breach of duty. Even then, with rare exceptions, a breach of the duty must threaten physical injury, not simply damage to property or financial interests." (*Wilson v. Southern California Edison Co.* (2015) 234 Cal.App.4th 123, 156 [184 Cal.Rptr.3d 26].)

Secondary Sources

6 Witkin, Summary of California Law (11th ed. 2017) Torts, §§ 1850–1854

Haning et al., California Practice Guide: Personal Injury, Ch. 3-C, *Specific Items Of Compensatory Damages*, ¶ 3:140 et seq. (The Rutter Group)

California Tort Damages (Cont.Ed.Bar) Bodily Injury, §§ 1.68–1.74

4 Levy et al., California Torts, Ch. 51, *Pain and Suffering*, §§ 51.01–51.14 (Matthew Bender)

15 California Forms of Pleading and Practice, Ch. 177, *Damages*, § 177.44 (Matthew Bender)

6 California Points and Authorities, Ch. 64, *Damages: Tort*, § 64.145 et seq. (Matthew Bender)

1 California Civil Practice Torts, § 5:10 (Thomson Reuters)

4200. Actual Intent to Hinder, Delay, or Defraud a Creditor—Essential Factual Elements (Civ. Code, § 3439.04(a)(1))

[*Name of plaintiff***] claims [he/she/it] was harmed because [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***] in order to avoid paying a debt to [***name of plaintiff***]. [This is called "actual fraud."] To establish this claim against [***name of defendant***], [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] has a right to payment from [***name of debtor***] for [***insert amount of claim***];**
2. **That [***name of debtor***] [transferred property/incurred an obligation] to [***name of defendant***];**
3. **That [***name of debtor***] [transferred the property/incurred the obligation] with the intent to hinder, delay, or defraud one or more of [his/her/its] creditors;**
4. **That [***name of plaintiff***] was harmed; and**
5. **That [***name of debtor***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

To prove intent to hinder, delay, or defraud creditors, it is not necessary to show that [*name of debtor***] had a desire to harm [his/her/its] creditors. [***Name of plaintiff***] need only show that [***name of debtor***] intended to remove or conceal assets to make it more difficult for [his/her/its] creditors to collect payment.**

[It does not matter whether [*name of plaintiff***]'s right to payment arose before or after [***name of debtor***] [transferred property/incurred an obligation].]**

New June 2006; Revised June 2013, June 2016

Directions for Use

Under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act), a transfer made or obligation incurred by a debtor is voidable as to a creditor, whether the creditor's claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation with actual intent to hinder, delay, or defraud a creditor. (Civ. Code, § 3439.04(a)(1).)

This instruction assumes the defendant is a transferee of the original debtor. Read the bracketed second sentence if the plaintiff is asserting claims for both actual and constructive fraud. Read the last bracketed sentence if the plaintiff's alleged claim arose after the defendant's property was transferred or the obligation was incurred.

Note that in element 3, only the debtor-transferor's intent is required. (See Civ. Code, § 3439.04(a)(1).) The intent of the transferee is irrelevant. However, a transferee who receives the property both in good faith and for a reasonably equivalent value has an affirmative defense. (See Civ. Code, § 3439.08(a); CACI No. 4207, *Affirmative Defense—Good Faith*.)

If the case concerns an incurred obligation, users may wish to insert a brief description of the obligation in this instruction, e.g., "a lien on the property."

Courts have held that there is a right to a jury trial whenever the remedy sought is monetary relief, including even the return of a "determinate sum of money." (*Wisden v. Superior Court* (2004) 124 Cal.App.4th 750, 757 [21 Cal.Rptr.3d 523].) If the only remedy sought is the return of a particular nonmonetary asset, the action is an equitable action. However, even if a specific nonmonetary asset is involved, a conspiracy claim or an action against any party other than the transferee who possesses the asset (e.g., "the person for whose benefit the transfer was made") (Civ. Code, § 3439.08(b)(1)(A)) necessarily would seek monetary relief and give rise to a right to a jury trial.

Note that there may be a split of authority regarding the appropriate standard of proof of intent. The Sixth District Court of Appeal has stated: "Actual intent to defraud must be shown by clear and convincing evidence. (*Hansford v. Lassar* (1975) 53 Cal.App.3d 364, 377 [125 Cal.Rptr. 804].)" (*Reddy v. Gonzalez* (1992) 8 Cal.App.4th 118, 123 [10 Cal.Rptr.2d 58].) Note that the case relied on by the *Hansford* court (*Aggregates Assoc., Inc. v. Packwood* (1962) 58 Cal.2d 580 [25 Cal.Rptr. 545, 375 P.2d 425]) was disapproved by the Supreme Court in *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291–292 [137 Cal.Rptr. 635, 562 P.2d 316]. The Fourth District Court of Appeal, Division Two, disagreed with *Reddy*: "In determining whether transfers occurred with fraudulent intent, we apply the preponderance of the evidence test, even though we recognize that some courts believe that the test requires clear and convincing evidence." (*Gagan v. Gouyd* (1999) 73 Cal.App.4th 835, 839 [86 Cal.Rptr.2d 733], internal citations omitted, disapproved on other grounds in *Mejia v. Reed* (2003) 31 Cal.4th 657, 669, fn. 2 [3 Cal.Rptr.3d 390, 74 P.3d 166].)

Sources and Authority

- Uniform Voidable Transactions Act. Civil Code section 3439 et seq.
- "Claim" Defined for UVTA. Civil Code section 3439.01(b).
- • Creditor Remedies Under UVTA. Civil Code section 3439.07.
- "The UFTA permits defrauded creditors to reach property in the hands of a transferee." (*Mejia*, *supra*, 31 Cal.4th at p. 663.)
- "The UVTA, formerly known as the Uniform Fraudulent Transfer Act, 'permits defrauded creditors to reach property in the hands of a transferee.' 'A fraudulent conveyance is a transfer by the debtor of property to a third person undertaken with the intent to prevent a creditor from reaching that interest to satisfy its claim.' . . . The purpose of the voidable transactions statute is ' "to prevent

debtors from placing property which legitimately should be available for the satisfaction of demands of creditors beyond their reach . . . .” ’ ” (*Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1071 [234 Cal.Rptr.3d 824], internal citations omitted.)

