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INVITATION TO COMMENT

CACI 10-02

Title
Civil Jury Instructions (CACI) Revisions

Proposed Revisions
Add and revise jury instructions

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

Action Requested
Review and submit comments by September 10, 2010

Proposed Effective Date
December 14, 2010

Contact
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Summary

New and revised instructions and verdict forms reflecting recent developments in the law.

CIVIL JURY INSTRUCTIONS (CACI 10–02)
TABLE OF CONTENTS

106. Evidence

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

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

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

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

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

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

New September 2003; Revised February 2005, December 2010

Directions for Use

This instruction should be given as an introductory instruction.

Sources and Authority

- Evidence Code section 140 defines "evidence" as "testimony, writings, material objects, or other things presented to the senses that are offered to prove the existence or nonexistence of a fact."

- Evidence Code section 312 provides:
  Except as otherwise provided by law, where the trial is by jury:

(a) All questions of fact are to be decided by the jury.

(b) Subject to the control of the court, the jury is to determine the effect and value of the evidence addressed to it, including the credibility of witnesses and hearsay declarants.

- Evidence Code section 353 provides:

  A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

  (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

  (b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice.

- A stipulation in proper form is binding on the parties if it is within the authority of the attorney. Properly stipulated facts may not be contradicted. (*Palmer v. City of Long Beach* (1948) 33 Cal.2d 134, 141-142 [199 P.2d 952].)

- Courts have held that "attempts to suggest matters of an evidentiary nature to a jury other than by the legitimate introduction into evidence is misconduct whether by questions on cross-examination, argument or other means." (*Smith v. Covell* (1980) 100 Cal.App.3d 947, 960 [161 Cal.Rptr. 377].)

- Courts have stated that "[t]he right to object on appeal to misconduct or improper argument, even when prejudicial, is generally waived in the absence of a proper objection and request the jury be admonished." (*Atkins v. Bisigier* (1971) 16 Cal.App.3d 414, 427 [94 Cal.Rptr. 49]; *Horn v. Atchison, Topeka & Santa Fe Ry. Co*. (1964) 61 Cal.2d 602, 610 [39 Cal.Rptr. 721, 394 P.2d 561].)

Secondary Sources

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

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

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

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

114. Bench Conferences and Conferences in Chambers

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

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

New December 2010

Directions for Use

This instruction is based on the federal 9th Circuit Court of Appeal Model Instruction 1.18. It may be used to explain to the jury why there may be discussions at the bench that the jury will not be able to hear, and why sometimes the judge will call a recess for discussions outside of the presence of the jury.

Secondary Sources

303. Breach of Contract—Essential Factual Elements

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

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

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

3. **[That all conditions required by the contract for [*name of defendant*]'s performance [had occurred/ [or] were excused];]**

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

[*or*]

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

5. **That [*name of plaintiff*] was harmed by that failure.**

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

Directions for Use

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

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

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

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

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

Sources and Authority

- Civil Code section 1549 provides: "A contract is an agreement to do or not to do a certain thing." Courts have defined the term as follows: "A contract is a voluntary and lawful agreement, by competent parties, for a good consideration, to do or not to do a specified thing." (*Robinson v. Magee* (1858) 9 Cal. 81, 83.)

- A complaint for breach of contract must include the following: (1) the existence of a contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) damages to plaintiff therefrom. (*Acoustics, Inc. v. Trepte Construction Co.* (1971) 14 Cal.App.3d 887, 913 [92 Cal.Rptr. 723].) Additionally, if the defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove that the event transpired. (*Consolidated World Investments, Inc. v. Lido Preferred Ltd.* (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524].)

- "Implicit in the element of damage is that the defendant's breach *caused* the plaintiff's damage." (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1352 [90 Cal.Rptr.3d 589], original italics.)

- "It is elementary a plaintiff suing for breach of contract must prove it has performed all conditions on its part or that it was excused from performance. Similarly, where defendant's duty to perform under the contract is conditioned on the happening of some event, the plaintiff must prove the event transpired." (*Consolidated World Investments, Inc. v. Lido Preferred Ltd*. (1992) 9 Cal.App.4th 373, 380 [11 Cal.Rptr.2d 524], internal citation omitted.)

- ~~Restatement Second of Contracts, section 1, provides: "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."~~

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

- ~~The doctrine of substantial performance does not apply to the party accused of the breach.~~ Restatement Second of Contracts, section 235(2), provides: "When performance of a duty under a contract is due any non-performance is a breach." Comment (b) to section 235 states that "[w]hen performance is due, …anything short of full performance is a breach, even if the party who does not fully perform was not at fault and even if the defect in his performance was not substantial."

Secondary Sources

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

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

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

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

350. Introduction to Contract Damages

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

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

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

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

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

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

New September 2003; Revised October 2004, December 2010

Directions for Use

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

Sources and Authority

- Civil Code section 3281 provides: "Every person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages."

- Civil Code section 3282 provides: "Detriment is a loss or harm suffered in person or property."

- Civil Code section 3300 provides: "For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom."

- ~~"The detriment that is 'likely to result therefrom' is that which is foreseeable to the breaching party at the time the contract is entered into." (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)~~

- Civil Code section 3301 provides: "No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."

- Civil Code section 3358 provides: "Except as expressly provided by statute, no person can recover a greater amount in damages for the breach of an obligation, than he could have gained by the full performance thereof on both sides."

- Civil Code section 3359 provides: "Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered."

- ~~Restatement Second of Contracts, section 351, provides:~~

  ~~(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.~~

  ~~(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach~~

  ~~(a) in the ordinary course of events, or~~

  ~~(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.~~

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

- "The basic object of damages is compensation, and in the law of contracts the theory is that the party injured by a breach should receive as nearly as possible the equivalent of the benefits of performance. The aim is to put the injured party in as good a position as he would have been had performance been rendered as promised. This aim can never be exactly attained yet that is the problem the trial court is required to resolve." (*Brandon & Tibbs v. George Kevorkian Accountancy Corp.* (1990) 226 Cal.App.3d 442, 455 [277 Cal.Rptr. 40], internal citations omitted.)

- "The damages awarded should, insofar as possible, place the injured party in the same position it would have held had the contract properly been performed, but such damage may not exceed the benefit which it would have received had the promisor performed." (*Brandon & Tibbs, supra,* 226 Cal.App.3d at p. 468, internal citations omitted.)

- " 'The rules of law governing the recovery of damages for breach of contract are very flexible. Their

application in the infinite number of situations that arise is beyond question variable and uncertain. Even more than in the case of other rules of law, they must be regarded merely as guides to the court, leaving much to the individual feeling of the court created by the special circumstances of the particular case.' " (*Brandon & Tibbs, supra,* 226 Cal.App.3d at p. 455, internal citation omitted.)

- "Contractual damages are of two types—general damages (sometimes called direct damages) and special damages (sometimes called consequential damages)." (*Lewis Jorge Construction Management, Inc. v. Pomona Unified School Dist.* (2004) 34 Cal.4th 960, 968 [22 Cal.Rptr.3d 340, 102 P.3d 257].)

- "General damages are often characterized as those that flow directly and necessarily from a breach of contract, or that are a natural result of a breach. Because general damages are a natural and necessary consequence of a contract breach, they are often said to be within the contemplation of the parties, meaning that because their occurrence is sufficiently predictable the parties at the time of contracting are 'deemed' to have contemplated them." (*Lewis Jorge Construction Management, Inc., supra,* 34 Cal.4th at p. 968, internal citations omitted.)

- " 'Contract damages are generally limited to those within the contemplation of the parties when the contract was entered into or at least reasonably foreseeable by them at that time; consequential damages beyond the expectation of the parties are not recoverable. This limitation on available damages serves to encourage contractual relations and commercial activity by enabling parties to estimate in advance the financial risks of their enterprise.' 'In contrast, tort damages are awarded to [fully] compensate the victim for [all] injury suffered.' " (*Erlich v. Menezes* (1999) 21 Cal.4th 543, 550 [87 Cal.Rptr.2d 886, 981 P.2d 978], internal citations omitted.)

- ~~"California case law has long held the correct measure of damages to be as follows: 'Damages are awarded in an action for breach of contract to give the injured party the benefit of his bargain and insofar as possible to place him in the same position he would have been in had the promisor performed the contract. Damages must be reasonable, however, and the promisor is not required to compensate the injured party for injuries that he had no reason to foresee as the probable result of his breach when he made the contract.' " (*Martin v. U-Haul Co. of Fresno* (1988) 204 Cal.App.3d 396, 409 [251 Cal.Rptr. 17], internal citations omitted.)~~

- ~~" 'It is often said that damages must be "foreseeable" to be recoverable for breach of contract. The seminal case announcing this doctrine, still generally accepted as a limitation on damages recoverable for breach of contract, is *Hadley v. Baxendale.* First, general damages are ordinarily confined to those which would naturally arise from the breach, or which might have been reasonably contemplated or foreseen by both parties, at the time they made the contract, as the probable result of the breach. Second, if special circumstances caused some unusual injury, special damages are not recoverable therefor unless the circumstances were known or should have been known to the breaching party at the time he entered into the contract.' " (*Resort Video, Ltd. v. Laser Video, Inc.* (1995) 35 Cal.App.4th 1679, 1697 [42 Cal.Rptr.2d 136], internal citations omitted.)~~

- "The detriment that is 'likely to result therefrom' is that which is foreseeable to the breaching party at the time the contract is entered into." (*Wallis v. Farmers Group, Inc.* (1990) 220 Cal.App.3d 718, 737 [269 Cal.Rptr. 299], internal citation omitted.)

- "Where the fact of damages is certain, as here, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation be used, and the result reached can be a reasonable approximation." (*Acree v. General Motors Acceptance Corp.* (2001) 92 Cal.App.4th 385, 398 [112 Cal.Rptr.2d 99], footnotes and internal citations omitted.)

- ~~"It is well settled that the party claiming the damage must prove that he has suffered damage and prove the elements thereof with reasonable certainty." (*Mendoyoma, Inc. v. County of Mendocino* (1970) 8 Cal.App.3d 873, 880-881 [87 Cal.Rptr. 740], internal citation omitted.)~~

- ~~"Whether the theory of recovery is breach of contract or tort, damages are limited to those proximately caused by their wrong." (*State Farm Mutual Automobile Insurance Co. v. Allstate Insurance Co.* (1970) 9 Cal.App.3d 508, 528 [88 Cal.Rptr. 246], internal citation omitted.)~~

- "Under contract principles, the nonbreaching party is entitled to recover only those damages, including lost future profits, which are 'proximately caused' by the specific breach. Or, to put it another way, the breaching party is only liable to place the nonbreaching party in the same position as if the specific breach had not occurred. Or, to phrase it still a third way, the breaching party is only responsible to give the nonbreaching party the benefit of the bargain to the extent the specific breach deprived that party of its bargain." (*Postal Instant Press v. Sealy* (1996) 43 Cal.App.4th 1704, 1709 [51 Cal.Rptr.2d 365], internal citations omitted.)

- "[D]amages for mental suffering and emotional distress are generally not recoverable in an action for breach of an ordinary commercial contract in California." (*Erlich, supra,* 21 Cal.4th 543 at p. 558, internal citations omitted.)

- "Cases permitting recovery for emotional distress typically involve mental anguish stemming from more personal undertakings the traumatic results of which were unavoidable. Thus, when the express object of the contract is the mental and emotional well-being of one of the contracting parties, the breach of the contract may give rise to damages for mental suffering or emotional distress." (*Erlich, supra,* 21 Cal.4th at p. 559, internal citations omitted.)

- "The right to recover damages for emotional distress for breach of mortuary and crematorium contracts has been well established in California for many years." (*Saari v. Jongordon Corp*. (1992) 5 Cal.App.4th 797, 803 [7 Cal.Rptr.2d 82], internal citation omitted.)

- Restatement Second of Contracts, section 351, provides:

  (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

  (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

  (a) in the ordinary course of events, or

(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

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

Secondary Sources

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

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

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

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

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

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

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

359. Present Cash Value of Future Damages

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

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

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

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

New September 2003; Revised June 2010

Directions for Use

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

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

Present-value tables may assist the jury in making its determination of present cash value. Tables, worksheets, and an instruction on how to use them are provided in CACI No. 3904B, *Use of Present Value Tables*.
a~~Present cash value tables have limited application. In order to use the tables, the discount rate to be used must be established by stipulation or by the evidence. Care must be taken that the table selected fits the circumstances of the case. Expert testimony will usually be required to accurately establish present values for future economic losses. However, tables may be helpful in many cases.~~

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

Sources and Authority

- Civil Code section 3283 provides: "Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future."

- "In an action for damages for such a breach, the plaintiff in that one action recovers all his damages, past and prospective. A judgment for the plaintiff in such an action absolves the defendant from any duty, continuing or otherwise, to perform the contract. The judgment for damages is substituted for the wrongdoer's duty to perform the contract." (*Coughlin v. Blair* (1953) 41 Cal.2d 587, 598 [262 P.2d 305], internal citations omitted.)

- "If the breach is partial only, the injured party may recover damages for non-performance only to the time of trial and may not recover damages for anticipated future non-performance. Furthermore, even if a breach is total, the injured party may treat it as partial, unless the wrongdoer has repudiated the contract. The circumstances of each case determine whether an injured party may treat a breach of contract as total." (*Coughlin, supra*, 41 Cal.2d at pp. 598-599, internal citations omitted.)

Secondary Sources

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

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

450A. Good Samaritan—Nonemergency

[*Name of defendant*] claims that [he/she] is not responsible for [*name of plaintiff*]'s harm because [he/she] was voluntarily trying to protect [*name of plaintiff*] from harm. If you decide that [*name of defendant*] was negligent, [he/she] is not responsible unless [*name of plaintiff*] proves ~~both~~ all of the following:

1. That [*name of plaintiff*] was not in an emergency situation;

~~1~~2. [(a) That [*name of defendant*]'s failure to use reasonable care added to the risk of harm;]

[or]

[(b) That [*name of defendant*]'s conduct caused [*name of plaintiff*] to reasonably rely on [his/her] protection;]

AND

~~2~~3. That the [additional risk/ [or] reliance] was a substantial factor in causing harm to [*name of plaintiff*].

~~*New September 2003; Revised December 2007*~~*Derived from former CACI No. 450 December 2010*

Directions for Use

Use this instruction for situations other than at the scene of an emergency. Different standards apply in an emergency situation. (See Health. & Safe. Code, § 1799.102; CACI No. 450B, *Good Samaritan—Scene of Emergency*.)

~~This issue would most likely come up in an emergency situation, but not always. For this instruction to be appropriate, the harm must result from either 1(a) or (b) or both.~~ Select ~~Either~~ either or both options for element ~~1~~2~~(a) or (b) should be selected,~~ depending on the facts.

Sources and Authority

- "Under well-established common law principles, a person has no duty to come to the aid of another. If, however, a person elects to come to someone's aid, he or she has a duty to exercise due care. Thus, a 'good Samaritan' who attempts to help someone might be liable if he or she does not exercise due care and ends up causing harm." (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 324 [86 Cal.Rptr.3d 350, 197 P.3d 164], internal citations omitted.)

- "A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty

to act. Also pertinent to our discussion is the role of the volunteer who, having no initial duty to do so, undertakes to come to the aid of another—the 'good Samaritan.' ... He is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 [192 Cal.Rptr. 233, 664 P.2d 137], internal citations omitted.)

- ~~Restatement Second of Torts, section 323, provides: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if: his failure to exercise such care increases the risk of such harm, or the harm is suffered because of the other's reliance upon the undertaking."~~

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

- Cases involving police officers who render assistance in non-law enforcement situations involve "no more than the application of the duty of care attaching to any volunteered assistance." (*Williams, supra,* 34 Cal.3d at pp. 25–26.)

  - ~~"An employer generally owes no duty to his prospective employees to ascertain whether they are physically fit for the job they seek, but where he assumes such duty, he is liable if he performs it negligently. The obligation assumed by an employer is derived from the general principle expressed in section 323 of the Restatement Second of Torts, that one who voluntarily undertakes to perform an action must do so with due care." (*Coffee v. McDonnell-Douglas Corp*. (1972) 8 Cal.3d 551, 557 [105 Cal.Rptr. 358, 503 P.2d 1366], internal citations omitted.)~~

- Statutory exceptions to Good Samaritan liability include immunities under certain circumstances for medical licensees (Bus. & Prof. Code, §§ 2395–2398), nurses (Bus. & Prof. Code, §§ 2727.5, 2861.5), dentists (Bus. & Prof. Code, § 1627.5), rescue teams (Health & Saf. Code, § 1317(f)), persons rendering emergency medical services (Health & Saf. Code, § 1799.102~~; see *Van Horn, supra,* 45 Cal.4th at p. 324~~), paramedics (Health & Saf. Code, § 1799.104), and first-aid volunteers (Gov. Code, § 50086).