- “Under the UFTA, ‘a transfer of assets made by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer, if the debtor made the transfer (1) with an actual intent to hinder, delay or defraud any creditor, or (2) without receiving reasonably equivalent value in return, and either (a) was engaged in or about to engage in a business or transaction for which the debtor’s assets were unreasonably small, or (b) intended to, or reasonably believed, or reasonably should have believed, that he or she would incur debts beyond his or her ability to pay as they became due.’ ” (*Hasso v. Hapke* (2014) 227 Cal.App.4th 107, 121–122 [173 Cal.Rptr.3d 356], internal citations omitted.)
- “[A] conveyance will not be considered fraudulent if the debtor merely transfers property which is otherwise exempt from liability for debts. That is, because the theory of the law is that it is fraudulent for a judgment debtor to divest himself of assets against which the creditor could execute, if execution by the creditor would be barred while the property is in the possession of the debtor, then the debtor’s conveyance of that exempt property to a third person is not fraudulent.” (*Yaesu Electronics Corp. v. Tamura* (1994) 28 Cal.App.4th 8, 13 [33 Cal.Rptr.2d 283].)
- “A transfer is not voidable against a person ‘who took in good faith and for a reasonably equivalent value or against any subsequent transferee.’ ” (*Filip, supra,* 129 Cal.App.4th at p. 830, internal citations omitted.)
- “ ‘[T]he UFTA is not the exclusive remedy by which fraudulent conveyances and transfers may be attacked’; they ‘may also be attacked by, as it were, a common law action.’ ” (*Wisden, supra,* 124 Cal.App.4th at p. 758, internal citation omitted.)
- “[E]ven if the Legislature intended that all fraudulent conveyance claims be brought under the UFTA, the Legislature could not thereby dispense with a right to jury trial that existed at common law when the California Constitution was adopted.” (*Wisden, supra,* 124 Cal.App.4th at p. 758, internal citation omitted.)
- “Whether a conveyance was made with fraudulent intent is a question of fact, and proof often consists of inferences from the circumstances surrounding the transfer.” (*Filip, supra,* 129 Cal.App.4th at p. 834, internal citations omitted.)
- “In order to constitute intent to defraud, it is not necessary that the transferor act maliciously with the desire of causing harm to one or more creditors.” (*Economy Refining & Service Co. v. Royal Nat’l Bank* (1971) 20 Cal.App.3d 434, 441 [97 Cal.Rptr. 706].)
- “There is no minimum number of factors that must be present before the scales

tip in favor of finding of actual intent to defraud. This list of factors is meant to provide guidance to the trial court, not compel a finding one way or the other." (*Filip, supra,* 129 Cal.App.4th at p. 834.)

- "A well-established principle of the law of fraudulent transfers is, 'A transfer in fraud of creditors may be attacked only by one who is injured thereby. Mere intent to delay or defraud is not sufficient; injury to the creditor must be shown affirmatively. In other words, prejudice to the plaintiff is essential. It cannot be said that a creditor has been injured unless the transfer puts beyond [her] reach property [she] otherwise would be able to subject to the payment of [her] debt.' " (*Mehrtash v. Mehrtash* (2001) 93 Cal.App.4th 75, 80 [112 Cal.Rptr.2d 802], internal citations omitted.)
- "[G]ranting [plaintiff judgment creditor] an additional judgment against [defendant judgment debtor] under the UFTA for . . . 'the amount transferred here to avoid paying part of his underlying judgment, *would in effect allow [him] to recover more than the underlying judgment,* which the [UFTA] does not allow.' (Italics added.) We thus conclude that because [plaintiff] obtained a judgment in the prior action for the damages [defendant] caused him, the principle against double recovery for the same harm bars him from obtaining a second judgment against her under the UFTA for a portion of those same damages." (*Renda v. Nevarez* (2014) 223 Cal.App.4th 1231, 1238 [167 Cal.Rptr.3d 874], original italics.)

Secondary Sources

8 Witkin, California Procedure (5th ed. 2008) Enforcement of Judgment, § 495 et seq.

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:291 et seq. (The Rutter Group)

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-B, *Fraud—Fraudulent Transfers—Elements of Claim*, ¶ 5:528 (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, § 270.40 (Matthew Bender)

1 Goldsmith et al., Matthew Bender Practice Guide: California Debt Collection and Enforcement of Judgments, Ch. 4, *Fraudulent Transfers*, 4.05

4207. Affirmative Defense—Good Faith (Civ. Code, § 3439.08(a), (f)(1))

[*Name of defendant***] is not liable to [***name of plaintiff***] [on the claim for actual fraud] if [***name of defendant***] proves both of the following:**

[*Use one of the following two sets of elements:*]

[1. That [*name of defendant***] took the property from [***name of debtor***] in good faith; and**

2. That [he/she/it] took the property for a reasonably equivalent value.]

[*or*]

[1. That [*name of defendant***] received the property from [***name of third party***], who had taken the property from [***name of debtor***] in good faith; and**

2. That [*name of third party***] had taken the property for a reasonably equivalent value.]**

"Good faith" means that [*name of defendant/third party***] acted without actual fraudulent intent and that [he/she/it] did not collude with [***name of debtor***] or otherwise actively participate in any fraudulent scheme. If you decide that [***name of defendant/third party***] knew facts showing that [***name of debtor***] had a fraudulent intent, then [***name of defendant/third party***] cannot have taken the property in good faith.**

New June 2006; Revised June 2016, November 2017

Directions for Use

This instruction presents a defense that is available to a good-faith transferee for value in cases involving allegations of actual fraud under the Uniform Voidable Transactions Act (formerly the Uniform Fraudulent Transfer Act). (See Civ. Code, § 3439.08(a), (f)(1).) Include the bracketed language in the first sentence if the plaintiff is bringing claims for both actual fraud and constructive fraud.

The Legislative Committee Comments—Assembly to Civil Code section 3439.08(a) provides that the transferee's knowledge of the transferor's fraudulent intent may, *in combination with other facts,* be relevant on the issue of the transferee's good faith. (See *Annod Corp. v. Hamilton & Samuels* (2002) 100 Cal.App.4th 1286, 1299 [123 Cal.Rptr.2d 924], emphasis added.) However, another sentence of the same comment provides "knowledge of facts rendering the transfer voidable would be inconsistent with the good faith that is required of a protected transferee." This language indicates that if the transferee knew facts showing that the transferor had a fraudulent intent, there cannot be a finding of good faith regardless of any

combination of facts; and one court has so held. (See *Nautilus, Inc. v. Yang* (2017) 11 Cal.App.5th 33, 46 [217 Cal.Rptr.3d 458].) The committee believes that *Nautilus* presents the better rule.

Sources and Authority

- Transaction Not Voidable as to Good-Faith Transferee for Reasonable Value. Civil Code section 3439.08(a).
- Transferee's Burden of Proving Good Faith and Reasonable Value. Civil Code section 3439.08(f)(1).
- When Value is Given. Civil Code section 3439.03.
- "If a transferee or obligee took in good faith and for a reasonably equivalent value, however, the transfer or obligation is not voidable. Whether a transfer is made with fraudulent intent and whether a transferee acted in good faith and gave reasonably equivalent value within the meaning of section 3439.08, subdivision (a), are questions of fact." (*Nautilus Inc., supra,* 11 Cal.App.5th at p. 40, internal citation and footnote omitted.)
- "The Legislative Committee comment to Civil Code section 3439.08, subdivision (a), provides that 'good faith,' within the meaning of the provision, 'means that the transferee acted without actual fraudulent intent and that he or she did not collude with the debtor or otherwise actively participate in the fraudulent scheme of the debtor. The transferee's knowledge of the transferor's fraudulent intent may, in combination with other facts, be relevant on the issue of the transferee's good faith . . . .' " (*Annod Corp., supra,* 100 Cal.App.4th at p. 1299, internal citations omitted.)
- " 'Fraudulent intent,' 'collusion,' 'active participation,' 'fraudulent scheme'—this is the language of *deliberate wrongful conduct*. It belies any notion that one can become a fraudulent transferee by accident, or even negligently. It certainly belies the notion that guilty knowledge can be created by the fiction of constructive notice." (*Lewis v. Superior Court* (1994) 30 Cal.App.4th 1850, 1859 [37 Cal.Rptr.2d 63], original italics.)
- "We read *Brincko* [*v. Rio Props.* (D.Nev., Jan. 14, 2013, No. 2:10-CV-00930-PMP-PAL) 2013 U.S.Dist. Lexis 5986, pp. *51–*52] as requiring *actual* knowledge by the transferee of a fraudulent intent on the part of the transferor—not merely *constructive* knowledge or inquiry notice. To that extent, we agree with *Brincko's* construction of the proper test for application of the good faith defense. However, our formulation of the test (1) does not use the words 'suggest to a reasonable person' because that phrase might imply inquiry notice—a concept rejected in *Lewis* and *Brincko*—and (2) avoids use of the words 'voidable' and 'fraudulent transfer' because those concepts are inconsistent with the Legislative Committee comment to section 3439.08. Accordingly, we hold that a transferee does not take in good faith if the transferee had actual knowledge of facts showing the transferor had fraudulent intent." (*Nautilus, Inc., supra,* 11 Cal.App.5th at p. 46, original italics.)

- "[T]he trial court erred in placing the burden of proof on [plaintiff] to prove the good faith defense did not apply." (*Nautilus, Inc., supra,* 11 Cal.App.5th at p. 41.)
- "[U]nder section 3439.08, subdivision (b)(1)(A), judgment for a fraudulent transfer may be entered against '[t]he first transferee of the asset *or the person for whose benefit the transfer was made*.' " (*Lo v. Lee* (2018) 24 Cal.App.5th 1065, 1072 [234 Cal.Rptr.3d 824], original italics.)
- "Contrary to plaintiff's suggestion, the fact that a person received any kind of 'benefit,' no matter how intangible or indirect, from a fraudulent transaction does not necessarily subject that person to liability. There are limits to the legal assessment of the type of 'benefit' that will subject a beneficiary to liability for the debtor's alleged fraudulent transfer. The benefit received must be 'direct, ascertainable and quantifiable' and must bear a ' "necessary correspondence to the value of the property transferred." ' ' "[T]ransfer beneficiary status depends on three aspects of the 'benefit': (1) it must actually have been received by the beneficiary; (2) it must be quantifiable; and (3) it must be accessible to the beneficiary." ' " (*Lo*, *supra*, 24 Cal.App.5th at p. 1073.)

Secondary Sources

Ahart, California Practice Guide: Enforcing Judgments & Debts, Ch. 3-C, *Prejudgment Collection—Prelawsuit Considerations*, ¶ 3:324. (The Rutter Group)

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 5(III)-C, *Fraud—Fraudulent Transfers—Particular Defenses*, ¶ 5:580 et seq. (The Rutter Group)

23 California Forms of Pleading and Practice, Ch. 270, *Fraudulent Conveyances*, §§ 270.35[2], 270.44[1], 270.47[2], [3] (Matthew Bender)

4321. Affirmative Defense—Retaliatory Eviction—Tenant's Complaint (Civ. Code, § 1942.5)

[*Name of defendant*] claims that [*name of plaintiff*] is not entitled to evict [him/her/it] because [*name of plaintiff*] filed this lawsuit in retaliation for [*name of defendant*]'s having exercised [his/her/its] rights as a tenant. To succeed on this defense, [*name of defendant*] must prove all of the following:

[1. That [*name of defendant*] was not in default in the payment of [his/her/its] rent;]

2. That [*name of plaintiff*] filed this lawsuit in retaliation because [*name of defendant*] had complained about the condition of the property to [[*name of plaintiff*]/[*name of appropriate agency*]]; and

3. That [*name of plaintiff*] filed this lawsuit within 180 days after

[*Select the applicable date(s) or event(s):*]

[the date on which [*name of defendant*], in good faith, gave notice to [*name of plaintiff*] or made an oral complaint to [*name of plaintiff*] regarding the conditions of the property][./; or]

[the date on which [*name of defendant*], in good faith, filed a written complaint, or an oral complaint that was registered or otherwise recorded in writing, with [*name of appropriate agency*], of which [*name of plaintiff*] had notice, for the purpose of obtaining correction of a condition of the property][./; or]

[the date of an inspection or a citation, resulting from a complaint to [*name of appropriate agency*] of which [*name of plaintiff*] did not have notice][./; or]

[the filing of appropriate documents to begin a judicial or an arbitration proceeding involving the conditions of the property][./ ; or]

[entry of judgment or the signing of an arbitration award that determined the issue of the conditions of the property against [*name of plaintiff*]].