Secondary Sources

4 Witkin, California Procedure (4th ed. 1996) Pleadings, § 553

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1060–1065

Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group) ¶¶ 2:583.10–2:583.11, 2:876

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

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[5][c] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.150 (Matthew Bender)

450B. Good Samaritan—Scene of Emergency

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

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

1. **That the harm occurred at the scene of an emergency;**

2. **That [***name of defendant***] was acting in good faith; and**

3. **That [***name of defendant***] was not acting for compensation.**

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

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

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

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

1. **[(a) That [***name of defendant***]'s conduct added to the risk of harm;]**

   [or]

   [(b) That [*name of defendant***]'s conduct caused [***name of plaintiff***] to reasonably rely on [his/her] protection;]**

AND

2. **That the [additional risk/ [or] reliance] was a substantial factor in causing harm to [***name of plaintiff***].**

Derived from former CACI No. 450 December 2010

Directions for Use

Use this instruction for situations at the scene of an emergency. (See Health. & Safe. Code, § 1799.102.) In a nonemergency situation, give CACI No. 450A, *Good Samaritan—Nonemergency*.

Under Health and Safety Code section 1799.102(b), the defendant must have acted at the scene of an emergency, in good faith, and not for compensation. These terms are not defined, and neither the statute nor case law indicates who has the burden of proof. However, the advisory committee believes that it is more likely that the defendant has the burden of proving those things necessary to invoke the protections of the statute.

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

See also CACI No. 425, *Gross Negligence.*

Sources and Authority

- Health and Safety Code section 1799.102 provides:

  (a) No person who in good faith, and not for compensation, renders emergency medical or nonmedical care at the scene of an emergency shall be liable for any civil damages resulting from any act or omission. The scene of an emergency shall not include emergency departments and other places where medical care is usually offered. This subdivision applies only to the medical, law enforcement, and emergency personnel specified in this chapter.

  (b)

  (1) It is the intent of the Legislature to encourage other individuals to volunteer, without compensation, to assist others in need during an emergency, while ensuring that those volunteers who provide care or assistance act responsibly.

  (2) Except for those persons specified in subdivision (a), no person who in good faith, and not for compensation, renders emergency medical or nonmedical care or assistance at the scene of an emergency shall be liable for civil damages resulting from any act or omission other than an act or omission constituting gross negligence or willful or wanton misconduct. The scene of an emergency shall not include emergency departments and other places where medical care is usually offered. This subdivision shall not be construed to alter existing protections from liability for licensed medical or other personnel specified in subdivision (a) or any other law.

  (c) Nothing in this section shall be construed to change any existing legal duties or obligations, nor does anything in this section in any way affect the provisions in Section 1714.5 of the Civil Code, as proposed to be amended by Senate Bill 39 of the 2009-10 Regular Session of the Legislature.

  (d) The amendments to this section made by the act adding subdivisions (b) and (c) shall apply

exclusively to any legal action filed on or after the effective date of that act.

- " 'Gross negligence' long has been defined in California and other jurisdictions as either a ' " 'want of even scant care' " ' or ' " 'an extreme departure from the ordinary standard of conduct.' " ' " (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754 [62 Cal.Rptr.3d 527, 161 P.3d 1095], internal citations omitted.)

- "By contrast, 'wanton' or 'reckless' misconduct (or ' "willful and wanton negligence" ') describes conduct by a person who may have no intent to cause harm, but who intentionally performs an act so unreasonable and dangerous that he or she knows or should know it is highly probable that harm will result." (*City of Santa Barbara, supra,* 41 Cal.4th at p. 754, fn. 4, internal citations omitted.)

- "Under well-established common law principles, a person has no duty to come to the aid of another. If, however, a person elects to come to someone's aid, he or she has a duty to exercise due care. Thus, a 'good Samaritan' who attempts to help someone might be liable if he or she does not exercise due care and ends up causing harm." (*Van Horn v. Watson* (2008) 45 Cal.4th 322, 324 [86 Cal.Rptr.3d 350, 197 P.3d 164], internal citations omitted.)

- "A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act. Also pertinent to our discussion is the role of the volunteer who, having no initial duty to do so, undertakes to come to the aid of another—the 'good Samaritan.' ... He is under a duty to exercise due care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking." (*Williams v. State of California* (1983) 34 Cal.3d 18, 23 [192 Cal.Rptr. 233, 664 P.2d 137], internal citations omitted.)

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

- Statutory exceptions to Good Samaritan liability include immunities under certain circumstances for medical licensees (Bus. & Prof. Code, §§ 2395–2398), nurses (Bus. & Prof. Code, §§ 2727.5, 2861.5), dentists (Bus. & Prof. Code, § 1627.5), rescue teams (Health & Saf. Code, § 1317(f)), persons rendering emergency medical services (Health & Saf. Code, § 1799.102), paramedics (Health & Saf. Code, § 1799.104), and first-aid volunteers (Gov. Code, § 50086).

Secondary Sources

4 Witkin, California Procedure (4th ed. 1996) Pleadings, § 553

6 Witkin, Summary of California Law (10th ed. 2005) Torts, §§ 1060–1065

Flahavan et al., California Practice Guide: Personal Injury (The Rutter Group) ¶¶ 2:583.10–2:583.11, 2:876

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

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

33 California Forms of Pleading and Practice, Ch. 380, *Negligence*, § 380.32[5][c] (Matthew Bender)

16 California Points and Authorities, Ch. 165, *Negligence*, § 165.150 (Matthew Bender)

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

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

1. **That [***name of defendant***] [owned/leased/occupied/controlled] the property;**

2. **That [***name of defendant***] retained control over safety conditions at the worksite;**

3. **That [***name of defendant***] negligently exercised [his/her/its] retained control over safety conditions by [***specify alleged negligent acts or omissions***];**

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

5. **That [***name of defendant***]'s negligent exercise of [his/her/its] retained control over safety conditions was a substantial factor in causing [***name of plaintiff***]'s harm.**

Derived from former CACI No. 1009 April 2007; Revised April 2009, December 2010

Directions for Use

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

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

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

adequately expresses the "affirmative contribution" requirement.

Sources and Authority

- "We conclude that a hirer of an independent contractor is not liable to an employee of the contractor merely because the hirer retained control over safety conditions at a worksite, but that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." (*Hooker, supra, ~~v. Department of Transportation~~* (2002) 27 Cal.4th at p.~~198,~~ 202 ~~[115 Cal.Rptr.2d 853, 38 P.3d 1081]~~, original italics.)

- "Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette*, *Toland* and *Camargo* because the liability of the hirer in such a case is not ' "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." ' To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term." (*Hooker, supra,* 27 Cal.4th at pp. 211–212, original italics, internal citations and footnote omitted.)

- "Such affirmative contribution need not always be in the form of actively directing a contractor or contractor's employee. There will be times when a hirer will be liable for its omissions. For example, if the hirer promises to undertake a particular safety measure, then the hirer's negligent failure to do so should result in liability if such negligence leads to an employee injury." (*Hooker, supra,* 27 Cal.4th at p. 212, fn. 3.)

- "[U]nder Government Code section 815.4, a public entity can be held liable under the retained control doctrine, provided a private person would be liable under the same circumstances. This means that the public entity must *negligently* exercise its retained control so as to affirmatively contribute to the injuries of the employee of the independent contractor." (*McCarty v. Department of Transportation* (2008), 164 Cal.App.4th 955, 985 [79 Cal.Rptr.3d 777], original italics.)

- Section 414 of the Restatement Second of Torts provides: "One who entrusts work to an independent contractor, but who retains the control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care."

Secondary Sources

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

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

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

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

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

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

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

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

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

New April 2008; Revised April 2009, December 2010

Directions for Use

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

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

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

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

supra, 153 Cal.App.4th at p. 147.) The advisory committee believes that the "affirmative contribution" requirement simply means that there must be causation between the hirer's conduct and the plaintiff's injury. Because "affirmative contribution" might be construed by a jury to require active conduct rather than a failure to act, the committee believes that its standard "substantial factor" element adequately expresses the "affirmative contribution" requirement.

Sources and Authority

- "The nondelegable duty doctrine addresses an affirmative duty imposed by reason of a person or entity's relationship with others. Such a duty cannot be avoided by entrusting it to an independent contractor. Nondelegable duties may arise when a statute provides specific safeguards or precautions to insure the safety of others." (*Padilla v. Pomona College* (2008) 166 Cal.App.4th 661, 671–672 [82 Cal.Rptr.3d 869], internal citations omitted.)

- "One who by statute or by administrative regulation is under a duty to provide specified safeguards or precautions for the safety of others is subject to liability to the others for whose protection the duty is imposed for harm caused by the failure of a contractor employed by him to provide such safeguards or precautions." (*Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137, 146 [62 Cal.Rptr.3d 479].)

- "Imposing tort liability on a hirer of an independent contractor when the hirer's conduct has affirmatively contributed to the injuries of the contractor's employee is consistent with the rationale of our decisions in *Privette*, *Toland* and *Camargo* because the liability of the hirer in such a case is *not* ' "in essence 'vicarious' or 'derivative' in the sense that it derives from the 'act or omission' of the hired contractor." ' To the contrary, the liability of the hirer in such a case is *direct* in a much stronger sense of that term." (*Hooker v. Dep't of Transp.* (2002) 27 Cal.4th 198, 211–212 [115 Cal.Rptr.2d 853, 38 P.3d 1081], original italics, internal citations omitted.)

- "[T]he liability of a hirer for injury to employees of independent contractors caused by breach of a nondelegable duty imposed by statute or regulation remains subject to the *Hooker* test. Under that test, the hirer will be liable if its breach of regulatory duties affirmatively contributes to the injury of a contractor's employee." (*Padilla, supra,* 166 Cal.App.4th at p. 673, internal citations omitted.)

- "[A]n owner may be liable if its breach of regulatory duties affirmatively contributes to injury of a contractor's employee." (*Evard, supra,* 153 Cal.App.4th at p. 147.)

- "Liability may be predicated on a property owner's 'breach of its own regulatory duties, regardless of whether or not it voluntarily retained control or actively participated in the project. … For purposes of imposing liability for affirmatively contributing to a plaintiff's injuries, the affirmative contribution need not be active conduct but may be in the form of an omission to act.' " (*Evard, supra,* 153 Cal. App. 4th at p. 147.)

- "Notwithstanding *Evard's* conclusion that the regulation at issue imposed a nondelegable duty, we do not agree with plaintiff's inference from that case that in every instance Cal-OSHA regulations

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

Secondary Sources

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

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

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

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

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

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

1201. Strict Liability—Manufacturing Defect—Essential Factual Elements

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

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

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

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

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

New September 2003; Revised April 2009, December 2009, December 2010

Directions for Use

Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

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

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

- In California, there is no requirement that the plaintiff prove that the defect made the product "unreasonably dangerous." (*Cronin v. J.B.E. Olson Corp.* (1972) 8 Cal.3d 121, 134-135 [104 Cal.Rptr. 433, 501 P.2d 1153].) Also, the plaintiff does not have to prove that he or she was unaware

of the defect. (*Luque v. McLean* (1972) 8 Cal.3d 136, 146 [104 Cal.Rptr. 443, 501 P.2d 1163].)

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

Secondary Sources

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

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

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

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

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

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

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

2. **That the [***product***] did not perform as safely as an ordinary consumer would have expected ~~at the time of use~~ while using or misusing the [*product*] in a reasonably intended or foreseeable way;**

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

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

New September 2003; Revised December 2005, April 2009, December 2009;December 2010

Directions for Use

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

Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

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

- "[A] product is defective in design either (1) if the product has failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner, or (2) if, in light of the relevant factors … , the benefits of the challenged design do not outweigh the risk of

danger inherent in such design." (~~In~~ *Barker v. Lull Engineering* (1978) 20 Cal.3d 413, 418 [143 Cal.Rptr. 225, 573 P.2d 443]~~, the court established two alternative tests for determining whether a product is defectively designed. Under the first test, a product may be found defective in design if the plaintiff demonstrates that the product "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner." (*Id.* at p. 429.) Under the second test, a product is defective if the risk of danger inherent in the design outweighs the benefits of such design. (*Id.* at p. 430.)~~

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

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

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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

(b) The likelihood that this harm would occur;

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

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

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

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

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

Directions for Use

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

Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d

51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

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

Sources and Authority

- " '[O]nce the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design, the burden should appropriately shift to the defendant to prove, in light of the relevant factors, that the product is not defective.' Appellants are therefore correct in asserting that it was not their burden to show that the risks involved in the loader's design -- the lack of mechanical safety devices, or of a warning -- outweighed the benefits of these aspects of its designs. The trial court's instruction to the jury, which quite likely would have been understood to place this burden on appellants, was therefore an error." (*Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 498 [200 Cal.Rptr. 387], internal citations omitted.)~~Under the risk-benefit test, the plaintiff does not have to prove the presence of a defect. Rather, once the plaintiff makes a prima facie showing that the product's design caused the injury, the burden shifts to the defendant to prove the design was not defective. A jury instruction stating that the plaintiff had the burden of proving that a design was defective in a case based on the risk-benefit test was held to be error in *Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487], and in *Lunghi v. Clark Equipment Co., Inc.* (1984) 153 Cal.App.3d 485, 498 [200 Cal.Rptr. 387]~~.
- "[T]he defendant's burden is one 'affecting the burden of proof, rather than simply the burden of producing evidence' " (*Moreno v. Fey Manufacturing Corp.* (1983) 149 Cal.App.3d 23, 27 [196 Cal.Rptr. 487].)

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

- "Plaintiffs contend aesthetics is not a proper consideration in the risk-benefit analysis, and the trial court's ruling to the contrary was an '[e]rror in law' We disagree. In our view, much of the perceived benefit of a car lies in its appearance. A car is not a strictly utilitarian

product. We believe that a jury properly may consider aesthetics in balancing the benefits of a challenged design against the risk of danger inherent in the design. Although consideration of the disadvantages of an alternative design (CACI No. 1204, factor (e)) would encompass any impact on aesthetics, we conclude that there was no error in the trial court's approval of the modification listing aesthetics as a relevant factor." (*Bell, supra,* 181 Cal.App.4th at p. 1131, internal citations omitted.)

- "Taken together, section 2, subdivision (b), and section 5 of the Restatement indicate that a component part manufacturer may be held liable for a defect in the component. When viewed in its entirety, the Restatement does not support [defendant]'s argument that '[o]nly if the component part analysis establishes sufficient control over the design of the alleged defect should the component manufacturer be held to the standard of the risk-benefit test.' Instead, the test considering foreseeable risks of harm and alternative designs is applied to the component part manufacturer when the alleged defect is in the component." (*Gonzalez, supra,* 154 Cal.App.4th at pp. 789–790.)

- ~~The plaintiff does not have to prove the existence of a feasible alternative design. (*Bernal v. Richard Wolf Medical Instruments Corp.* (1990) 221 Cal.App.3d 1326, 1335 [272 Cal.Rptr. 41], disapproved and overruled on another point in *Soule v. GM Corp.* (1994) 8 Cal.4th 548, 580 [34 Cal.Rptr.2d 607, 882 P.2d 298].)~~

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

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New September 2003; Revised April 2009, December 2009; December 2010

Directions for Use

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

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

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

Product misuse is a complete defense to strict products liability if the defendant proves that an unforeseeable abuse or alteration of the product after it left the manufacturer's hands was the sole reason that the product caused injury. (*Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 56 [148 Cal.Rptr. 596, 583 P.2d 121].) See CACI No. 1245, *Affirmative Defense—Product Misuse or Modification*. Misuse or modification that was a substantial factor in, but not the sole cause of, plaintiff's harm may also be considered in determining the comparative fault of the plaintiff or of third persons. See CACI No. 1207A, *Strict Liability—Comparative Fault of Plaintiff,* and CACI No. 1207B, *Strict Liability—Comparative Fault of Third Person*.

Sources and Authority

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

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

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

- "It is true that the two types of failure to warn claims are not necessarily exclusive: 'No valid reason appears to require a plaintiff to elect whether to proceed on the theory of strict liability in tort or on the theory of negligence. … [¶] Nor does it appear that instructions on the two theories will be confusing to the jury. There is nothing inconsistent in instructions on the two theories and to a large extent the two theories parallel and supplement each other.' Despite the often significant overlap

between the theories of negligence and strict liability based on a product defect, a plaintiff is entitled to instructions on both theories if both are supported by the evidence." (*Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 717 [99 Cal.Rptr.3d 418].)

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

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

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

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

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

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

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

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

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

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

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

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

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

Secondary Sources

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

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

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

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

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

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

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

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

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

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

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

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

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

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

New September 2003; Revised December 2010

Directions for Use

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

Sources and Authority

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

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

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

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

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

  ~~One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier~~

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

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

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

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

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

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

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

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

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

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

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

  Comment m provides:. "Reasonably foreseeable uses and risks in design and warning claims. Subsections (b) and (c) impose liability only when the product is put to uses that it is reasonable to expect a seller or distributor to foresee. Product sellers and distributors are not required to foresee and take precautions against every conceivable mode of use and abuse to which their products might be put. Increasing the costs of designing and marketing products in order to avoid the consequences of unreasonable modes of use is not required."