[Even if [*name of defendant*] has proved that [*name of plaintiff*] filed this lawsuit with a retaliatory motive, [*name of plaintiff*] is still entitled to possession of the premises if [he/she/it] proves that [he/she/it] also filed the lawsuit in good faith for a reason stated in the [3/30/60]-day notice.]

New August 2007; Revised June 2010

Directions for Use

This instruction is based solely on Civil Code section 1942.5(a), which has the 180-day limitation. The remedies provided by this statute are in addition to any other remedies provided by statutory or decisional law. (Civ. Code, § 1942.5(j).) Thus, there are two parallel and independent sources for the doctrine of retaliatory eviction: the statute and the common law. (*Barela v. Superior Court* (1981) 30 Cal.3d 244, 251 [178 Cal.Rptr. 618, 636 P.2d 582].) Whether the common law provides additional protection against retaliation beyond the 180-day period has not been decided. (See *Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 776 [187 Cal.Rptr. 242] [statute not a limit in tort action for wrongful eviction; availability of the common law retaliatory eviction defense, unlike that authorized by section 1942.5, is apparently not subject to time limitations].)

Include element 1 only if the landlord's asserted ground for eviction is something other than nonpayment of rent. If nonpayment is the ground, the landlord has the burden to prove that the tenant is in default. (See CACI No. 4302, *Termination for Failure to Pay Rent—Essential Factual Elements*.)

If element 1 is included, there may be additional issues of fact that the jury must resolve in order to decide whether the tenant is in default in the payment of rent. If necessary, instruct that the tenant is not in default if he or she has exercised any legally protected right not to pay the contractual amount of rent, such as a habitability defense, a "repair and deduct" remedy, or a rent increase that is alleged to be retaliatory.

For element 3, select the appropriate date or event that triggered the 180-day period within which a landlord may not file an unlawful detainer. (Civ. Code, § 1942.5(a).)

Include the last paragraph if the landlord alleges that there was also a lawful cause for the eviction (see Civ. Code, § 1942.5(f) [landlord may proceed "for any lawful cause"]), and that this cause was both asserted in good faith and set forth in the notice terminating the tenancy. (See Civ. Code, § 1942.5(g); *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 595–596 [3 Cal.Rptr.3d 205, 73 P.3d 1185] [landlord asserting lawful cause under 1942.5(f) must also establish good faith under 1942.5(g), but need not establish total absence of retaliatory motive].)

Sources and Authority

- Retaliatory Eviction: Tenant Complaints. Civil Code section 1942.5(a).
- Lawful Acts Permitted; No Tenant Waiver. Civil Code section 1942.5(f).
- Landlord's Good Faith Acts. Civil Code section 1942.5(g).
- "The defense of 'retaliatory eviction' has been firmly ensconced in this state's statutory law and judicial decisions for many years. 'It is settled that a landlord may be precluded from evicting a tenant in retaliation for certain kinds of lawful activities of the tenant. As a landlord has no right to possession when he seeks it for such an invalid reason, a tenant may raise the defense of retaliatory eviction in an unlawful detainer proceeding.' The retaliatory eviction doctrine is founded on the premise that '[a] landlord may normally evict a tenant for any

reason or for no reason at all, but he may not evict for an improper reason . . . .' " (*Barela, supra,* 30 Cal.3d at p. 249, internal citations omitted.)

- "Thus, California has two parallel and independent sources for the doctrine of retaliatory eviction. This court must decide whether petitioner raised a legally cognizable defense of retaliatory eviction under the statutory scheme and/or the common law doctrine." (*Barela, supra,* 30 Cal.3d at p. 251.)
- "Retaliatory eviction occurs, as Witkin observes, '[When] a landlord exercises his legal right to terminate a residential tenancy in an authorized manner, but with the motive of retaliating against a tenant who is not in default but has exercised his legal right to obtain compliance with requirements of habitability.' It is recognized as an affirmative defense in California; and as appellant correctly argues, it extends beyond warranties of habitability into the area of First Amendment rights." (*Four Seas Inv. Corp. v. International Hotel Tenants' Assn.* (1978) 81 Cal.App.3d 604, 610 [146 Cal.Rptr. 531], internal citations omitted.)
- "If a tenant factually establishes the retaliatory motive of his landlord in instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. . . . 'If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all.' " (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97], internal citations omitted.)
- "The existence or nonexistence of a landlord's retaliatory motive is ordinarily a question of fact." (*W. Land Office v. Cervantes* (1985) 175 Cal.App.3d 724, 731 [220 Cal.Rptr. 784].)
- "[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith—i.e., a bona fide—intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence." (*Drouet, supra,* 31 Cal.4th at p. 596.)
- "Only when the landlord has been unable to establish a bona fide intent need the fact finder proceed to determine whether the eviction is for the purpose of retaliating against the tenant under subdivision (a) or (c) of section 1942.5." (*Drouet, supra,* 31 Cal.4th at p. 600.)
- "*Drouet*'s interpretation 'give[s] effect to the plain language of [Civil Code section 1942.5], including [former] subdivisions (d) and (e), which permit a landlord to go out of business and evict the tenants—even if the landlord has a retaliatory motive—so long as the landlord *also* has the bona fide intent to go

out of business. . . . If, on the other hand, the landlord cannot establish a bona fide intent to go out of business, the tenants may rely on [former] subdivisions (a) and (c) to resist the eviction.' " (*Coyne v. De Leo* (2018) 26 Cal.App.5th 801, 806 [237 Cal.Rptr.3d 359], original italics.)

- "[T]he cause of action for retaliation recognized by section 1942.5 applies to tenants of a mobilehome park. . . . 'By their terms, subdivisions (c) and (f) of section 1942.5 give a right of action to any lessee who has been subjected to an act of unlawful retaliation. Thus, on its face the statute provides protection to mobilehome park tenants who own their own dwellings and merely rent space from their landlord.' " (*Banuelos v. LA Investment, LLC* (2013) 219 Cal.App.4th 323, 330 [161 Cal.Rptr.3d 772].)
- "[T]he Legislature intended to create a cause of action for retaliatory eviction that is not barred by the litigation privilege. If the litigation privilege trumped a suit for retaliatory eviction under section 1942.5 the privilege would " 'effectively immunize conduct that the [statute] prohibits' " [citation], thereby encouraging, rather than suppressing, " 'the mischief at which it was directed. [Citation.]' " ' " (*Winslett v. 1811 27th Avenue LLC* (2018) 26 Cal.App.5th 239, 254 [237 Cal.Rptr.3d 25].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 739, 742, 745

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.113–8.117

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.65, 12.38

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 16

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

Miller & Starr, California Real Estate, *Landlord-Tenant*, § 34.206 (Thomson Reuters)

4322. Affirmative Defense—Retaliatory Eviction—Engaging in Legally Protected Activity (Civ. Code, § 1942.5(d))

[*Name of defendant***] claims that [***name of plaintiff***] is not entitled to evict [him/her/it] because [***name of plaintiff***] filed this lawsuit in retaliation for [***name of defendant***]'s having engaged in legally protected activities. To succeed on this defense, [***name of defendant***] must prove both of the following:**

1. **[***Insert one or both of the following options:***]**

   [That [*name of defendant***] lawfully organized or participated in [a tenants' association/an organization advocating tenants' rights];] [or]**

   [That [*name of defendant***] lawfully and peaceably [***insert description of lawful activity***];]**

AND

2. **That [***name of plaintiff***] filed this lawsuit because [***name of defendant***] engaged in [this activity/these activities].**

[Even if [*name of defendant***] has proved that [***name of plaintiff***] filed this lawsuit with a retaliatory motive, [***name of plaintiff***] is still entitled to possession of the premises if [he/she/it] proves that [he/she/it] also filed the lawsuit in good faith for a reason stated in the [3/30/60]-day notice.]**

New August 2007

Directions for Use

In element 1, select the tenant's conduct that is alleged to be the reason for the landlord's retaliation. (Civ. Code, § 1942.5(d).)

Include the last paragraph if the landlord alleges that there was also a lawful cause for the eviction (see Civ. Code, § 1942.5(f)), and that this cause was both asserted in good faith and set forth in the notice terminating the tenancy. (See Civ. Code, § 1942.5(g); *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 595–596 [3 Cal.Rptr.3d 205, 73 P.3d 1185] [landlord asserting lawful cause under 1942.5(f) must also establish good faith under 1942.5(g), but need not establish total absence of retaliatory motive].)

Sources and Authority

- Retaliatory Eviction: Exercise of Tenant Rights. Civil Code section 1942.5(d).
- Lawful Acts Permitted; No Tenant Waiver. Civil Code section 1942.5(f).
- Landlord's Good-Faith Acts. Civil Code section 1942.5(g).
- "If a tenant factually establishes the retaliatory motive of his landlord in

instituting a rent increase and/or eviction action, such proof should bar eviction. Of course, we do not imply that a tenant who proves a retaliatory purpose is entitled to remain in possession in perpetuity. . . . 'If this illegal purpose is dissipated, the landlord can, in the absence of legislation or a binding contract, evict his tenants or raise their rents for economic or other legitimate reasons, or even for no reason at all. The question of permissible or impermissible purpose is one of fact for the court or jury.' " (*Schweiger v. Superior Court of Alameda County* (1970) 3 Cal.3d 507, 517 [90 Cal.Rptr. 729, 476 P.2d 97], internal citations omitted.)

- "In an unlawful detainer action, where the defense of retaliatory eviction is asserted pursuant to Civil Code section 1942.5, the tenant has the overall burden of proving his landlord's retaliatory motive by a preponderance of the evidence. If the landlord takes action for a valid reason not listed in the unlawful detainer statutes, he must give notice to the tenant of the ground upon which he proceeds; and if the tenant controverts that ground, the landlord has the burden of proving its existence by a preponderance of the evidence." (*Western Land Office, Inc. v. Cervantes* (1985) 175 Cal.App.3d 724, 741 [220 Cal.Rptr. 784].)
- "[T]he burden was on the tenants to establish retaliatory motive by a preponderance of the evidence." (*Western Land Office, Inc., supra,* 175 Cal.App.3d at p. 744.)
- "[T]he proper way to construe the statute when a landlord seeks to evict a tenant under the Ellis Act, and the tenant answers by invoking the retaliatory eviction defense under section 1942.5, is to hold that the landlord may nonetheless prevail by asserting a good faith—i.e., a bona fide—intent to withdraw the property from the rental market. If the tenant controverts the landlord's good faith, the landlord must establish the existence of the bona fide intent at a trial or hearing by a preponderance of the evidence." (*Drouet, supra,* 31 Cal.4th at p. 596.)
- "Only when the landlord has been unable to establish a bona fide intent need the fact finder proceed to determine whether the eviction is for the purpose of retaliating against the tenant under subdivision (a) or (c) of section 1942.5." (*Drouet, supra,* 31 Cal.4th at p. 600.)
- "*Drouet*'s interpretation 'give[s] effect to the plain language of [Civil Code section 1942.5], including [former] subdivisions (d) and (e), which permit a landlord to go out of business and evict the tenants—even if the landlord has a retaliatory motive—so long as the landlord *also* has the bona fide intent to go out of business. . . . If, on the other hand, the landlord cannot establish a bona fide intent to go out of business, the tenants may rely on [former] subdivisions (a) and (c) to resist the eviction.' " (*Coyne v. De Leo* (2018) 26 Cal.App.5th 801, 806 [237 Cal.Rptr.3d 359], original italics.)
- "[T]he cause of action for retaliation recognized by section 1942.5 applies to tenants of a mobilehome park. . . . 'By their terms, subdivisions (c) and (f) of

section 1942.5 give a right of action to any lessee who has been subjected to an act of unlawful retaliation. Thus, on its face the statute provides protection to mobilehome park tenants who own their own dwellings and merely rent space from their landlord.' " (*Banuelos v. LA Investment, LLC* (2013) 219 Cal.App.4th 323, 330 [161 Cal.Rptr.3d 772].)

- "[T]he Legislature intended to create a cause of action for retaliatory eviction that is not barred by the litigation privilege. If the litigation privilege trumped a suit for retaliatory eviction under section 1942.5 the privilege would " 'effectively immunize conduct that the [statute] prohibits' " [citation], thereby encouraging, rather than suppressing, " 'the mischief at which it was directed. [Citation.]' " ' " (*Winslett v. 1811 27th Avenue LLC* (2018) 26 Cal.App.5th 239, 254 [237 Cal.Rptr.3d 25].)