Secondary Sources

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

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

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

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

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

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

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

New September 2003; Revoked June 2010; Revised and restored December 2010

Sources and Authority

- California Uniform Commercial Code section 2313 provides:

  (1) Express warranties by the seller are created as follows:

  (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.

  (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.

  (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

  (2) It is not necessary to the creation of an express warranty that the seller use formal words such as "warrant" or "guarantee" or that he have a specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create a warranty.

- "The key under [Uniform Commercial Code section 2313] is that the seller's statements -- whether fact or opinion -- must become 'part of the basis of the bargain.' The basis of the bargain requirement represents a significant change in the law of warranties. Whereas plaintiffs in the past have had to prove their reliance upon specific promises made by the seller, the Uniform Commercial Code requires no such proof. According to official comment 3 to the Uniform Commercial Code following section 2313, 'no particular reliance . . . need be shown in order to weave [the seller's affirmations of fact] into the fabric of the agreement. Rather, any fact which is to take such affirmations, once made,

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

- "The California Supreme Court, in discussing the continued viability of the reliance factor, noted that commentators have disagreed in regard to the impact of this development. Some have indicated that it shifts the burden of proving nonreliance to the seller, and others have indicated that the code eliminates the concept of reliance altogether." (*Keith v. Buchanan* (1985) 173 Cal.App.3d 13, 22 [220 Cal.Rptr. 392], *citing Hauter, supra,* 14 Cal.3d at pp. 115–116.)

- "The official Uniform Commercial Code comment in regard to section 2-313 'indicates that in actual practice affirmations of fact made by the seller about the goods during a bargain are regarded as part of the description of those goods; hence no particular reliance on such statements need be shown in order to weave them into the fabric of the agreement.' It is clear from the new language of this code section that the concept of reliance has been purposefully abandoned." (*Keith, supra,* 173 Cal.App.3d at p. 23, internal citations omitted.)

- "The change of the language in section 2313 of the California Uniform Commercial Code modifies both the degree of reliance and the burden of proof in express warranties under the code. A warranty statement made by a seller is presumptively part of the basis of the bargain, and the burden is on the seller to prove that the resulting bargain does not rest at all on the representation." (*Keith, supra,* 173 Cal.App.3d at p. 23.)

- "[O]nce affirmations have been made, they are woven into the fabric of the agreement and the seller must present 'clear affirmative proof' to remove them from the agreement." (*Weinstat v. Dentsply Internat., Inc.* (2010) 180 Cal.App.4th 1213, 1234 [103 Cal.Rptr.3d 614.)

- "[W]hile the basis of the bargain of course includes dickered terms to which the buyer specifically assents, section 2313 itself does not suggest that express warranty protection is confined to them such that affirmations by the seller that are not dickered are excluded. Any affirmation, once made, is part of the agreement unless there is 'clear affirmative proof' that the affirmation has been taken out of the agreement." (*Weinstat, supra,* 180 Cal.App.4th at p. 1229.)

- "The official comment to section 2313 is also instructive on this point, providing: 'The precise time when words of description or affirmation are made … is not material. The sole question is whether the language … [is] fairly to be regarded as part of the contract.' Thus, the California Uniform Commercial Code contemplates that affirmations, promises and descriptions about the goods contained in product manuals and other materials that are given to the buyer at the time of delivery can become part of the basis of the bargain, and can be 'fairly … regarded as part of the contract,' notwithstanding that delivery occurs after the purchase price has been paid. (*Weinstat, supra,* 180 Cal.App.4th at p. 1230.)

- "The buyer's actual knowledge of the true condition of the goods prior to the making of the contract may make it plain that the seller's statement was not relied upon as one of the inducements for the purchase, but the burden is on the seller to demonstrate such knowledge on the part of the buyer. Where the buyer inspects the goods before purchase, he may be deemed to have waived the seller's express warranties. But, an examination or inspection by the buyer of the goods does not necessarily

discharge the seller from an express warranty if the defect was not actually discovered and waived." (*Keith, supra,* 173 Cal.App.3d at pp. 23-24.)

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

Secondary Sources

California Products Liability Actions, Ch. 8, *Defenses*, § 8.07 (Matthew Bender)

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

1246. Affirmative Defense—Design Defect—Government Contractor

[*Name of defendant*] may not be held liable for design defects in the [*product*] if it proves all of the following:

1. **That [*name of defendant*] contracted with the United States government to provide the [*product*] for military use;**
2. **That the United States approved reasonably precise specifications for the [*product*];**
3. **That the [*product*] conformed to those specifications; and**
4. **That [*name of defendant*] warned the United States about the dangers in the use of the [*product*] that were known to [*name of defendant*] but not to the United States.**

New June 2010; Revised December 2010

Directions for Use

This instruction is for use if the defendant's product whose design is challenged was provided to the United States government for military use. The essence of the defense is that the plaintiff should not be able to impose on a government contractor a duty under state law that is contrary to the duty imposed by the government contract. (See *Boyle v.United Technologies Corp.* (1988) 487 U.S. 500, 508–509 [108 S.Ct. 2510, 101 L.Ed.2d 442].)

–It has been stated that the defense is not limited to military contracts (see *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 710 [99 Cal.Rptr.3d 418]), though no California court has expressly so held. ~~There would appear to be no policy reason why this defense should be limited to military contracts.~~

Different standards and elements apply in a failure-to-warn case. For an instruction for use in such a case. See CACI No. 1247, *Affirmative Defense—Failure to Warn—Government Contractor.* ~~This instruction must be modified for use in such a case. (See *Oxford, supra,* 177 Cal.App.4th at p. 712; *Butler v. Ingalls Shipbuilding* (9th Cir. 1996) 89 F.3d 582, 586.)~~

Sources and Authority

- "The [United States] Supreme Court noted that in areas of ' "uniquely federal interests" ' state law may be preempted or displaced by federal law, and that civil liability arising from the performance of federal procurement contracts is such an area. The court further determined that preemption or displacement of state law occurs in an area of uniquely federal interests only where a ' "significant conflict" ' exists between an identifiable federal policy or interest and the operation of state law. The court concluded that 'state law which holds Government contractors liable for design defects in military equipment does in some circumstances present a "significant conflict" with federal policy and must be displaced.' " (*Oxford, supra,* 177 Cal.App.4th at p. 708, quoting *Boyle, supra,* 487 U.S. at pp. 500, 504, 507, 512.)

- "Liability for design defects in military equipment cannot be imposed, pursuant to state law, when (1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States. The first two of these conditions assure that the suit is within the area where the policy of the 'discretionary function' would be frustrated—i.e., they assure that the design feature in question was considered by a Government officer, and not merely by the contractor itself. The third condition is necessary because, in its absence, the displacement of state tort law would create some incentive for the manufacturer to withhold knowledge of risks, since conveying that knowledge might disrupt the contract but withholding it would produce no liability. We adopt this provision lest our effort to protect discretionary functions perversely impede them by cutting off information highly relevant to the discretionary decision." (*Boyle, supra,* 487 U.S. at pp. 512–513.)

- "[T]he fact that a company supplies goods to the military does not, in and of itself, immunize it from liability for the injuries caused by those goods. Where the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply." (*In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 811.)

- "In our view, if a product is produced according to military specifications and used by the military because of particular qualities which serve a military purpose, and is incidentally sold commercially as well, that product may nonetheless still qualify as military equipment under the military contractor defense." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1319 [273 Cal.Rptr. 214].)

- "While courts such as the court in *Hawaii* have sought to confine the government contractor defense to products that are made exclusively for the military, we agree with the court in *Jackson* that this limitation is unduly confining. Though the court in *Boyle* discussed the parameters of the contractor defense in terms of 'military equipment,' use of that term appears to have followed from the facts of that case. Other courts considering this issue have concluded the defense is not limited to military contracts. … [*Boyle's*] application focuses instead on whether the issue or area is one involving 'uniquely federal interests' and, if so, whether the application of state law presents a 'significant conflict' with federal policy." (*Oxford, supra,* 177 Cal.App.4th at p. 710; the split on this issue in the federal and other state courts is noted in *Carley v. Wheeled Coach* (3d Cir. 1993) 991 F.2d 1117, 1119, fn. 1.)

- "[T]he Supreme Court in *Boyle* did not expressly limit its holding to products liability causes of action. Thus, the government contractor defense is applicable to related negligence claims." (*Oxford, supra,* 177 Cal.App.4th at p. 711.)

- "In a failure-to-warn action, where no conflict exists between requirements imposed under a federal contract and a state law duty to warn, regardless of any conflict which may exist between the contract and state law design requirements, *Boyle* commands that we defer to the operation of state law." (*Butler v. Ingalls Shipbuilding* (9th Cir. 1996) 89 F.3d 582, ~~*Butler, supra,* 89 F.3d at p.~~ 586.)

- "The appellate court in *Tate* [*Tate v. Boeing Helicopters* (6th Cir. 1995) 55 F.3d 1150, 1156–1157] offered an alternative test for applying the government contractor defense in the context of failure to warn claims: 'When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not.' " (*Oxford, supra,* 177 Cal.App.4th at p. 712.)

Secondary Sources

6 Witkin, Summary of California Law (10th ed. 2005) Torts, § 1538

1 California Products Liability Actions, Ch. 8, *Defenses*, § 8.05 (Matthew Bender)

2 Levy et al., California Torts, Ch. 21, *Aviation Tort Law*, § 21.02[6] (Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 16, *Airplanes and Airports*, § 16.10[5] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § 460.104[23] (Matthew Bender)

1247. Affirmative Defense—Failure to Warn—Government Contractor

[*Name of defendant***] may not be held liable for failure to warn about the about the dangers in the use of the [***product***] if it proves all of the following:**

1. **That [***name of defendant***] contracted with the United States government to provide the [***product***] for military use;**

2. **That the United States approved reasonably precise specifications regarding the provision of warnings for the [***product***];**

3. **That the [***product***] conformed to those specifications regarding warnings; and**

4. **That [***name of defendant***] warned the United States about the dangers in the use of the [***product***] that were known to [***name of defendant***] but not to the United States.**

New December 2010

Directions for Use

This instruction is for use if the defendant's product about which a failure to warn is alleged (see CACI No. 1205, *Strict Liability—Failure to Warn—Essential Factual Elements* and CACI No. 1222, *Negligence—Manufacturer or Supplier—Duty to Warn—Essential Factual Elements*) was provided to the United States government for military use. The essence of the defense is that the plaintiff should not be able to impose on a government contractor a duty under state law that is contrary to the duty imposed by the government contract. (See *Boyle v.United Technologies Corp.* (1988) 487 U.S. 500, 508–509 [108 S.Ct. 2510, 101 L.Ed.2d 442].)

It has been stated that the defense is not limited to military contracts (see *Oxford v. Foster Wheeler LLC* (2009) 177 Cal.App.4th 700, 710 [99 Cal.Rptr.3d 418]), though no California court has expressly so held.

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

Sources and Authority

- "The appellate court in *Tate* [*Tate v. Boeing Helicopters* (6th Cir. 1995) 55 F.3d 1150, 1157] offered an alternative test for applying the government contractor defense in the context of failure to warn claims: 'When state law would otherwise impose liability for a failure to warn of dangers in using military equipment, that law is displaced if the contractor can show: (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor provided warnings that conformed to the approved warnings; and (3) the contractor warned the United States of the dangers in the equipment's use about which the contractor knew, but the United States did not.' " (*Oxford, supra,* 177 Cal.App.4th at p. 712.)

- "As in design defect cases, in order to satisfy the first condition—government 'approval'—in failure to warn cases, the government's involvement must transcend rubber stamping. And where the government goes beyond approval and actually determines for itself the warnings to be provided, the contractor has surely satisfied the first condition because the government exercised its discretion. The second condition in failure to warn cases, as in design defect cases, assures that the defense protects the government's, not the contractor's, exercise of discretion. Finally, the third condition encourages frank communication to the government of the equipment's dangers and increases the likelihood that the government will make a well-informed judgment." (*Oxford, supra,* 177 Cal.App.4th at p. 712, quoting *Tate, supra,* 55 F.3d at p. 1157.)

- "Under California law, a manufacturer has a duty to warn of a danger when the manufacturer has knowledge of the danger or has reason to know of it and has no reason to know that those who use the product will realize its dangerous condition. Whereas the government contractor's defense may be used to trump a design defect claim by proving that the government, not the contractor, is responsible for the defective design, that defense is inapplicable to a failure to warn claim in the absence of evidence that in making its decision whether to provide a warning … , [defendant] was 'acting in compliance with "reasonably precise specifications" imposed on [it] by the United States.' " (*Butler v. Ingalls Shipbuilding* (9th Cir. 1996) 89 F.3d 582, 586.)

- "Defendants' evidence did not establish as a matter of law the necessary significant conflict between federal contracting requirements and state law. Although defendants' evidence did show that certain warnings were required by the military specifications, that evidence did not establish that the specifications placed any limitation on additional information from the manufacturers to users of their products. Instead, the evidence suggested no such limitation existed." (*Jackson v. Deft, Inc.* (1990) 223 Cal.App.3d 1305, 1317 [273 Cal.Rptr. 214].)

- "The [United States] Supreme Court noted that in areas of ' "uniquely federal interests" ' state law may be preempted or displaced by federal law, and that civil liability arising from the performance of federal procurement contracts is such an area. The court further determined that preemption or displacement of state law occurs in an area of uniquely federal interests only where a ' "significant conflict" ' exists between an identifiable federal policy or interest and the operation of state law.' " (*Oxford, supra,* 177 Cal.App.4th at p. 708, quoting *Boyle, supra,* 487 U.S. at pp. 500, 504, 507, 512.)

- "[T]he Supreme Court in *Boyle* did not expressly limit its holding to products liability causes of action. Thus, the government contractor defense is applicable to related negligence claims." (*Oxford, supra,* 177 Cal.App.4th at p. 711.)

- "[T]he fact that a company supplies goods to the military does not, in and of itself, immunize it from liability for the injuries caused by those goods. Where the goods ordered by the military are those readily available, in substantially similar form, to commercial users, the military contractor defense does not apply." (*In re Hawaii Federal Asbestos Cases* (9th Cir. 1992) 960 F.2d 806, 811.)

- "In our view, if a product is produced according to military specifications and used by the military because of particular qualities which serve a military purpose, and is incidentally sold

commercially as well, that product may nonetheless still qualify as military equipment under the military contractor defense." (*Jackson, supra,* 223 Cal.App.3d at p. 1319.)

- "While courts such as the court in *Hawaii* have sought to confine the government contractor defense to products that are made exclusively for the military, we agree with the court in *Jackson* that this limitation is unduly confining. Though the court in *Boyle* discussed the parameters of the contractor defense in terms of 'military equipment,' use of that term appears to have followed from the facts of that case. Other courts considering this issue have concluded the defense is not limited to military contracts. … [*Boyle's*] application focuses instead on whether the issue or area is one involving 'uniquely federal interests' and, if so, whether the application of state law presents a 'significant conflict' with federal policy." (*Oxford, supra,* 177 Cal.App.4th at p. 710; the split on this issue in the federal and other state courts is noted in *Carley v. Wheeled Coach* (3d Cir. 1993) 991 F.2d 1117, 1119, fn. 1.)

Secondary Sources

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

1 California Products Liability Actions, Ch. 8, *Defenses*, § x.xx (Matthew Bender)

2 Levy et al., California Torts, Ch. 21, *Aviation Tort Law*, § xx.xx[x] (Matthew Bender)

2 California Forms of Pleading and Practice, Ch. 16, *Airplanes and Airports*, § xx.xx[x] (Matthew Bender)

40 California Forms of Pleading and Practice, Ch. 460, *Products Liability*, § xxx.xxx[xx] (Matthew Bender)

1400. Essential Factual Elements—No Arrest Involved

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

1. **That [*name of defendant*] intentionally deprived [*name of plaintiff*] of [his/her] freedom of movement by use of [physical barriers/force/threats of force/menace/fraud/deceit/unreasonable duress];**

2. **That the [restraint/detention/confinement] compelled [*name of plaintiff*] to stay or go somewhere for some appreciable time, however short;~~[and]~~**

~~2~~3. **That [*name of plaintiff*] did not [knowingly or voluntarily] consent;**

~~3~~4. **That [*name of plaintiff*] was ~~[~~actually~~]~~ harmed; and**

~~4~~5. **That [*name of defendant*]'s conduct was a substantial factor in causing [*name of plaintiff*]'s harm.**

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

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

New September 2003; Revised December 2010

Directions for Use

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

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

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

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

~~nominal damages are also being sought.~~

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

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

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

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

Sources and Authority

- "The crime of false imprisonment is defined by Penal Code section 236 as the 'unlawful violation of the personal liberty of another.' The tort is identically defined. As we recently formulated it, the tort consists of the ' "nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short." ' That length of time can be as brief as 15 minutes. Restraint may be effectuated by means of physical force, threat of force or of arrest, confinement by physical barriers, or by means of any other form of unreasonable duress." (*Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 716 [30 Cal.Rptr.2d 18, 872 P.2d 559, internal citations omitted.)~~Penal Code section 236 provides: "False imprisonment is the unlawful violation of the personal liberty of another." Courts have held that this statutory definition applies whether the offense is treated as a tort or a crime. (See *Fermino v. Fedco, Inc.* (1994) 7 Cal.4th 701, 715 [30 Cal.Rptr.2d 18, 872 P.2d 559]; *Molko v. Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1123 [252 Cal.Rptr. 122, 762 P.2d 46]; see also *Wilson v. Houston Funeral Home* (1996) 42 Cal.App.4th 1124, 1135 [50 Cal.Rptr.2d 169] [the tort of false imprisonment is "a willful and wrongful interference with the freedom of movement of another against his will"].)~~

- " '[T]he tort [of false imprisonment] consists of the " 'nonconsensual, intentional confinement of a person, without lawful privilege, for an appreciable length of time, however short.' " ' " (*Scofield, supra,* 45 Cal.App.4th at p. 1001, internal citations omitted.)