Secondary Sources

12 Witkin, Summary of California Law (11th ed. 2017) Real Property, §§ 739, 742, 745

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.113–8.117

2 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 10.65, 12.38

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) Ch. 16

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.62 (Matthew Bender)

Miller & Starr, California Real Estate, *Landlord-Tenant*, § 34:206 (Thomson Reuters)

4328. Affirmative Defense—Tenant Was Victim of Domestic Violence, Sexual Assault, Stalking, Elder/Dependent Adult Abuse, or Human Trafficking (Code Civ. Proc., § 1161.3)

[*Name of defendant*] claims that [*name of plaintiff*] is not entitled to evict [him/her] because [*name of plaintiff*] filed this lawsuit based on [an] act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] against [[*name of defendant*]/ [or] a member of [*name of defendant*]'s household]. To succeed on this defense, [*name of defendant*] must prove all of the following:

1. **That [[*name of defendant*]/ [or] a member of [*name of defendant*]'s household] was a victim of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult];**
2. **That the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] [was/were] documented in a [court order/law enforcement report/statement of a third party acting in a professional capacity];**
3. **That the person who committed the act[s] of [domestic violence/ sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] is not also a tenant of the same living unit as [*name of defendant*]; and**
4. **That [*name of plaintiff*] filed this lawsuit because of the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult].**

Even if [*name of defendant*] proves all of the above, [*name of plaintiff*] may still evict [*name of defendant*] if [*name of plaintiff*] proves both of the following:

1. **[Either] [*Name of defendant*] allowed the person who committed the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] to visit the property after [the taking of a police report/issuance of a court order] against that person;**

   [or]

   [*Name of plaintiff*] reasonably believed that the presence of the person who committed the act[s] of [domestic violence/sexual assault/stalking/human trafficking/ [or] abuse of an elder or dependent adult] posed a physical threat to [other persons with a

right to be on the property/[or] another tenant's right of quiet possession];

and

2. [*Name of plaintiff***] previously gave at least three days' notice to [***name of defendant***] to correct this situation.**

New December 2011; Revised June 2013, June 2014, January 2019

Directions for Use

This instruction is a tenant's affirmative defense alleging that he or she is being evicted because he or she was the victim of domestic violence, sexual assault, stalking, human trafficking, or elder or dependent adult abuse. (See Code Civ. Proc., § 1161.3.) If the tenant establishes the elements of the defense, the landlord may attempt to establish a statutory exception that would allow the eviction. The last part of the instruction sets forth the exception.

All protected statuses are defined by statute. (See Civ. Code, § 1708.7 [stalking]; Code Civ. Proc., § 1219 [sexual assault]; Fam. Code, § 6211 [domestic violence]; Pen. Code, § 236.1 [human trafficking]; Welf. & Inst. Code, § 15610.07 [abuse of elder or dependent adult].) Consider an additional instruction defining the protected status to make the meaning clear to the jury.

The acts of domestic violence, sexual assault, stalking, human trafficking, or elder or dependent adult abuse must be documented in a court order, law enforcement report, or tenant and qualified third-party statement (element 2). (Code Civ. Proc., § 1161.3(a)(1)(C), (D).) A "qualified third party" is a health practitioner, domestic violence counselor, a sexual assault counselor, or a human trafficking caseworker. (Code Civ. Proc., 1161.3(d)(3).)

Under the exception the tenant may be evicted if the landlord reasonably believes that the presence of the perpetrator poses a physical threat to other tenants, guests, invitees, or licensees, or to a tenant's right to quiet possession pursuant to section 1927 of the Civil Code. (Code Civ. Proc., § 1161.3(b)(1)(B).) In the second option for element 1 of the landlord's response, this group has been expressed as "other persons with a right to be on the property." If more specificity is required, use the appropriate words from the statute.

The tenant must prove that the perpetrator is not a tenant of the same "dwelling unit" (see Code Civ. Proc., § 1161.3(a)(2)), which is expressed in element 3 as "living unit." Presumably, the legislative intent is to permit the perpetrator to be evicted notwithstanding that the victim will be evicted also. The term "dwelling unit" is not defined. In a multi-unit building, the policies underlying the statute would support defining "dwelling unit" to include a single unit or apartment, but not the entire building. Otherwise, the victim could be evicted if the perpetrator lives in the same building but not the same apartment.

Sources and Authority

- Defense to Termination of Tenancy: Tenant Was Victim of Domestic Violence, Sexual Assault, Stalking, Elder/Dependent Adult Abuse, or Human Trafficking. Code of Civil Procedure section 1161.3.

Secondary Sources

12 Witkin, Summary of California Law (10th ed. 2005) Real Property, § 683A

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 4-D, *Rights And Obligations During The Tenancy—Other Issues*, ¶ 4:240 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 5-G, *Eviction Controls*, ¶ 5:288 et seq. (The Rutter Group)

Friedman et al., California Practice Guide: Landlord-Tenant, Ch. 8-D, *Answer To Unlawful Detainer Complaint*, ¶ 8:297 et seq., 8:381.10 (The Rutter Group)

7 California Real Estate Law and Practice, Ch. 200, *Termination: Causes and Procedures*, § 200.41 (Matthew Bender)

7 California Real Estate Law and Practice, Ch. 210, *Unlawful Detainer*, § 210.64 (Matthew Bender)

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.28 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, § 236.76 (Matthew Bender)

1 Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 4, *Termination of Tenancy*, 4.20B

1 Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.21

4700. Consumers Legal Remedies Act—Essential Factual Elements (Civ. Code, § 1770)

[*Name of plaintiff***] claims that [***name of defendant***] engaged in unfair methods of competition and unfair or deceptive acts or practices in a transaction that resulted, or was intended to result, in the sale or lease of goods or services to a consumer, and that [***name of plaintiff***] was harmed by [***name of defendant***]'s violation. To establish this claim, [***name of plaintiff***] must prove all of the following:**

1. **That [***name of plaintiff***] acquired, or sought to acquire, by purchase or lease, [***specify product or service***] for personal, family, or household purposes;**
2. **That [***name of defendant***] [***specify one or more prohibited practices from Civ. Code, § 1770(a), e.g., represented that [product or service] had characteristics, uses, or benefits that it did not have***];**
3. **That [***name of plaintiff***] was harmed; and**
4. **That [***name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct.**

[[*Name of plaintiff***]'s harm resulted from [***name of defendant***]'s conduct if [***name of plaintiff***] relied on [***name of defendant***]'s representation. To prove reliance, [***name of plaintiff***] need only prove that the representation was a substantial factor in [his/her] decision. [He/She] does not need to prove that it was the primary factor or the only factor in the decision.**

If [*name of defendant***]'s representation of fact was material, reliance may be inferred. A fact is material if a reasonable consumer would consider it important in deciding whether to buy or lease the [goods/services].]**

New November 2017

Directions for Use

Give this instruction for a claim under the Consumers Legal Remedies Act (CLRA).

The CLRA prohibits 27 distinct unfair methods of competition and unfair or deceptive acts or practices with regard to consumer transactions. (See Civ. Code, § 1770(a).) In element 2, insert the prohibited practice or practices at issue in the case.

The last two optional paragraphs address the plaintiff's reliance on the defendant's conduct. CLRA claims not sounding in fraud do not require reliance. (See, e.g., Civ. Code, § 1770(a)(19) [inserting an unconscionable provision in a contract].) Give these paragraphs in a case sounding in fraud.

Many of the prohibited practices involve a misrepresentation made by the defendant. (See, e.g., Civ. Code, § 1770(a)(4) [using deceptive representations or designations of geographic origin in connection with goods or services].) In a misrepresentation claim, the plaintiff must have relied on the information given. (*Nelson v. Pearson Ford Co.* (2010) 186 Cal.App.4th 983, 1022 [112 Cal.Rptr.3d 607], disapproved of on other grounds in *Raceway Ford Cases* (2016) 2 Cal.5th 161, 180 [211 Cal.Rptr.3d 244, 385 P.3d 397].) An element of reliance is that the information must have been material (or important). (*Collins v. eMachines, Inc.* (2011) 202 Cal.App.4th 249, 256 [134 Cal.Rptr.3d 588].)

Other prohibited practices involve a failure to disclose information. (See *Gutierrez v. Carmax Auto Superstores California* (2018) 19 Cal.App.5th 1234, 1258 [228 Cal.Rptr.3d 699]; see, e.g., Civ. Code, § 1770(a)(9) [advertising goods or services with intent not to sell them as advertised].) Reliance in concealment cases is best expressed in terms that the plaintiff would have behaved differently had the true facts been known. (See *Mirkin v. Wasserman* (1993) 5 Cal.4th 1082, 1093 [23 Cal.Rptr.2d 101, 858 P.2d 568].) The next-to-last paragraph may be modified to express reliance in this manner. (See CACI No. 1907, *Reliance*.)

The CLRA provides for class actions. (See Civ. Code, § 1781.) In a class action, this instruction should be modified to state that only the named plaintiff's reliance on the defendant's representation must be proved. Class-wide reliance does not require a showing of actual reliance on the part of every class member. Rather, if all class members have been exposed to the same material misrepresentations, class-wide reliance will be inferred, unless rebutted by the defendant. (*Vasquez v. Superior Court* (1971) 4 Cal.3d 800, 814–815 [94 Cal.Rptr. 796, 484 P.2d 964]; *Occidental Land, Inc. v. Superior Court* (1976) 18 Cal.3d 355, 362–363 [134 Cal.Rptr. 388, 556 P.2d 750]; *Massachusetts Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal.App.4th 1282, 1293 [119 Cal.Rptr.2d 190].) In class cases then, exposure and materiality are the only facts that need to be established to justify class-wide relief. Those determinations are a part of the class certification analysis and will, therefore, be within the purview of the court.

Sources and Authority

- Consumers Legal Remedies Act: Prohibited Practices. Civil Code section 1770(a).
- Consumers Legal Remedies Act: Private Cause of Action. Civil Code section 1780(a).
- " 'The CLRA makes unlawful, in Civil Code section 1770, subdivision (a) . . . various "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer." ' The CLRA proscribes 27 specific acts or practices." (*Rubenstein v. The Gap, Inc.* (2017) 14 Cal.App.5th 870, 880–881 [222 Cal.Rptr.3d 397], internal citation omitted.)
- " 'Whether a practice is deceptive, fraudulent, or unfair is generally a question of fact which requires "consideration and weighing of evidence from both

sides" and which usually cannot be made on demurrer.' " (*Brady v. Bayer Corp.* (2018) 26 Cal.App.5th 1156, 1164 [237 Cal.Rptr.3d 683].)

- "The CLRA is set forth in Civil Code section 1750 et seq. . . . [U]nder the CLRA a consumer may recover actual damages, punitive damages and attorney fees. However, relief under the CLRA is limited to '[a]ny consumer who suffers any damage *as a result* of the use or employment by any person of a method, act, or practice' unlawful under the act. As [defendant] argues, this limitation on relief requires that plaintiffs in a CLRA action show not only that a defendant's conduct was deceptive but that the deception caused them harm." (*Massachusetts Mutual Life Ins. Co., supra*, 97 Cal.App.4th at p. 1292, original italics, internal citations omitted.)
- "[T]he CLRA does not require lost injury or property, but does require damage and causation. 'Under Civil Code section 1780, subdivision (a), CLRA actions may be brought "only by a consumer 'who suffers any damage as a result of the use or employment' of a proscribed method, act, or practice. . . . Accordingly, 'plaintiffs in a CLRA action [must] show not only that a defendant's conduct was deceptive but that the deception caused them harm." ' " (*Veera v. Banana Republic, LLC* (2016) 6 Cal.App.5th 907, 916, fn. 3 [211 Cal.Rptr.3d 769].)
- " 'To have standing to assert a claim under the CLRA, a plaintiff must have "suffer[ed] any damage as a result of the . . . practice declared to be unlawful." ' Our Supreme Court has interpreted the CLRA's 'any damage' requirement broadly, concluding that the 'phrase . . . is not synonymous with "actual damages," which generally refers to pecuniary damages.' Rather, the consumer must merely 'experience some [kind of] damage,' or 'some type of increased costs' as a result of the unlawful practice." (*Hansen v. Newegg.com Americas, Inc.* (2018) 25 Cal.App.5th 714, 724 [236 Cal.Rptr.3d 61], internal citations omitted.)
- "This language does not create an automatic award of statutory damages upon proof of an unlawful act." (*Moran v. Prime Healthcare Management, Inc.* (2016) 3 Cal.App.5th 1131, 1152 [208 Cal.Rptr.3d 303].)
- "[Civil Code section 1761(e)] provides a broad definition of 'transaction' as 'an agreement between a consumer and any other person, whether or not the agreement is a contract enforceable by action, and includes the making of, and the performance pursuant to, that agreement.' " (*Wang v. Massey Chevrolet* (2002) 97 Cal.App.4th 856, 869 [118 Cal.Rptr.2d 770].)
- " 'While a plaintiff must show that the misrepresentation was an immediate cause of the injury-producing conduct, the plaintiff need not demonstrate it was the only cause. " 'It is not . . . necessary that [the plaintiff's] reliance upon the truth of the fraudulent misrepresentation be the sole or even the predominant or decisive factor in influencing his conduct. . . . It is enough that the representation has played a substantial part, and so has been a substantial factor, in influencing his decision.' [Citation.]" ' In other words, it is enough if a