- "The only mental state required to be shown to prove false imprisonment is the intent to confine, or to create a similar intrusion." (*Fermino, supra,* 7 Cal.4th at p. 716.)

- ~~There is no requirement that the restraint last for any particular period of time. (See *Alterauge v. Los Angeles Turf Club* (1950) 97 Cal.App.2d 735, 736 [218 P.2d 802] [15 minutes was sufficient for false imprisonment]; see also *City of Newport Beach, supra,* 9 Cal.App.3d at p. 810 [restraint must be for an "appreciable length of time, however short"].~~)

- False imprisonment "requires some restraint of the person and that he be deprived of his liberty or compelled to stay where he does not want to remain, or compelled to go where he does not wish to go; and that the person be restrained of his liberty without sufficient complaint or authority." (*Collins v. County of Los Angeles* (1966) 241 Cal.App.2d 451, 459-460 [50 Cal.Rptr. 586], internal citations omitted.)

- "[I]t is clear that force or the threat of force are not the only means by which the tort of false imprisonment can be achieved. Fraud or deceit or any unreasonable duress are alternative methods of accomplishing the tort." (*Scofield, supra,* 45 Cal.App.4th at p. 1002, internal citations omitted.)

- "Because '[t]here is no real or free consent when it is obtained through fraud' … the [plaintiffs'] confinement on the aircraft was nonconsensual and therefore actionable as a false imprisonment." (*Scofield, supra,* 45 Cal.App.4th at p. 1006, fn. 16, internal citations omitted.)

- "[C]ontemporaneous awareness of the false imprisonment is not, and need not be, an essential element of the tort." (*Scofield, supra,* 45 Cal.App.4th at p. 1006.)

- "[T]he critical question as to causation in intentional torts is whether the actor's conduct is a substantial factor in bringing about the type of harm which he intended from his original act." (*Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1536, fn. 6 [254 Cal.Rptr. 492], internal citations omitted.)

- "[T]he law of this state clearly allows a cause of action for false imprisonment notwithstanding the fact a plaintiff suffered merely nominal damage." (*Scofield, supra,* 45 Cal.App.4th at p. 1007.)

- "In addition to recovery for emotional suffering and humiliation, one subjected to false imprisonment is entitled to compensation for other resultant harm, such as loss of time, physical discomfort or inconvenience, any resulting physical illness or injury to health, business interruption, and damage to reputation, as well as punitive damages in appropriate cases." (*Scofield, supra,* 45 Cal.App.4th at p. 1009, internal citation omitted.)

Secondary Sources

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

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

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

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

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

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

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

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

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

If you find that [*name of plaintiff*] has proved this claim, the court will determine the amount of damages to award.

New September 2003; Revised December 2010

Directions for Use

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

Sources and Authority

- Civil Code section 3346(a) provides: "For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such sum as would compensate for the actual detriment, except that where the trespass was casual or involuntary, or that the defendant in any action brought under this section had probable cause to believe that the land on which the trespass was committed was his own or the land of the person in whose service or by whose direction the act was done, the measure of damages shall be twice the sum as would compensate for the actual detriment, and excepting further that where the wood was taken by the authority of highway officers for the purpose of repairing a public highway or bridge upon the land or adjoining it, in which case judgment shall only be given in a sum equal to the actual detriment."

- Code of Civil Procedure section 733 provides, in part: "Any person who cuts down or carries off any wood or underwood, tree, or timber ... or otherwise injures any tree or timber on the land of another person ... is liable to the owner of such land ... for treble the amount of damages which may be assessed therefor, in a civil action, in any Court having jurisdiction."

- The damages provisions in sections 3346 and 733 must be "treated as penal and punitive." (*Baker v.*

Ramirez (1987) 190 Cal.App.3d 1123, 1138 [235 Cal.Rptr. 857], internal citation omitted.)

- " 'However, due to the penal nature of these provisions, the damages should be neither doubled nor tripled under section 3346 if punitive damages are awarded under section 3294. That would amount to punishing the defendant twice and is not necessary to further the policy behind section 3294 of educating blunderers (persons who mistake location of boundary lines) and discouraging rogues (persons who ignore boundary lines).' " (*Hassoldt v. Patrick Media Group, Inc.* (2000) 84 Cal.App.4th 153, 169 [100 Cal.Rptr.2d 662], internal citations omitted.)

- "Although an award of double the actual damages is mandatory under section 3346, the court retains discretion whether to triple them under that statute or Code of Civil Procedure section 733. [¶] 'So, the effect of section 3346 as amended, read together with section 733, is that the Legislature intended, insofar as wilful and malicious trespass is concerned under either section, to leave the imposition of treble damages discretionary with the court, but to place a floor upon that discretion at double damages which must be applied whether the trespass be wilful and malicious or casual and involuntary, etc. There are now three measures of damages applicable to the pertinent types of trespass: (1) for wilful and malicious trespass the court may impose treble damages but must impose double damages; (2) for casual and involuntary trespass, etc., the court must impose double damages; and (3) for trespass under authority actual damages.' " (*Ostling, supra, ~~v. Loring~~ (1994)* 27 Cal.App.4th at p.~~1731,~~ 1742 ~~[33 Cal.Rptr.2d 391]~~, internal citation omitted.)

- "Treble damages could only be awarded under [section 3346] where the wrongdoer intentionally acted wilfully or maliciously. The required intent is one to vex, harass or annoy, and the existence of such intent is a question of fact for the trial court." (*Sills v. Siller* (1963) 218 Cal.App.2d 735, 743 [32 Cal.Rptr. 621], internal citation omitted.)

- "Although neither section [3346 or 733] expressly so provides, it is now settled that to warrant such an award of treble damages it must be established that the wrongful act was willful and malicious." (*Caldwell v. Walker* (1963) 211 Cal.App.2d 758, 762 [27 Cal.Rptr. 675], internal citations omitted.)

- "A proper and helpful analogue here is the award of exemplary damages under section 3294 of the Civil Code when a defendant has been guilty, inter alia, of 'malice, express or implied.' … 'In order to warrant the allowance of such damages the act complained of must not only be wilful, in the sense of intentional, but it must be accompanied by some aggravating circumstance, amounting to malice. Malice implies an act conceived in a spirit of mischief or with criminal indifference towards the obligations owed to others. There must be an intent to vex, annoy or injure. Mere spite or ill will is not sufficient.' … Malice may consist of a state of mind determined to perform an act with reckless or wanton disregard of or indifference to the rights of others." Since a defendant rarely admits to such a state of mind, it must frequently be established from the circumstances surrounding his allegedly malicious acts." (*Caldwell, supra*, 211 Cal.App.2d at pp. 763-764, internal citations omitted.)

- "Under [Health and Safety Code] section 13007, a tortfeasor generally is liable to the owner of property for damage caused by a negligently set fire. '[T]he statute places no restrictions on the type of property damage that is compensable.' Such damages might include, for example, damage to structures, to movable personal property, to soil, or to undergrowth; damages may even include such elements as the lost profits of a business damaged by fire. If the fire also damages trees—that is,

causes 'injuries to … trees … upon the land of another'—then the actual damages recoverable under section 13007 may be doubled (for negligently caused fires) or trebled (for fires intended to spread to the plaintiff's property) pursuant to section 3346." (*Kelly v. CB&I Constructors, Inc.* (2009) 179 Cal.App.4th 442, 461 [102 Cal.Rptr.3d 32], internal citations omitted; but see *Gould v. Madonna* (1970) 5 Cal.App.3d 404, 407–408 [85 Cal.Rptr. 457] [Civ. Code, § 3346 does not apply to fires negligently set; Health & Saf. Code, § 13007 provides sole remedy].)

Secondary Sources

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

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

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

2031. Damages for Annoyance and Discomfort—Trespass or Nuisance

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

New December 2010

Directions for Use

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

Sources and Authority

- "Once a cause of action for trespass or nuisance is established, an occupant of land may recover damages for annoyance and discomfort that would naturally ensue therefrom." (*Kornoff v. Kingsburg Cotton Oil Co.* (1955) 45 Cal.2d 265, 272 [288 P.2d 507].)

- "We do not question that a nonresident property owner may suffer mental or emotional distress from damage to his or her property. But annoyance and discomfort damages are distinct from general damages for mental and emotional distress. Annoyance and discomfort damages are intended to compensate a plaintiff for the loss of his or her peaceful occupation and enjoyment of the property. … 'We recognize that annoyance and discomfort by their very nature include a mental or emotional component, and that some dictionary definitions of these terms include the concept of distress. Nevertheless, the "annoyance and discomfort" for which damages may be recovered on nuisance and trespass claims generally refers to distress arising out of physical discomfort, irritation, or inconvenience caused by odors, pests, noise, and the like. Our cases have permitted recovery for annoyance and discomfort damages on nuisance and trespass claims while at the same time precluding recovery for "pure" emotional distress.' " (*Kelly, supra,* 179 Cal.App.4th at p 456, internal citations omitted.)

- "California cases upholding an award of annoyance and discomfort damages have involved a plaintiff who was in immediate possession of the property as a resident or commercial tenant. We are aware of no California case upholding an award of annoyance and discomfort damages to a plaintiff who was not personally in immediate possession of the property." (*Kelly, supra,* 179 Cal.App.4th at p. 458, internal citations omitted.)

Secondary Sources

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

We answer the questions submitted to us as follows:

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

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

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

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

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

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

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

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

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

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

~~6~~5. Did [*name of defendant*] act willfully ~~or~~ and maliciously ~~with the intent to vex, harass, or annoy~~?
____ Yes ____ No

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

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

[a. Past economic loss

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

[b. Future economic loss

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

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

$ _____]

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

$ _____]

TOTAL $ _____

Signed: _____
Presiding Juror

Dated: _____

[After it has been signed/After all verdict forms have been signed], deliver this verdict form to the [clerk/bailiff/judge].

New September 2003; Revised April 2007, December 2010

Directions for Use

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

This verdict form is based on CACI No. 2002, *Trespass to Timber,* and CACI No. 2003, ~~*Treble Damage to Timbers — Timber*~~*Willful and Malicious Conduct*.

If specificity is not required, users do not have to itemize all the damages listed in question ~~7~~ 6 and do not have to categorize "economic" and "noneconomic" damages, especially if it is not a Proposition 51 case. The breakdown of damages is optional depending on the circumstances.

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

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

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

2100. Conversion—Essential Factual Elements

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

1. **That [*name of plaintiff*] [owned/possessed/had a right to possess] [a/an] [*insert item of personal property*];**

2. **That [*name of defendant*] intentionally and substantially interfered with [*name of plaintiff*]'s property by [*insert one or more of the following:*]**

   [~~took~~ taking possession of the [*insert item of personal property*]~~ for a significant period of time~~;] [or]

   [~~prevented~~ preventing [*name of plaintiff*] from having access to the [*insert item of personal property*]~~ for a significant period of time~~;] [or]

   [~~destroyed~~ destroying the [*insert item of personal property*];] [or]

   [~~refused~~ refusing to return ~~[*name of plaintiff*]~~'s~~the~~ [*insert item of personal property*] after [*name of plaintiff*] demanded its return.]

3. **That [*name of plaintiff*] did not consent;**

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

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

New September 2003; Revised December 2009, December 2010

Directions for Use

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

Sources and Authority

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

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

- "[A]ny act of dominion wrongfully exerted over the personal property of another inconsistent with the owner's rights thereto constitutes conversion." (*Plummer v. Day/Eisenberg, LLP* (2010) 184 Cal.App.4th 38, 50 [108 Cal.Rptr.3d 455].)

- "Conversion is a strict liability tort. The foundation of the action rests neither in the knowledge nor the intent of the defendant. Instead, the tort consists in the breach of an absolute duty; the act of conversion itself is tortious. Therefore, questions of the defendant's good faith, lack of knowledge, and motive are ordinarily immaterial." (*Burlesci v. Petersen* (1998) 68 Cal.App.4th 1062, 1066 [80 Cal.Rptr.2d 704], internal citations omitted.)

- "[I]t is generally acknowledged that conversion is a tort that may be committed only with relation to personal property and not real property." (*Munger v. Moore* (1970) 11 Cal.App.3d 1, 7 [89 Cal.Rptr. 323], disagreeing with *Katz v. Enos* (1945) 68 Cal.App.2d 266, 269 [156 P.2d 461].)

- "The first element of that cause of action is his ownership or right to possession of the property at the time of the conversion. Once it is determined that [plaintiff] has a right to reinstate the contract, he has a right to possession of the vehicle and standing to bring conversion. Unjustified refusal to turn over possession on demand constitutes conversion even where possession by the withholder was originally obtained lawfully and of course so does an unauthorized sale." (*Cerra v. Blackstone* (1985) 172 Cal.App.3d 604, 609 [218 Cal.Rptr. 15], internal citations omitted.)

- " 'To establish a conversion, plaintiff must establish an actual interference with his ownership or right of possession. … Where plaintiff neither has title to the property alleged to have been converted, nor possession thereof, he cannot maintain an action for conversion.' " (*Moore v. Regents of the Univ. of Cal.* (1990) 51 Cal.3d 120, 136 [271 Cal.Rptr. 146, 793 P.2d 479], internal citations omitted.)

- "In a conversion action the plaintiff need show only that he was entitled to possession at the time of conversion; the fact that plaintiff regained possession of the converted property does not prevent him from suing for damages for the conversion." (*Enterprise Leasing Corp. v. Shugart Corp*. (1991) 231 Cal.App.3d 737, 748 [282 Cal.Rptr. 620], internal citation omitted.)

- "Neither legal title nor absolute ownership of the property is necessary. … A party need only allege it is 'entitled to immediate possession at the time of conversion. … ' … However, a mere contractual right of payment, without more, will not suffice." (*Plummer, supra,* 184 Cal.App.4th at p. 45~~It is clear that legal title to property is not a requisite to maintain an action for damages in conversion. To mandate a conversion action 'it is not essential that plaintiff shall be the absolute owner of the property converted but she must show that she was entitled to immediate possession at the time of conversion.' " (*Hartford Financial Corp. v. Burns* (1979) 96 Cal.App.3d 591, 598 [158 Cal.Rptr. 169], internal citation omitted~~.)

- "The existence of a lien … can establish the immediate right to possess needed for conversion. 'One who holds property by virtue of a lien upon it may maintain an action for conversion if the property

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

- "Where the conduct complained of does not amount to a substantial interference with possession or the right thereto, but consists of intermeddling with or use of or damages to the personal property, the owner has a cause of action for trespass or case, and may recover only the actual damages suffered by reason of the impairment of the property or the loss of its use. As [plaintiff] was a cotenant and had the right of possession of the realty, which included the right to keep his personal property thereon, [defendant] 's act of placing the goods in storage, although not constituting the assertion of ownership and a substantial interference with possession to the extent of a conversion, amounted to an intermeddling. Therefore, [plaintiff] is entitled to actual damages in an amount sufficient to compensate him for any impairment of the property or loss of its use." (*Zaslow v. Kroenert* (1946), 29 Cal.2d 541, 551–552 [176 P.2d 1], internal citation omitted.)

- "[T]he law is well settled that there can be no conversion where an owner either expressly or impliedly assents to or ratifies the taking, use or disposition of his property." (*Farrington v. A. Teichert & Son, Inc.* (1943) 59 Cal.App.2d 468, 474 [139 P.2d 80], internal citations omitted.)

- "As to intentional invasions of the plaintiff's interests, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort. 'The absence of lawful consent,' said Mr. Justice Holmes, 'is part of the definition of an assault.' The same is true of false imprisonment, conversion, and trespass." (*Tavernier v. Maes* (1966) 242 Cal.App.2d 532, 552 [51 Cal.Rptr. 575], internal citations omitted.)

- " 'Money cannot be the subject of a cause of action for conversion unless there is a specific, identifiable sum involved, such as where an agent accepts a sum of money to be paid to another and fails to make the payment.' A 'generalized claim for money [is] not actionable as conversion.' " (*PCO, Inc. v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro, LLP* (2007) 150 Cal.App.4th 384, 395 [58 Cal.Rptr.3d 516], internal citations omitted.)