plaintiff shows that ' "in [the] absence [of the misrepresentation] the plaintiff 'in all reasonable probability' would not have engaged in the injury-producing conduct.' [Citation.]' " (*Veera, supra*, 6 Cal.App.5th at p. 919, internal citations omitted.)

- "Under the CLRA, plaintiffs must show actual reliance on the misrepresentation and harm." (*Nelson, supra*, 186 Cal.App.4th at p. 1022.)
- "A ' "misrepresentation is material for a plaintiff only if there is reliance—that is, ' " 'without the misrepresentation, the plaintiff would not have acted as he did' " ' . . . ." [Citation.]' " (*Moran, supra*, 3 Cal.App.5th at p. 1152.)
- "[M]ateriality usually is a question of fact. In certain cases, a court can determine the factual misrepresentation or omission is so obviously unimportant that the jury could not reasonably find that a reasonable person would have been influence (*sic*) by it." (*Gutierrez*, *supra*, 19 Cal.App.5th at p. 1262, internal citations omitted.)
- "If a claim of misleading labeling runs counter to ordinary common sense or the obvious nature of the product, the claim is fit for disposition at the demurrer stage of the litigation." (*Brady*, *supra*, 26 Cal.App.5th at p. 1165.)
- "In the CLRA context, a fact is deemed 'material,' and obligates an exclusively knowledgeable defendant to disclose it, if a ' "reasonable [consumer]" ' would deem it important in determining how to act in the transaction at issue." (*Collins, supra*, 202 Cal.App.4th at p. 256.)
- "If the undisclosed assessment was material, an inference of reliance as to the entire class would arise, subject to any rebuttal evidence [defendant] might offer." (*Massachusetts Mutual Life Ins. Co., supra*, 97 Cal.App.4th at p. 1295.)
- "[U]nless the advertisement targets a particular disadvantaged or vulnerable group, it is judged by the effect it would have on a reasonable consumer." (*Consumer Advocates v. Echostar Satellite Corp.* (2003) 113 Cal.App.4th 1351, 1360 [8 Cal.Rptr.3d 22].)
- "In California . . . product mislabeling claims are generally evaluated using a 'reasonable consumer' standard, as distinct from an 'unwary consumer' or a 'suspicious consumer' standard." (*Brady*, *supra*, 26 Cal.App.5th at p. 1174.)
- "Not every omission or nondisclosure of fact is actionable. Consequently, we must adopt a test identifying which omissions or nondisclosures fall within the scope of the CLRA. Stating that test in general terms, we conclude an omission is actionable under the CLRA if the omitted fact is (1) 'contrary to a [material] representation actually made by the defendant' or (2) is 'a fact the defendant was obliged to disclose.' " (*Gutierrez*, *supra*, 19 Cal.App.5th at p. 1258.)
- "[T]here is no independent duty to disclose [safety] concerns. Rather, a duty to disclose material safety concerns 'can be actionable in four situations: (1) when the defendant is in a fiduciary relationship with the plaintiff; (2) when the defendant had exclusive knowledge of material facts not known to the plaintiff; (3) when the defendant actively conceals a material fact from the plaintiff; or

(4) when the defendant makes partial representations but also suppresses some material fact.' " (*Gutierrez*, *supra*, 19 Cal.App.5th at p. 1260.)

- "Under the CLRA, even if representations and advertisements are true, they may still be deceptive because ' "[a] perfectly true statement couched in such a manner that it is likely to mislead or deceive the consumer, such as by failure to disclose other relevant information, is actionable." [Citation.]' " (*Jones, supra*, 237 Cal.App.4th Supp. at p. 11.)
- "Defendants next allege that plaintiffs cannot sue them for violating the CLRA because their debt collection efforts do not involve 'goods or services.' The CLRA prohibits 'unfair methods of competition and unfair or deceptive acts or practices.' This includes the inaccurate 'represent[ation] that a transaction confers or involves rights, remedies, or obligations which it does not have or involve . . . .' However, this proscription only applies with respect to 'transaction[s] intended to result or which result[] in the sale or lease of goods or services to [a] consumer . . . .' The CLRA defines 'goods' as 'tangible chattels bought or leased for use primarily for personal, family, or household purposes', and 'services' as 'work, labor, and services for other than a commercial or business use, including services furnished in connection with the sale or repair of goods.' " (*Alborzian v. JPMorgan Chase Bank, N.A.* (2015) 235 Cal.App.4th 29, 39–40 [185 Cal.Rptr.3d 84], internal citations omitted [mortgage loan is neither a good nor a service].)

Secondary Sources

4 Witkin, Summary of California Law (11th ed. 2017) Sales, § 298 et seq.

Wiseman & Reese, California Practice Guide: Civil Procedure Before Trial Claims & Defenses, Ch. 14(II)-B, *Consumers Legal Remedies Act—Elements of Claim*, ¶ 14:315 et seq. (The Rutter Group)

Cabraser, California Class Actions and Coordinated Proceedings, Ch. 4, *California's Consumer Legal Remedies Act*, § 4.01 et seq. (Matthew Bender)

44 California Forms of Pleading and Practice, Ch. 504, *Sales: Consumers Legal Remedies Act*, § 504.12 (Matthew Bender)

1 Matthew Bender Practice Guide: California Contract Litigation, Ch. 1, *Determining the Applicable Law*, 1.33