- "~~'Conversion is any act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein.'~~ One who buys property in good faith from a party lacking title and the right to sell may be liable for conversion. The remedies for conversion include specific recovery of the property, damages, and a quieting of title." (*State Farm Mut. Auto. Ins. Co. v. Department of Motor Vehicles* (1997) 53 Cal.App.4th 1076, 1081–1082 [62 Cal.Rptr.2d 178], internal citations omitted.)

- "[Conversion]~~ is the wrongful exercise of dominion over the personal property of another. The act~~ must be knowingly or intentionally done, but a wrongful intent is not necessary. Because the act must be knowingly done, 'neither negligence, active or passive, nor a breach of contract, even though it result in injury to, or loss of, specific property, constitutes a conversion.' It follows therefore that mistake, good faith, and due care are ordinarily immaterial, and cannot be set up as defenses in an action for conversion." (*Taylor v. Forte Hotels International* (1991) 235 Cal.App.3d 1119, 1124 [1 Cal.Rptr.2d 189], internal citations omitted.)

- "In order to establish a conversion, the plaintiff 'must show an intention or purpose to convert the goods and to exercise ownership over them, or to prevent the owner from taking possession of his property.' Thus, a necessary element of the tort is an intent to exercise ownership over property which belongs to another. For this reason, conversion is considered an intentional tort." (*Collin v. American Empire Insurance Co.* (1994) 21 Cal.App.4th 787, 812 [26 Cal.Rptr.2d 391], internal citations omitted.)

- "A conversion can occur when a willful failure to return property deprives the owner of possession." (*Fearon v. Department of Corrections* (1984) 162 Cal.App.3d 1254, 1257 [209 Cal.Rptr. 309], internal citation omitted.)

- "A demand for return of the property is not a condition precedent to institution of the action when possession was originally acquired by a tort as it was in this case." (*Igauye v. Howard* (1952) 114 Cal.App.2d 122, 127 [249 P.2d 558].)

- " 'Negligence in caring for the goods is not an act of dominion over them such as is necessary to make the bailee liable as a converter.' Thus a warehouseman's negligence in causing a fire which destroyed the plaintiffs' goods will not support a conversion claim." (*Gonzales v. Pers. Storage* (1997) 56 Cal.App.4th 464, 477 [65 Cal.Rptr.2d 473], internal citations omitted.)

- "Although damages for conversion are frequently the equivalent to the damages for negligence, i.e., specific recovery of the property or damages based on the value of the property, negligence is no part of an action for conversion." (*Taylor, supra*, 235 Cal.App.3d at p. 1123, internal citation omitted.)

- "A person without legal title to property may recover from a converter if the plaintiff is responsible to the true owner, such as in the case of a bailee or pledgee of the property." (*Department of Industrial Relations v. UI Video Stores, Inc.* (1997) 55 Cal.App.4th 1084, 1096 [64 Cal.Rptr.2d 457], internal citation omitted.)

Secondary Sources

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

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

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

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

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

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

1. That the [*name of local governmental entity***] had an official [policy/custom] [***specify policy or custom***];**

2. That [*name of local governmental entity***] knew, or it should have been obvious to it, that this official [policy/custom] was likely to result in a deprivation of the right [***specify right violated***];**

~~1~~3. That [*name of officer, employee, etc.***] [intentionally/[***insert other applicable state of mind***]] [***insert conduct allegedly violating plaintiff's civil rights***]~~;~~**

4. That [*name of plaintiff***]'s right [***specify right***] was violated;**

~~2~~5. That [*name of officer, employee, etc.~~insert conduct allegedly violating plaintiff's civil rights~~***] ~~occurred as a result~~acted because of ~~the~~ this official [policy/custom]~~ of the [name of municipality]~~;**

~~3~~6. That [*name of plaintiff***] was harmed; and**

~~4~~7. That [*name of officer, employee, etc.***]'s conduct was a substantial factor in causing [***name of plaintiff***]'s harm.**

New September 2003; Revised December 2010

Directions for Use

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

The policy must amount to a deliberate indifference to constitutional rights. (*Burke v. County of Alameda* (9th Cir. 2009) 586 F.3d 725, 734.) Element 2 expresses this deliberate-indifference standard. (See *Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1249.)

In element ~~1~~3, ~~the standard~~ a constitutional violation is not always based on intentional conduct. Insert the appropriate level of scienter. For example, Eighth Amendment cases ~~involve~~ involving failure to provide a prisoner with proper medical care require "deliberate indifference.~~,~~" (See *Hudson v. McMillian*

(1992) 503 U.S. 1, 5 [112 S.Ct. 995, 117 L.Ed.2d 156].) ~~and~~ And Fourth Amendment claims require an "unreasonable" search or seizure. (See *Sacramento County Deputy Sheriffs' Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1477 [59 Cal.Rptr.2d 834.) ~~do not necessarily involve intentional conduct.~~

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

Sources and Authority

- "[I]t is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." (*Monell v. Dept. of Social Services of New York* (1978) 436 U.S. 658, 694 [98 S.Ct. 2018, 56 L.Ed.2d 611].)

- "To establish municipal liability under § 1983, a plaintiff 'must show that (1) she was deprived of a constitutional right; (2) the County had a policy; (3) the policy amounted to a deliberate indifference to her constitutional right; and (4) the policy was the moving force behind the constitutional violation.' " (*Burke, supra,* 586 F.3d at p. 734.)

- Local governmental entities " 'can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where ... the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted. ...' " Local governmental entities also can be sued " 'for constitutional deprivations visited pursuant to governmental "custom".' " In addition, " '[t]he plaintiff must ... demonstrate that, through its *deliberate* conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.' " (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1147 [119 Cal.Rptr.2d 709, 45 P.3d 1171], internal citations omitted.)

- "Entity liability may arise in one of two forms. The municipality may itself have directed the deprivation of federal rights through an express government policy. This was the situation in *Monell,* where there was an explicit policy requiring pregnant government employees to take unpaid leaves of absence before such leaves were medically required. ... Alternatively, the municipality may have in place a custom or practice so widespread in usage as to constitute the functional equivalent of an express policy." (*Choate v. County of Orange* (2000) 86 Cal.App.4th 312, 328 [103 Cal.Rptr.2d 339].)

- " '[I]n order to successfully maintain an action under 42 United States Code section 1983 against governmental defendants for the tortious conduct of employees under federal law, it is necessary to establish that the conduct occurred in execution of a government's policy or custom promulgated either by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 1564 [266 Cal.Rptr. 682], internal

citations omitted.)

- "Normally, the question of whether a policy or custom exists would be a jury question. However, when there are no genuine issues of material fact and the plaintiff has failed to establish a prima facie case, disposition by summary judgment is appropriate." (*Trevino v. Gates* (9th. Cir. 1996) 99 F.3d 911, 920.)

- "At most, *Monell* liability adds an additional defendant, a municipality, to the universe of actors who will be jointly and severally liable for the award." (*Choate, supra,* 86 Cal.App.4th at p. 328.)

- "Local governmental bodies such as cities and counties are considered 'persons' subject to suit under section 1983. States and their instrumentalities, on the other hand, are not." (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1101 [100 Cal.Rptr.2d 289], internal citations omitted.)

- "A local governmental unit cannot be liable under this section for acts of its employees based solely on a respondeat superior theory. A local governmental unit is liable only if the alleged deprivation of rights 'implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers,' or when the injury is in 'execution of a [local] government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy.' " (*County of Los Angeles v. Superior Court* (1998) 68 Cal.App.4th 1166, 1171 [80 Cal.Rptr.2d 860], internal citations omitted.)

- "A municipality's policy or custom resulting in constitutional injury may be actionable even though the individual public servants are shielded by good faith immunity." (*Bach v. County of Butte* (1983) 147 Cal.App.3d 554, 568 [195 Cal.Rptr. 268], internal citations omitted.)

- "No punitive damages can be awarded against a public entity." (*Choate, supra,* 86 Cal.App.4th at p. 328, internal citation omitted.)

Secondary Sources

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

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

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

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

1. **That [***name of ~~public~~ local governmental entity***]'s training program was not adequate to train its [officers/employees]~~ to properly handle usual and recurring situations~~;**

2. **That [***name of local governmental entity***] knew, or it should have been obvious to it, that the inadequate training program was likely to result in a deprivation of the right [***specify right violated***];~~That [*name of public entity*] was deliberately indifferent to the need to train its [officers/employees] adequately;~~**

3. **That [***name of plaintiff***]'s right [***specify right***] was violated;**

~~3~~4. **That the failure to provide ~~proper~~ adequate training was the cause of the deprivation of [***name of plaintiff***]'s right [***~~insert~~ specify right~~, e.g., "of privacy"~~***];**

~~4~~5. **That [***name of plaintiff***] was harmed; and**

~~5~~6. **That [***name of ~~public~~ local governmental entity***]'s failure to adequately train its [officers/employees] was a substantial factor in causing [***name of plaintiff***]'s harm.**

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

New September 2003; Revised December 2010

Directions for Use

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

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

For other theories of liability against a local governmental entity, see CACI No. 3007, *Local Government*

Liability—Policy or Custom—Essential Facutal Elements, and CACI No. 3010, *Local Government Liability— Act or Ratification by Official With Final Policy-Making Authority—Essential Factual Elements*.

Sources and Authority

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ... ."

- ~~"Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)~~

- "We hold today that the inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact. This rule is most consistent with our admonition in *Monell* and *Polk County v. Dodson*, that a municipality can be liable under § 1983 only where its policies are the 'moving force [behind] the constitutional violation.' Only where a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants can such a shortcoming be properly thought of as a city 'policy or custom' that is actionable under § 1983." (*City of Canton v. Harris* (1989) 489 U.S. 378, 388-389 [109 S.Ct. 1197, 103 L.Ed.2d 412], internal citations and footnote omitted.)

- "To impose liability on a local government for failure to adequately train its employees, the government's omission must amount to 'deliberate indifference' to a constitutional right. This standard is met when 'the need for more or different training is so obvious, and the inadequacy so likely to result in the violation of constitutional rights, that the policymakers of the city can reasonably be said to have been deliberately indifferent to the need.' For example, if police activities in arresting fleeing felons 'so often violate constitutional rights that the need for further training must have been plainly obvious to the city policymakers,' then the city's failure to train may constitute 'deliberate indifference.' " (*Clouthier, supra,* 591 F.3d at p. 1249, internal citations omitted.)

- "It would be hard to describe the *Canton* understanding of deliberate indifference, permitting liability to be premised on obviousness or constructive notice, as anything but objective." (*Farmer v. Brennan* (1994) 511 U.S. 825, 841 [114 S.Ct. 1970, 128 L.Ed.2d 811].)

- "To prove deliberate indifference, the plaintiff must show that the municipality was on actual or constructive notice that its omission would likely result in a constitutional violation." (*Gibson v. County of Washoe* (2002) 290 F.3d 1175, 1186, internal citation omitted.)

- " 'The issue in a case like this one ... is whether that training program is adequate; and if it is not, the question becomes whether such inadequate training can justifiably be said to represent "city policy." ' Furthermore, the inadequacy in the city's training program must be closely related to the 'ultimate injury,' such that the injury would have been avoided had the employee been trained under a program

that was not deficient in the identified respect." (*Irwin v. City of Hemet* (1994) 22 Cal.App.4th 507, 526 [27 Cal.Rptr.2d 433], internal citations omitted.)

Secondary Sources

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

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

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

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

1. **That [***name of plaintiff***]'s right [***specify right violated***] was violated;**

2. **That [either] [***name of official***] was the person who [actually made/ [or] later personally ratified] the decision that led to the deprivation of [***name of plaintiff***]'s civil rights;**

3. **That [***name of official***]'s decision was a conscious and deliberate choice to follow a course of action from among various alternatives; and**

4. **That [***name of official***] [made/ [or] approved] the decision with knowledge of [***specify facts constituting the alleged unlawful conduct***].**

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

New December 2010

Directions for Use

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

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

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

The court determines whether a person is an official policy maker under state law. (See *Jett v. Dallas*

Independent School Dist. (1989) 491 U.S. 701, 737 [109 S.Ct. 2702, 105 L.Ed.2d 598].)

Sources and Authority

- "[A] local government may be held liable under § 1983 when 'the individual who committed the constitutional tort was an official with final policy-making authority' or such an official 'ratified a subordinate's unconstitutional decision or action and the basis for it.' 'If the authorized policymakers approve a subordinate's decision and the basis for it, their ratification would be chargeable to the municipality because their decision is final.' 'There must, however, be evidence of a conscious, affirmative choice' on the part of the authorized policymaker. A local government can be held liable under § 1983 'only where "a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question." ' " (*Clouthier v. County of Contra Costa* (9th Cir. 2010) 591 F.3d 1232, 1250, internal citations omitted.)

- "Two terms ago, … we undertook to define more precisely when a decision on a single occasion may be enough to establish an unconstitutional municipal policy. … First, a majority of the Court agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, 'that is, acts which the municipality has officially sanctioned or ordered.' Second, only those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability.. Third, whether a particular official has 'final policymaking authority' is a question of state law. Fourth, the challenged action must have been taken pursuant to a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business." (*St. Louis v. Praprotnik* (1988) 485 U.S. 112, 123 [108 S. Ct. 915, 99 L. Ed. 2d 107], internal citations omitted.)

- "A municipality can be liable even for an isolated constitutional violation … when the person causing the violation has final policymaking authority." (*Webb v. Sloan* (9th Cir. 2003), 330 F.3d 1158, 1164.)

- "As with other questions of state law relevant to the application of federal law, the identification of those officials whose decisions represent the official policy of the local governmental unit is itself a legal question to be resolved by the trial judge *before* the case is submitted to the jury." (*Jett, supra,* 491 U.S. at p. 737.)

- "Ratification is the voluntary election by a person to adopt in some manner as his own an act which was purportedly done on his behalf by another person, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him." (*Rakestraw v. Rodrigues* (1972) 8 Cal.3d 67, 73 [104 Cal.Rptr. 57, 500 P.2d 1401].)

- "To show ratification, a plaintiff must prove that the 'authorized policymakers approve a subordinate's decision and the basis for it.' Accordingly, ratification requires, among other things, knowledge of the alleged constitutional violation." (*Christie v. Iopa* (9th Cir. 1999) 176 F.3d 1231, 1239, internal citations omitted.)

- "[A] policymaker's mere refusal to overrule a subordinate's completed act does not constitute approval." (*Christie, supra,* 176 F.3d at p. 1239.)

Secondary Sources

~~3010~~3013. Violation of Prisoner's Federal Civil Rights—Eighth Amendment—Excessive Force (42 U.S.C. § 1983)

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

1. **That [*name of defendant*] used force against [*name of plaintiff*];**
2. **That the force used was excessive;**
3. **That [*name of defendant*] was acting or purporting to act in the performance of [his/her] official duties;**
4. **That [*name of plaintiff*] was harmed; and**
5. **That [*name of defendant*]'s use of excessive force was a substantial factor in causing [*name of plaintiff*]'s harm.**

Force is excessive if it is used maliciously and sadistically to cause harm. In deciding whether excessive force was used, you should consider, among other factors, the following:

(a) The need for the use of force;

(b) The relationship between the need and the amount of force that was used;

(c) The extent of injury inflicted;

(d) The extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them; [and]

(e) Any efforts made to temper the severity of a forceful response; [and]

(f) [*Insert other relevant factor.*]

Force is not excessive if it is used in a good-faith effort to protect the safety of inmates, staff, or others, or to maintain or restore discipline.

New September 2003; Revised June 2010; Renumbered from CACI No. 3010 December 2010

Directions for Use

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

There is law suggesting that the jury should give deference to prison officials in the adoption and execution of policies and practices that in their judgment are needed to preserve discipline and to maintain internal security in a prison. This principle is covered in the final sentence by the term "good faith."

Sources and Authority

- 42 U.S.C. section 1983 provides, in part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ... subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law ... ."

- "Section 1983 claims may be brought in either state or federal court." (*Pitts v. County of Kern* (1998) 17 Cal.4th 340, 348 [70 Cal.Rptr.2d 823, 949 P.2d 920].)

- "The Constitution 'does not mandate comfortable prisons,' but neither does it permit inhumane ones, and it is now settled that 'the treatment a prisoner receives in prison and the conditions under which he is confined are subject to scrutiny under the Eighth Amendment.' In its prohibition of 'cruel and unusual punishments,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must 'take reasonable measures to guarantee the safety of the inmates.' " (*Farmer v. Brennan* (1994) 511 U.S. 825, 832 [114 S.Ct. 1970, 128 L.Ed.2d 811], internal citations omitted.)

- "[A]pplication of the deliberate indifference standard is inappropriate when authorities use force to put down a prison disturbance. Instead, 'the question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on "whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." ' " (*Hudson v. McMillian* (1992) 503 U.S. 1, 6 [112 S.Ct. 995, 117 L.Ed.2d 156], internal citations omitted.)

- "[W]e hold that whenever prison officials stand accused of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the core judicial inquiry is that set out in *Whitley:* whether force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm." (*Hudson, supra,* 503 U.S. at pp. 6–7, internal citations omitted.)

- "Whether the prison disturbance is a riot or a lesser disruption, corrections officers must balance the need 'to maintain or restore discipline' through force against the risk of injury to inmates. Both situations may require prison officials to act quickly and decisively. Likewise, both implicate the principle that 'prison administrators ... should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security.'" (*Hudson, supra,* 503 U.S. at p. 6, internal citations omitted.)

- "[T]his Court rejected the notion that 'significant injury' is a threshold requirement for stating an excessive force claim. … 'When prison officials maliciously and sadistically use force to cause harm,' … 'contemporary standards of decency always are violated . . . whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury.' " (*Wilkins v. Gaddy* (2010) __ U.S. __ [130 S.Ct. 1175, 175 L.Ed.2d 995, 999].)

- "This is not to say that the 'absence of serious injury' is irrelevant to the Eighth Amendment inquiry. '[T]he extent of injury suffered by an inmate is one factor that may suggest 'whether the use of force could plausibly have been thought necessary' in a particular situation.' The extent of injury may also provide some indication of the amount of force applied. … [N]ot 'every malevolent touch by a prison guard gives rise to a federal cause of action.' 'The Eighth Amendment's prohibition of "cruel and unusual" punishments necessarily excludes from constitutional recognition *de minimis* uses of physical force, provided that the use of force is not of a sort repugnant to the conscience of mankind.' An inmate who complains of a 'push or shove' that causes no discernible injury almost certainly fails to state a valid excessive force claim. … [¶] Injury and force, however, are only imperfectly correlated, and it is the latter that ultimately counts." (*Wilkins, supra,* __ U.S. at p. __ [175 L.Ed.2d at p. 999], original italics, internal citations omitted.).

- " '[S]uch factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of injury inflicted,' are relevant to that ultimate determination. From such considerations inferences may be drawn as to whether the use of force could plausibly have been thought necessary, or instead evinced such wantonness with respect to the unjustified infliction of harm as is tantamount to a knowing willingness that it occur. But equally relevant are such factors as the extent of the threat to the safety of staff and inmates, as reasonably perceived by the responsible officials on the basis of the facts known to them, and any efforts made to temper the severity of a forceful response." (*Whitley v. Albers* (1986) 475 U.S. 312, 321 [106 S.Ct. 1078, 89 L.Ed.2d 251], internal citations omitted.)

- "The Supreme Court has interpreted the phrase 'under "color" of law' to mean 'under "pretense" of law.' A police officer's actions are under pretense of law only if they are 'in some way "related to the performance of his official duties." ' By contrast, an officer who is ' "pursuing his own goals and is not in any way subject to control by [his public employer]," ' does not act under color of law, unless he 'purports or pretends' to do so. Officers who engage in confrontations for personal reasons unrelated to law enforcement, and do not 'purport[] or pretend[]' to be officers, do not act under color of law." (*Huffman v. County of Los Angeles* (9th Cir. 1998) 147 F.3d 1054, 1058, internal citations omitted.)

- "We have found supervisorial liability under § 1983 where the supervisor 'was personally involved in the constitutional deprivation or a sufficient causal connection exists between the supervisor's unlawful conduct and the constitutional violation.' Thus, supervisors 'can be held liable for: 1) their own culpable action or inaction in the training, supervision, or control of subordinates; 2) their acquiescence in the constitutional deprivation of which a complaint is made; or 3) for conduct that showed a reckless or callous indifference to the rights of others.' " (*Edgerly v. City & County of San Francisco* (9th Cir. 2010) 599 F.3d 946, 961, internal citations omitted.)

Secondary Sources

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

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

~~3013~~3017. Supervisor Liability (42 U.S.C. § 1983)

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

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

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

Directions for Use

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

Sources and Authority

- "A 'supervisory official may be held liable in certain circumstances for the constitutional injuries inflicted by their subordinates. … [T]hat liability is not premised upon *respondeat superior* but upon "a recognition that supervisory indifference or tacit authorization of subordinates' misconduct may be a causative factor in the constitutional injuries they inflict." ' " (*Weaver v. State of California* (1998) 63 Cal.App.4th 188, 209 [73 Cal.Rptr.2d 571], internal citations omitted.)

- "To establish supervisory liability under section 1983, [plaintiff] was required to prove: (1) the supervisor had actual or constructive knowledge of [defendant's] wrongful conduct; (2) the supervisor's response " 'was so inadequate as to show "deliberate indifference to or tacit authorization of the alleged offensive practices" ' "; and (3) the existence of an 'affirmative causal link' between the supervisor's inaction and [plaintiff's] injuries." (*Grassilli v. Barr* (2006) 142 Cal.App.4th 1260, 1279–1280 [48 Cal.Rptr.3d 715], internal citations omitted.)

Secondary Sources

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

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

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

11 California Forms of Pleading and Practice, Ch. 115, *Civil Rights: Employment Discrimination*, §

115.20[4] (Matthew Bender)

3904A. Present Cash Value

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

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

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

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

New September 2003; Revised April 2008; Revised and renumbered June 2010

Directions for Use

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

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

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

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

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

Sources and Authority

- "The present value of a gross award of future damages is that sum of money prudently invested at the time of judgment which will return, over the period the future damages are incurred, the gross amount of the award. 'The concept of present value recognizes that money received after a given period is worth less than the same amount received today. This is the case in part because money received today can be used to generate additional value in the interim.' The present value of an award of future damages will vary depending on the gross amount of the award, and the timing and amount of the individual payments." (*Holt v. Regents of the University of California* (1999) 73 Cal.App.4th 871, 878 [86 Cal.Rptr.2d 752], internal citations omitted.)

- "Exact actuarial computation should result in a lump-sum, present-value award which if prudently invested will provide the beneficiaries with an investment return allowing them to regularly withdraw matching support money so that, by reinvesting the surplus earnings during the earlier years of the expected support period, they may maintain the anticipated future support level throughout the period and, upon the last withdrawal, have depleted both principal and interest." (*Canavin v. Pacific Southwest Airlines* (1983) 148 Cal.App.3d 512, 521 [196 Cal.Rptr. 82].)

- The Supreme Court has held that "it is not a violation of the plaintiff's jury trial right for the court to submit only the issue of the gross amount of future economic damages to the jury, with the timing of periodic payments—and hence their present value—to be set by the court in the exercise of its sound discretion." (*Salgado, supra,* 19 Cal.4th at p. 649, internal citation omitted.)

- "Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the 'jury would have been put to sheer speculation in determining ... "the present sum of money which ... will pay to the plaintiff ... the equivalent of his [future economic] loss ... ." ' " (*Schiernbeck, supra,* 7 Cal.App.4th at p. 877, internal citations omitted.)

Secondary Sources

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

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

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

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

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

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

3904B. Use of Present-Value Tables

[*For Table A:***]**

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

1. **Determine the amount of [***name of plaintiff***]'s future loss for [***e.g., lost income***] each year. Enter this amount into Worksheet A, Step 1.**

2. **Determine the number of years that this loss will continue. Enter this amount into Worksheet A, Step 2.**

3. **Select the interest rate that you decide [based on the expert testimony that you have heard] represents the most likely rate of return on money invested today over that period of years. Enter this amount into Worksheet A, Step 3.**

4. **Select the appropriate Present Value Factor from Table A. To locate this factor, use the Number of Years from step 2 on the worksheet and the Interest Rate from step 3 on the worksheet and find the number that is the intersection of the Interest Rate column and Number of Years row. (For example, if the number of years is 15 and the interest rate is 10 percent, the corresponding Present Value Factor is 7.61.) Enter the factor into Worksheet A, Step 4.**

5. **Multiply the amount of [***name of plaintiff***]'s annual future loss from step 1 by the factor from step 4. This is the present value of [***name of plaintiff***]'s total future loss for [***e.g., lost income***]. Enter this amount into Worksheet A, Step 5.**

WORKSHEET A

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

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

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

Step 4: Present Value Factor from Table A: _____

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

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

[*For Table B:***]**

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

1. **Determine the future years in which a future loss will occur. Starting with the current year, enter each year through the last year that you determined a future loss will occur in Column A.**

2. **Determine the amount of [***name of plaintiff***]'s future loss for [***e.g., future surgeries***] for each year that you determine the loss will occur. Enter these future losses into Column B on the worksheet. Enter $0 if no future loss occurs in a given year.**

3. **Select the interest rate that you decide [based on the expert testimony that you have heard] represents a reasonable rate of return on money invested today over the number of years determined in step 2. Enter this rate into Column C on the worksheet for each year with future loss amounts in Column B.**

4. **Select the appropriate Present Value Factor from Table B for each year for which you determined the loss will occur. To locate this factor, use the Number of Years from Column A on the worksheet and the Interest Rate in Column C on the worksheet and find the number that is the intersection of the Interest Rate column and Number of Years row from the table. (For example, for year 15, if the interest rate is 10 percent, the corresponding Present Value Factor is 0.239.) Enter the appropriate Present Value Factors in Column D. For the current year, the Present Value Factor is 1.000. It is not necessary to select an interest rate for the current year in step 3.**

5. **Multiply the amount in Column B by the factor in Column D for each year for which you determined the loss will continue and enter these amounts in Column E.**

6. **Add all of the entries in Column E and enter this sum into Total Present Value of Future Loss.**

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

WORKSHEET B

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

New December 2010

The Judicial Council Advisory Committee on Civil Jury Instructions wishes to express its gratitude to Navigant Consulting, Inc. and particularly to David Gulley, for their assistance with the text, worksheets, and tables for this instruction.

Directions for Use

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

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

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

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

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

Sources and Authority

- "Neither party introduced any evidence of compounding or discounting factors, including how to calculate an appropriate rate of return throughout the relevant years. Under such circumstances, the 'jury would have been put to sheer speculation in determining ... "the present sum of money which ... will pay to the plaintiff ... the equivalent of his [future economic] loss ... ." ' " (*Schiernbeck v. Haight* (1992) 7 Cal.App.4th 869, 877 [9 Cal.Rptr.2d 716], internal citations omitted.)

- "[W]e cannot presume that the jurors were unable to make the various computations without the proffered aid of court and counsel after first reaching necessary agreement on the various determinables comprising the formula. Further, defendant's counsel took a calculated risk in this regard; he produced neither statistician nor economist to aid his cause in this regard. Too, we have found no California cases which hold that use of the present table is indispensable to a proper award of damages for loss of future earning capacity … ." (*Howard v. Global Marine, Inc.* (1972) 28

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

- "The trial court was also correct in refusing the proposed instruction, on its merits, for lack of evidence which would have supported a jury finding of the 'present cash value' of any sum assessed as the value of [plaintiff]'s future earning capacity … . The computation of such 'present cash value' is 'difficult and confusing . . . to present to a jury' and, in the pertinent cases, the computation was apparently reached by the respective juries upon the basis of real evidence. Absent such evidence in the present case (and there was none), this jury would have been put to sheer speculation in determining (as the proposed instruction would have had it do) 'the present sum of money which, together with interest thereon when invested so as to yield the highest rate of interest consistent with reasonable security, will pay to the plaintiff … the equivalent of his loss of earning capacity . . . in the future . . . .' The instruction would have required the jury to reach this result without the benefit of evidence or advice as to the complicated factors of compounding and discounting which the instruction necessarily involved. There are 'present cash value' tables which might have assisted the jury in this regard, if judicially noticed for instruction purposes, but the proposed instruction included no reference to them. For these reasons, and on the instruction's merits, the trial court did not err in refusing to give it." (*Wilson, supra,* 25 Cal.App.3d at pp. 613–614, internal citations omitted.)

- "Anticipated future increases of medical costs may be presented to the jury. Expert testimony may be used with regard to a 'subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact; … ' Future medical expenses are such a subject. Testimony by actuaries is frequently used to show discount rates and the present value of future benefits. [¶] The expert testimony was substantial evidence supporting the portion of the award relating to the future cost of attendant care. The substantial evidence test is applied in view of the entire record; other than a vigorous cross-examination of plaintiffs' expert, appellants presented no evidence on the cost of attendant care. The elaborate economic arguments presented in the briefs of appellants and amicus curiae might better have been presented to the jury in opposition to respondents' expert testimony." (*Niles v. City of San Rafael* (1974) 42 Cal.App.3d 230, 243 [116 Cal.Rptr. 733], internal citations omitted.)

- "Appellants claim that the 5 percent discount rate presented by the expert was too low. A discount rate, similar to an interest rate, is used to determine the present value of future expenses. The expert, in arriving at a 5 percent rate, used commercial investment studies pertaining to the riskiness of corporate bonds, charts compiled by the Federal Reserve System showing interest yields on various bonds since 1920, and tables published by the United States Savings and Loan League showing interest rates on savings accounts since 1929. He took into account the need for reasonable security of investment over the period of [plaintiff]'s life. All of this was apparently within the competence of the expert." (*Niles, supra,* 42 Cal.App.3d at pp. 243–244.)

Secondary Sources

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

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

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

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

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

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

3920. Loss of Consortium (Noneconomic Damage)

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

1. **The loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support; and**

2. **The loss of the enjoyment of sexual relations [or the ability to have children].**

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

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

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

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

1. **The loss of financial support from [*name of injured spouse*];**

2. **Personal services, such as nursing, that [*name of plaintiff*] has provided or will provide to [*name of injured spouse*]; or**

3. **Any loss of earnings that [*name of plaintiff*] has suffered by giving up employment to take care of [*name of injured spouse*].**

4. **The cost of obtaining domestic household services to replace services that would have been performed by [*name of injured spouse*].**

New September 2003; Revised December 2010

Directions for Use

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

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

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

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

Sources and Authority

- Civil Code section 1431.2(b)(2) provides, in part: "For purposes of this section, the term 'non-economic damages' means subjective, non-monetary losses including ... loss of consortium ... ."

- "We ... declare that in California each spouse has a cause of action for loss of consortium, as defined herein, caused by a negligent or intentional injury to the other spouse by a third party." (*Rodriguez v. Bethlehem Steel Corp.* (1974) 12 Cal.3d 382, 408 [115 Cal.Rptr. 765, 525 P.2d 669].)

- "The concept of consortium includes not only loss of support or services; it also embraces such elements as love, companionship, comfort, affection, society, sexual relations, the moral support each spouse gives the other through the triumph and despair of life, and the deprivation of a spouse's physical assistance in operating and maintaining the family home." (*Ledger v. Tippitt* (1985) 164 Cal.App.3d 625, 633 [210 Cal.Rptr. 814], disapproved of on other grounds in *Elden v. Sheldon* (1988) 46 Cal.3d 267, 277 [250 Cal.Rptr. 254, 758 P.2d 582].)

- "Since he has no cause of action in tort his spouse has no cause of action for loss of consortium." (*Blain v. Doctor's Co.* (1990) 222 Cal.App.3d 1048, 1067 [272 Cal.Rptr. 250].)

- "*Rodriguez* never mentions the concept of a complete loss of consortium. To the contrary, the opinion speaks of 'loss or impairment of her rights of consortium.' This dichotomy suggests that a diminution of a wife's rights are compensible, and we so hold." (*Carlson v. Wald* (1984) 151 Cal.App.3d 598, 602 [199 Cal.Rptr. 10], internal citation omitted.)

- "[S]hould [husband] prevail in his own cause of action against these defendants, he will be entitled to recover, among his medical expenses, the full cost of whatever home nursing is necessary. To allow [wife] also to recover the value of her nursing services, however personalized, would therefore constitute double recovery." (*Rodriguez, supra,* 12 Cal.3d at p. 409, internal citations omitted.)

- "For the same reason, [wife] cannot recover for the loss of her earnings and earning capacity

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

- "The deprivation of a husband's physical assistance in operating and maintaining the home is a compensable item of loss of consortium." (*Rodriguez, supra,* 12 Cal.3d at p. 409, fn. 31, internal citations omitted.)

- "Although the trial court labeled the damages awarded [plaintiff] as being for 'loss of consortium' (a noneconomic damages item under Proposition 51), much of the testimony at trial actually involved the 'costs of obtaining substitute domestic services' on her behalf (an economic damage item in the statute). (*Kellogg v. Asbestos Corp. Ltd.* (1996) 41 Cal.App.4th 1397, 1408 [49 Cal.Rptr.2d 256].)

- "Whether the degree of harm suffered by the plaintiff's spouse is sufficiently severe to give rise to a cause of action for loss of consortium is a matter of proof. When the injury is emotional rather than physical, the plaintiff may have a more difficult task in proving negligence, causation, and the requisite degree of harm; but these are questions for the jury, as in all litigation for loss of consortium. In *Rodriguez* we acknowledged that the loss is 'principally a form of mental suffering,' but nevertheless declared our faith in the ability of the jury to exercise sound judgment in fixing compensation. We reaffirm that faith today." (*Molien v. Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 933 [167 Cal.Rptr. 831, 616 P.2d 813], internal citations omitted.)

- "We ... conclude that we should not recognize a cause of action by a child for loss of parental consortium." (*Borer v. American Airlines, Inc.* (1977) 19 Cal.3d 441, 451 [138 Cal.Rptr. 302, 563 P.2d 858].)

- A parent may not recover loss of consortium damages for injury to his or her child. (*Baxter v. Superior Court* (1977) 19 Cal.3d 461 [138 Cal.Rptr. 315, 563 P.2d 871].)

- Unmarried cohabitants may not recover damages for loss of consortium. (*Elden, supra,* 46 Cal.3d at p. 277.)

- Under Proposition 51, damages for loss of consortium may be reduced by the negligence of the injured spouse. (*Craddock v. Kmart Corp.* (2001) 89 Cal.App.4th 1300, 1309–1310 [107 Cal.Rptr.2d 881]; *Hernandez v. Badger Construction Equipment Co.* (1994) 28 Cal.App.4th 1791, 1810–1811 [34 Cal.Rptr.2d 732].)

- " 'To entitle a plaintiff to recover present damages for apprehended future consequences, there must be evidence to show such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury.' " (*Bellman v. San Francisco High School Dist.* (1938) 11 Cal.2d 576, 588 [81 P.2d 894], internal citation omitted.)

- "[I]n a common law action for loss of consortium, the plaintiff can recover not only for the loss of companionship and affection through the time of the trial but also for any future loss of companionship and affection that is sufficiently certain to occur. In *Rodriguez,* we held that when a plaintiff's spouse is permanently disabled as a result of a defendant's wrongdoing, future (posttrial)

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

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

Secondary Sources

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

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

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

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

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

3926. Settlement Deduction

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

New September 2003; Revised December 2010

Sources and Authority

- Code of Civil Procedure section 877 provides, in pertinent part: "Where a release, dismissal with or without prejudice, or a covenant not to sue or not to enforce judgment is given in good faith before verdict or judgment to one or more of a number of tortfeasors claimed to be liable for the same tort ... it shall have the following effect: ... It shall not discharge any other such party from liability unless its terms so provide, but it shall reduce the claims against the others in the amount stipulated by the release, the dismissal or the covenant, or in the amount of the consideration paid for it whichever is the greater."

- "When the plaintiff stipulates to the fact and amount of settlement before the court, an approved procedure is for the court to reduce the verdict award by the amount paid in settlement before entering judgment on the verdict." (*Syverson v. Heitmann* (1985) 171 Cal.App.3d 106, 111 [214 Cal.Rptr. 581], internal citations omitted.)

- Courts have held that it is "proper to exclude evidence of the pretrial settlement by one joint tortfeasor from the jury's consideration, leaving it to the court to apply Code of Civil Procedure section 877 to reduce the verdict." (*Knox v. County of Los Angeles* (1980) 109 Cal.App.3d 825, 834-835 [167 Cal.Rptr. 463], internal citation omitted.)

- "[W]here there is an admission 'that a settlement has been made with one or more joint tortfeasors in a certain amount there is no factual question to be resolved by the jury respecting the settlement.' " (*Albrecht v. Broughton*(1970) 6 Cal.App.3d 173, 177 [85 Cal.Rptr. 659], internal citation omitted.)

- "Where the purpose of introducing evidence of a settlement is to reduce any recovery that might be awarded pro tanto, this result can be achieved by a simple calculation made by the court after the verdict has been rendered." (*Shepherd v. Walley* (1972) 28 Cal.App.3d 1079, 1082 [105 Cal.Rptr. 387], footnote omitted.)

- "The presentation of evidence concerning the amount or fact of settlement to the jury ... is not only confusing, but also can lead to abuse in argument as it did here." (*Shepherd, supra,* 28 Cal.App.3d at p. 1083.)

- "[E]vidence of the fact and amount of settlement made by [plaintiff] with [settling witness] might be admissible under proper limiting instructions for the purpose of showing bias since he was a witness."

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

- "Under Civil Code section 1431.2, a defendant is only responsible for its share of noneconomic damages as that share has been determined by the jury. 'Therefore, a nonsettling defendant may not receive any setoff under [Code of Civil Procedure] section 877 for the portion of a settlement by another defendant that is attributable to noneconomic damages.' After application of Civil Code section 1431.2, '... there is no amount that represents a common claim for noneconomic damages against the settling and nonsettling defendants' and thus Code of Civil Procedure section 877 has no applicability to noneconomic damages." (*Ehret v. Congoleum Corp.* (1999) 73 Cal.App.4th 1308, 1319 [87 Cal.Rptr.2d 363], internal citations omitted.)

- "[A]n undifferentiated settlement must be apportioned between economic and noneconomic damages so that the setoff applies only to economic damages." (*Ehret, supra,* 73 Cal.App.4th at p. 1320, internal citation omitted.)

- It has been held that, "[i]n the absence of any other allocation ... the percentage of economic damages reflected in the jury verdict [should] be applied to determine the percentage of the settlements to be offset." (*Ehret, supra,* 73 Cal.App.4th at p. 1320, internal citation omitted.)

- "Where there is a complete dismissal of a defendant, and a plaintiff seeks an allocation of the settlement with that defendant for purposes of limiting the setoff against another defendant's liability, the burden is on the plaintiff to establish facts to justify the allocation." (*Ehret, supra,* 73 Cal.App.4th at p. 1322, internal citation omitted.)

Secondary Sources

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

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

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

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

6 California Points and Authorities, Ch. 65, *Damages* (Matthew Bender)

3933. Damages From Multiple Defendants

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

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

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

New December 2010

Directions for Use

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

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

Sources and Authority

- Civil Code section 1431.2(a) (Proposition 51) provides: "In any action for personal injury, property damage, or wrongful death, based upon principles of comparative fault, the liability of each defendant for non-economic damages shall be several only and shall not be joint. Each defendant shall be liable only for the amount of non-economic damages allocated to that defendant in direct proportion to that defendant's percentage of fault, and a separate judgment shall be rendered against that defendant for that amount."

- "The pro tanto reduction provision works to prevent settlements from producing double recoveries in the case of a single injury caused by joint tortfeasors. The general theory of compensatory damages bars double recovery for the same wrong. The principal situation is where joint or concurrent tortfeasors are jointly and severally liable for the same wrong. Only one complete satisfaction is

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

Secondary Sources

UNLAWFUL DETAINER

4304. Termination for Violation of Terms of Lease/Agreement—Essential Factual Elements

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[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has failed to perform [a] requirement(s) under [his/her/its] [lease/rental agreement/sublease]. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That under the [lease/rental agreement/sublease], [***name of defendant***] agreed [***insert required condition(s) that were not performed***];**

4. **That [***name of defendant***] failed to perform [that/those] requirement(s) by [***insert description of alleged failure to perform***];**

5. **That [***name of plaintiff***] properly gave [***name of defendant***] [and [***name of subtenant***]] three days' written notice to [either [***describe action to correct failure to perform***] or] vacate the property[, or that [***name of defendant***] actually received this notice at least three days before [***date on which action was filed***]]; [and]**

[6. That [*name of defendant***] did not [***describe action to correct failure to perform***]; and]**

7. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

[[*Name of defendant***]'s failure to perform the requirement(s) of the [lease/rental agreement/sublease] must not be trivial, but must be a substantial violation of [an] important obligation(s).]**

New August 2007; Revised June 2010, December 2010

Directions for Use

Uncontested elements may be deleted from this instruction.

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

If the plaintiff is the landlord or owner, select either "lease" or "rental agreement" in the opening paragraph and in element 3, "owns" in element 1, and "rented" in element 2. Commercial documents are usually called "leases" while residential documents are often called "rental agreements." Select the term that is used on the written document.

If the plaintiff is a tenant seeking to recover possession from a subtenant, select "sublease" in the opening paragraph and in element 3, "leases" in element 1, and "subleased" in element 2. (Code Civ. Proc., § 1161(3).)

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 5. Defective service is waived if defendant admits timely receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96].)

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 5.

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

Include the last paragraph if the tenant alleges that the violation was trivial. It is not settled whether the landlord must prove the violation was substantial or the tenant must prove triviality as an affirmative defense. (See *Superior Motels, Inc. v. Rinn Motor Hotels, Inc.* (1987) 195 Cal.App.3d 1032, 1051 [241 Cal.Rptr. 487]; *Keating v. Preston* (1940) 42 Cal.App.2d 110, 118 [108 P.2d 479].)

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

See CACI No. 4305, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement,* for an instruction on proper written notice.

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

Sources and Authority

- Code of Civil Procedure section 1161 provides, in part:

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

3. When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease.

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

- Civil Code section 1952.3(a) provides, in part: "[I]f the lessor brings an unlawful detainer proceeding and possession of the property is no longer in issue because possession of the property has been delivered to the lessor before trial or, if there is no trial, before judgment is entered, the case becomes an ordinary civil action … ."

- "[Code of Civil Procedure section 1161(3)] provides, that where the conditions or covenants of a lease can be performed, a lessee may within three days after the service of the notice perform them, and so save a forfeiture of his lease. By performing, the tenant may defeat the landlord's claim for possession. Where, however, the covenants cannot be performed, the law recognizes that it would be an idle and useless ceremony to demand their performance, and so dispenses with the demand to do so. And this is all that it does dispense with. It does not dispense with the demand for the possession of the premises. It requires that in any event. If the covenants can be performed, the notice is in the alternative, either to perform them or deliver possession. When the covenants are beyond performance an alternative notice would be useless, and demand for possession alone is necessary. Bearing in mind that the object of this statute is to speedily permit a landlord to obtain possession of his premises where the tenant has violated the covenants of the lease, the only reasonable interpretation of the statute is, that before bringing suit he shall take that means which should be most effectual for the purpose of obtaining possession, which is to demand it. If upon demand the tenant surrenders possession, the necessity for any summary proceeding is at an end, and by the demand is accomplished what the law otherwise would accord him under the proceeding." (*Schnittger v. Rose* (1903) 139 Cal. 656, 662 [73 P. 449].)

- "It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent or quit, perform the covenant or quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession. (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749].

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

- "The law sensibly recognizes that although every instance of noncompliance with a contract's terms constitutes a breach, not every breach justifies treating the contract as terminated. Following the lead of the Restatements of Contracts, California courts allow termination only if the breach can be classified as 'material,' 'substantial,' or 'total.' " (*Superior Motels, Inc., supra,* 195 Cal.App.3d at p. 1051, internal citations omitted.)

- "California too accepts that '[whether] a breach is so material as to constitute cause for the injured party to terminate a contract is ordinarily a question for the trier of fact.' " (*Superior Motels, Inc., supra*, 195 Cal.App.3d at pp. 1051-1052, internal citations omitted.)

- "As to the substantiality of the violation, the evidence shows that the violation was wilful. Therefore, the court will not measure the extent of the violation." (*Hignell v. Gebala* (1949) 90 Cal.App.2d 61, 66 [202 P.2d 378].)

- "If the tenant gives up possession of the property after the commencement of an unlawful detainer proceeding, the action becomes an ordinary one for damages." (*Fish Construction Co. v. Moselle Coach Works, Inc.* (1983) 148 Cal.App.3d 654, 658 [196 Cal.Rptr. 174].)

Secondary Sources

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

1 California Landlord-Tenant Practice (Cont.Ed.Bar 2d ed.) §§ 8.50–8.54

1 California Eviction Defense Manual (Cont.Ed.Bar 2d ed.) §§ 5.2, 6.38–6.49

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

Matthew Bender Practice Guide: California Landlord-Tenant Litigation, Ch. 5, *Unlawful Detainer*, 5.07

29 California Forms of Pleading and Practice, Ch. 333, *Landlord and Tenant: Eviction Actions*, § 333.10 (Matthew Bender)

23 California Points and Authorities, Ch. 236, *Unlawful Detainer*, §§ 236.11, 236.20 (Matthew Bender)

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, § 19:201

UNLAWFUL DETAINER

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

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

1. **That the notice informed [***name of defendant***] in writing that [he/she/it] must, within three days, [either comply with the requirements of the [lease/rental agreement/sublease] or] vacate the property;**

2. **That the notice described how [***name of defendant***] failed to comply with the requirements of the [lease/rental agreement/sublease] [and how to correct the failure];**

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***];**

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

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

[*or:*

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

[*or:*

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

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

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

New August 2007; Revised December 2010

Directions for Use

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

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

Select the manner of service used; personal service, substituted service by leaving the notice at the defendant’s home or place of work, or substituted service by posting on the property. (Code Civ. Proc., § 1162.) There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second and third bracketed options for the manner of service.

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

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

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

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

Sources and Authority

- Code of Civil Procedure section 1161 provides, in part:

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

  3. When he or she continues in possession, in person or by subtenant, after a neglect or failure to perform other conditions or covenants of the lease or agreement under which the property is held, including any covenant not to assign or sublet, than the one for the payment of rent, and three days' notice, in writing, requiring the performance of such conditions or covenants, or the possession of the property, shall have been served upon him or her, and if there is a subtenant in actual occupation of the premises, also, upon the subtenant. Within three days after the service of the notice, the tenant, or any subtenant in actual occupation of the premises, or any mortgagee of the term, or other person interested in its continuance, may perform the conditions or covenants of the lease or pay the stipulated rent, as the case may be, and thereby save the lease from forfeiture; provided, if the conditions and covenants of the lease, violated by the lessee, cannot afterward be performed, then no notice, as last prescribed herein, need be given to the lessee or his or her subtenant, demanding the performance of the violated conditions or covenants of the lease.

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

Reauthorization Act of 2005 (Public Law 109-162) that permit the removal from a lease of a tenant who engages in criminal acts of physical violence against cotenants.

Code of Civil Procedure section 1162 provides:

The notices required by Sections 1161 and 1161a may be served, either:

1. By delivering a copy to the tenant personally; or,

2. If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence; or,

3. If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

- "It is well settled that the notice required under [Code Civ. Proc., § 1161] subdivisions 2 and 3 (where the condition or covenant assertedly violated is capable of being performed) must be framed in the alternative, viz., pay the rent or quit, perform the covenant or quit, and a notice which merely directs the tenant to quit is insufficient to render such tenant guilty of unlawful detainer upon his continued possession. (*Hinman v. Wagnon* (1959) 172 Cal.App.2d 24, 27 [341 P.2d 749].

- "Plaintiff argues, however, that he should be allowed to amend his complaint so as to bring his action under section 1161, subdivision 4. The notice thereunder required need not be framed in the alternative. However, plaintiff has at no time, either by his three days' notice or in any of his pleadings, suggested that defendant had assigned the lease or sublet the property, or had committed waste contrary to the conditions or covenants of the lease, or

maintained a nuisance on the premises, or had used the property for an unlawful purpose. Plaintiff had three opportunities to state a cause of action; if he was of the belief that facts existed which brought his case under 1161, subdivision 4, it would have been a simple matter to allege such facts, but this he did not do." (*Hinman, supra,* 172 Cal.App.2d at p. 29.)

- "Where a covenant in a lease has been breached and the breach cannot be cured, a demand for performance is not a condition precedent to an unlawful detainer action." (*Salton Community Services Dist. v. Southard* (1967) 256 Cal.App.2d 526, 529 64 Cal.Rptr. 246], internal citation omitted.)

Secondary Sources

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

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

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

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

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

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

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

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

4308. Termination for Nuisance or Illegal Activity—Essential Factual Elements (Code Civ. Proc, § 1161(4))

[*Name of plaintiff***] claims that [***name of defendant***] [and [***name of subtenant***], a subtenant of [***name of defendant***],] no longer [has/have] the right to occupy the property because [***name of defendant***] has [created a nuisance/ [or] engaged in illegal activity] on the property. To establish this claim, [***name of plaintiff***] must prove all of the following:**

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

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

3. **That [***name of defendant***] [***include one or both of the following:***]**

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

   [or]

   engaged in illegal activity on the property by [*specify illegal activity***];**

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

5. **That [***name of defendant***] [or subtenant [***name of subtenant***]] is still occupying the property.**

New December 2010

Directions for Use

Uncontested elements may be deleted from this instruction.

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

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

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

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

If service of notice may have been defective, but there is evidence that the defendant actually did receive it, include the bracketed language at the end of element 4. Defective service is waived if defendant admits timely receipt of notice. (*Lehr v. Crosby* (1981) 123 Cal.App.3d Supp. 1, 6, fn. 3 [177 Cal.Rptr. 96].)

If the lease specifies a time period for notice other than the three-day period, substitute that time period in element 4.

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

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

See CACI No. 4309, *Sufficiency and Service of Notice of Termination for Violation of Terms of Agreement,* for an instruction on proper written notice.

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

Sources and Authority

- Code of Civil Procedure section 1161 provides, in part:

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

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

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

- Civil Code section 3479 provides: "Anything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, bay, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance."

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

Secondary Sources

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

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

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

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

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

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

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

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, §

4309. Sufficiency and Service of Notice of Termination for Nuisance or Illegal Activity

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

1. **That the notice informed [***name of defendant***] in writing that [he/she/it] must vacate the property within three days;**

2. **That the notice described how [***name of defendant***] [created a nuisance/ [or] engaged in illegal activity] on the property;**

3. **That the notice was given to [***name of defendant***] at least three days before [***insert date on which action was filed***];**

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

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

[*or:*

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

[*or:*

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

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

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

New December 2010

Directions for Use

Select the manner of service used; personal service, substituted service by leaving the notice at the defendant's home or place of work, or substituted service by posting on the property. (Code Civ. Proc., § 1162.) There is a conflict in the case law with respect to when the three-day period begins if substituted service is used. Compare *Davidson v. Quinn* (1982) 138 Cal.App.3d Supp. 9, 14 [188 Cal.Rptr. 421] [tenant must be given three days to pay, so period does not begin until actual notice is received] with *Walters v. Meyers* (1990) 226 Cal.App.3d Supp. 15, 19–20 [277 Cal.Rptr. 316] [notice is effective when posted and mailed]. This conflict is accounted for in the second and third bracketed options for the manner of service.

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

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

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

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

Sources and Authority

- Code of Civil Procedure section 1161 provides, in part:

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

  > 4. Any tenant, subtenant, or executor or administrator of his or her estate heretofore qualified and now acting, or hereafter to be qualified and act, assigning or subletting or committing waste upon the demised premises, contrary to the conditions or covenants of his or her lease, or maintaining, committing, or permitting the maintenance or commission of a nuisance upon the demised premises or using the premises for an unlawful purpose, thereby terminates the lease, and the landlord, or his or her successor in estate, shall upon service of three days' notice to quit upon the person or persons in possession, be entitled to restitution of possession of the demised premises under this chapter. For purposes of this subdivision, a person who commits

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

- Code of Civil Procedure section 1162 provides:

  The notices required by Sections 1161 and 1161a may be served, either:

  1. By delivering a copy to the tenant personally; or,

  2. If he or she is absent from his or her place of residence, and from his or her usual place of business, by leaving a copy with some person of suitable age and discretion at either place, and sending a copy through the mail addressed to the tenant at his or her place of residence; or,

  3. If such place of residence and business can not be ascertained, or a person of suitable age or discretion there can not be found, then by affixing a copy in a conspicuous place on the property, and also delivering a copy to a person there residing, if such person can be found; and also sending a copy through the mail addressed to the tenant at the place where the property is situated. Service upon a subtenant may be made in the same manner.

- "[T]he service and notice provisions in the unlawful detainer statutes and [Code of Civil Procedure] section 1013 are mutually exclusive, and thus, section 1013 does not extend the notice periods that are a prerequisite to filing an unlawful detainer action." (*Losornio v. Motta* (1998) 67 Cal.App.4th 110, 112 [78 Cal.Rptr.2d 799].)

- "We … hold that service made in accordance with section 1162, subdivision 3, as applied to section 1161, subdivision 2, must be effected in such a manner as will give a tenant the three days of written notice required by the Legislature in which he may cure his default in the payment of rent." (*Davidson, supra,* 138 Cal.App.3d Supp. at p. 14.)

- "We … hold that service of the three-day notice by posting and mailing is effective on the date the notice is posted and mailed." (*Walters, supra,* 226 Cal.App.3d Supp. at p. 20.)

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

Secondary Sources

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

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

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

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

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

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

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

Miller & Starr, California Real Estate (Thomson West) Ch. 19, *Landlord-Tenant*, §§

4400. Misappropriation of Trade Secrets—Introduction

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

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

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

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

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

New December 2007; Revised December 2010

Directions for Use

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

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

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

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

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

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

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

Sources and Authority

- Civil Code section 3426.1 provides:

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

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

  (b) "Misappropriation" means:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- "[T]he only California authority [defendant] cited for the asserted requirement [that a trade-secrets plaintiff must own the trade secret when the action is filed] was the official California pattern jury instructions—whose 'first element,' [defendant] asserted, 'requires the plaintiff to be either the owner or the licensee of the trade secret. See CACI Nos. 4400, 4401.' [Defendant] did not quote the cited instructions—for good reason. The most that can be said in favor of its reading is that the broader and less specific of the two instructions uses the present tense to refer to the requirement of ownership. That instruction, whose avowed purpose is 'to introduce the jury to the issues involved' in a trade secrets case (Directions for Use for CACI No. 4400), describes the plaintiff as claiming that he 'is' the owner/licensee of the trade secrets underlying the suit. (CACI No. 4400.) The second instruction, which enumerates the actual *elements* of the plaintiff's cause of action, dispels whatever weak whiff of relevance this use of the present tense might have. It requires the plaintiff to prove that he '*owned*' or '*was* a licensee of' the trade secrets at issue. (CACI No. 4401, italics added.) Given only these instructions to go on, one would suppose that *past* ownership—i.e., ownership at the time of the alleged misappropriation—is sufficient to establish this element." (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 997 [103 Cal.Rptr.3d 426], original italics.)

Secondary Sources

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

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

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

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

1 Zamore, Business Torts, Ch. 17, *Trade Secrets*, § 17.05 et seq. (Matthew Bender)
Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) Chs. 1, 2, 6, 12

4401. Misappropriation of Trade Secrets—Essential Factual Elements

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

1. **That [*name of plaintiff*] [owned/was a licensee of] [the following:][*describe each item claimed to be a trade secret that is subject to the misappropriation claim*];**

2. **That [this/these] [*select short term to describe, e.g., information*] [was/were] [a] trade secret[s] at the time of the misappropriation;**

3. **That [*name of defendant*] improperly [acquired/used/ [or] disclosed] the trade secret[s];**

4. **That [[*name of plaintiff*] was harmed/ [or] [*name of defendant*] was unjustly enriched]; and**

5. **That [*name of defendant*]'s [acquisition/use/ [or] disclosure] was a substantial factor in causing [[*name of plaintiff*]'s harm/ [or] [*name of defendant*] to be unjustly enriched].**

New December 2007; Revised December 2010

Directions for Use

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

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

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

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

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

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

Sources and Authority

- Civil Code section 3426.1 provides:

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

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

  (b) "Misappropriation" means:

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

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

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

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

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

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

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

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

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

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

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

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

- "A trade secret is misappropriated if a person (1) acquires a trade secret knowing or having reason to know that the trade secret has been acquired by 'improper means,' (2) discloses or uses a trade secret the person has acquired by 'improper means' or in violation of a nondisclosure obligation, (3) discloses or uses a trade secret the person knew or should have known was derived from another who had acquired it by improper means or who had a nondisclosure obligation or (4) discloses or uses a trade secret after learning that it is a trade secret but before a material change of position." (*Ajaxo Inc. v. E*Trade Group Inc.* (2005) 135 Cal.App.4th 21, 66 [37 Cal.Rptr.3d 221].)

- "A cause of action for monetary relief under CUTSA may be said to consist of the following elements: (1) possession by the plaintiff of a trade secret; (2) the defendant's misappropriation of the trade secret, meaning its wrongful acquisition, disclosure, or use; and (3) resulting or threatened injury to the plaintiff. The first of these elements is typically the most important, in the sense that until the content and nature of the claimed secret is ascertained, it will likely be impossible to intelligibly analyze the remaining issues." (*Silvaco Data Systems v. Intel Corp*. (2010) 184 Cal.App.4th 210, 220 [109 Cal.Rptr.3d 27].)

- "We find the trade secret situation more analogous to employment discrimination cases. In those cases, as we have seen, information of the employer's intent is in the hands of the employer, but discovery affords the employee the means to present sufficient evidence to raise an inference of discriminatory intent. The burden of proof remains with the plaintiff, but the defendant must then bear the burden of producing evidence once a prima facie case for the plaintiff is made. [¶] We conclude that the trial court correctly refused the proposed instruction that would have shifted the burden of proof." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1674 [3 Cal.Rptr.3d 279], internal citation omitted.)

- "[T]he only California authority [defendant] cited for the asserted requirement [that a trade-secrets plaintiff must own the trade secret when the action is filed] was the official California pattern jury instructions—whose 'first element,' [defendant] asserted, 'requires the plaintiff to be either the owner or the licensee of the trade secret. See CACI Nos. 4400, 4401.' [Defendant] did not quote the cited instructions—for good reason. The most that can be said in favor of its reading is that the broader and less specific of the two instructions uses the present tense to refer to the requirement of ownership. That instruction, whose avowed purpose is 'to introduce the jury to the issues involved' in a trade secrets case (Directions for Use for CACI No. 4400), describes the plaintiff as claiming that he 'is' the owner/licensee of the trade secrets underlying the suit. (CACI No. 4400.) The second instruction, which enumerates the actual *elements* of the plaintiff's cause of action, dispels whatever weak whiff of relevance this use of the present tense might have. It requires the plaintiff to prove that he 'owned' or 'was a licensee of' the trade secrets at issue. (CACI No. 4401, italics added.) Given only these instructions to go on, one would suppose that past ownership—i.e., ownership at the time of the alleged misappropriation—is sufficient to establish this element." (*Jasmine Networks, Inc. v. Superior Court* (2009) 180 Cal.App.4th 980, 997 [103 Cal.Rptr.3d 426].)

- "It is critical to any CUTSA cause of action—and any defense—that the information claimed to have been misappropriated be clearly identified. Accordingly, a California trade secrets plaintiff must, prior to commencing discovery, 'identify the trade secret with reasonable particularity.' " (*Silvaco Data Systems, supra,* 184 Cal.App.4th at p. 221.)

Secondary Sources

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

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

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

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

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) Chs. 1, 2, 6, 10, 11, 12

4406. Misappropriation by Disclosure

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

1. **Disclosed [it/them] without [***name of plaintiff***]'s consent; and**

2. **[Did any of the following:]**

   [*insert one or more of the following:***]**

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

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

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

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

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

New December 2007; Revised December 2010

Directions for Use

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

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

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

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

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

Sources and Authority

- Civil Code section 3426.1(b)(2) provides:

  (b) "Misappropriation" means:

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

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

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

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

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

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

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

- Civil Code section 19 provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

- "The fact that [defendant]'s postings were not of the 'entire secret,' and included only portions of courses, does not mean that [defendant]'s disclosures are not misappropriations. While previous partial disclosures arguably made public only those parts disclosed, [defendant]'s partial disclosures of non-public portions of the secrets may themselves be actionable because they constitute 'disclosure ... without ... consent by a person who ... knew or had reason to know that his ... knowledge of the trade secret was ... [either] derived from or through a person who had utilized improper means to acquire it [or] acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use.' " (*Religious Tech. Ctr. v. Netcom On-Line Commun. Servs.* (N.D. Cal. 1995) 923 F.Supp. 1231, 1257, fn. 31.)

- "Under the UTSA, simple disclosure or use may suffice to create liability. It is no longer necessary, if it ever was, to prove that the purpose to which the acquired information is put is outweighed by the interests of the trade secret holder or that use of a trade secret cannot be prohibited if it is infeasible to do so." (*Morlife, Inc. v. Perry* (1997) 56 Cal.App.4th 1514, 1527 [66 Cal.Rptr.2d 731].)

- "[N]othing in the UTSA requires that the defendant gain any advantage from the disclosure; it is sufficient to show 'use' by disclosure of a trade secret with actual or constructive knowledge that the secret was acquired under circumstances giving rise to a duty to maintain its secrecy." (*Religious Tech. Ctr., supra,* 923 F.Supp. at p. 1257, fn. 31.)

- "Liability under CUTSA is not dependent on the defendant's 'comprehension' of the trade secret but does require 'knowledge' of it." (*Silvaco Data Systems v. Intel Corp*. (2010) 184 Cal.App.4th 210, 229 [109 Cal.Rptr.3d 27].)

- " 'Knowledge,' of course, is '[t]he fact or condition of knowing,' … and in this context, '[t]he fact of knowing a thing, state, etc. …' (8 Oxford English Dict., supra, p. 517.) To 'know' a thing is to have information of that thing at one's command, in one's possession, subject to study, disclosure, and exploitation. To say that one 'knows' a fact is also to say that one *possesses information* of that fact. Thus, although the Restatement Third of Unfair Competition does not identify knowledge of the trade secret as an element of a trade secrets cause of action, the accompanying comments make it clear that liability presupposes the defendant's 'possession' of misappropriated information." (*Silvaco, supra,* 184 Cal.App.4th at pp. 225–226, original italics.)

- "The record contains no evidence that [defendant] ever possessed or had knowledge of any source code connected with either [software product]. So far as the record shows, [defendant] never had access to that code, could not disclose any part of it to anyone else, and had no way of using it to write or improve code of its own. [Defendant] appears to have been in substantially the same position as the customer in the pie shop who is accused of stealing the secret recipe because he bought a pie with knowledge that a rival baker had accused the seller of using the rival's stolen recipe. The customer does not, by buying or eating the pie, gain knowledge of the recipe used to make it." (*Silvaco, supra,* 184 Cal.App.4th at p. 226.)

- "When a competitor hires a former employee of plaintiff who is likely to disclose trade secrets, '[i]t is a question of fact whether the competitor had constructive notice of the plaintiff's right in the secret.' " (*Ralph Andrews Productions, Inc. v. Paramount Pictures Corp.* (1990) 222 Cal.App.3d 676, 682–683 [271 Cal.Rptr. 797], internal citation omitted.)

Secondary Sources

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

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

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) Chs. 2, 6, 12

4407. Misappropriation by Use

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

1. **Used [it/them] without [***name of plaintiff***]'s consent; and**

2. **[Did any of the following:]**

   [*insert one or more of the following:***]**

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

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

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

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

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

New December 2007; Revised December 2010

Directions for Use

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

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

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

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

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

Sources and Authority

- Civil Code section 3426.1(b)(2) provides:

  (b) "Misappropriation" means:

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

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

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

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

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

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

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

- Civil Code section 19 provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

- "Under the plain terms of the Uniform Trade Secrets Act, defendants may be personally liable if: they used, through the corporation, [plaintiff]'s trade secrets; at the time of the use of the confidential information they knew or had reason to know that knowledge of the trade secrets was derived from or through a person who had improperly acquired the knowledge, or the secrets were obtained by a person who owed a duty to plaintiffs to maintain the secrecy. Employing the confidential information in manufacturing, production, research or development, marketing goods that embody the trade secret, or soliciting customers through the use of trade secret information, all constitute use. Use of a trade secret without knowledge it was acquired by improper means does not subject a person to liability unless the person receives notice that its use of the information is wrongful." (*PMC, Inc. v. Kadisha* (2000) 78 Cal.App.4th 1368, 1383 [93 Cal.Rptr.2d 663], internal citations omitted.)

- "Under the UTSA, simple disclosure or use may suffice to create liability. It is no longer necessary, if it ever was, to prove that the purpose to which the acquired information is put is

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

- "One clearly engages in the 'use' of a secret, in the ordinary sense, when one directly exploits it for his own advantage, e.g., by incorporating it into his own manufacturing technique or product. But 'use' in the ordinary sense is not present when the conduct consists entirely of possessing, and taking advantage of, something that was made using the secret. One who bakes a pie from a recipe certainly engages in the 'use' of the latter; but one who eats the pie does not, by virtue of that act alone, make 'use' of the recipe in any ordinary sense, and this is true even if the baker is accused of stealing the recipe from a competitor, and the diner knows of that accusation. Yet this is substantially the same situation as when one runs software that was compiled from allegedly stolen source code. The source code is the recipe from which the pie (executable program) is baked (compiled). Nor is the analogy weakened by the fact that a diner is not ordinarily said to make 'use' of something he eats. His metabolism may be said to do so, or the analogy may be adjusted to replace the pie with an instrument, such as a stopwatch. A coach who employs the latter to time a race certainly makes 'use' of it, but only a sophist could bring himself to say that coach "uses" trade secrets involved in the manufacture of the watch." (*Silvaco Data Systems v. Intel Corp*. (2010) 184 Cal.App.4th 210, 224 [109 Cal.Rptr.3d 27].)

- "Liability under CUTSA is not dependent on the defendant's 'comprehension' of the trade secret but does require 'knowledge' of it. So far as the record shows, [defendant] did not know and had no way to get the information constituting the trade secret. It therefore could not, within the contemplation of the act, 'use' that information." (*Silvaco Data Systems, supra,* 184 Cal.App.4th at p. 229.)

- " 'Knowledge,' of course, is '[t]he fact or condition of knowing,' … and in this context, '[t]he fact of knowing a thing, state, etc. …' (8 Oxford English Dict., supra, p. 517.) To 'know' a thing is to have information of that thing at one's command, in one's possession, subject to study, disclosure, and exploitation. To say that one 'knows' a fact is also to say that one *possesses information* of that fact. Thus, although the Restatement Third of Unfair Competition does not identify knowledge of the trade secret as an element of a trade secrets cause of action, the accompanying comments make it clear that liability presupposes the defendant's 'possession' of misappropriated information." (*Silvaco, supra,* 184 Cal.App.4th at pp. 225–226, original italics.)

- "The record contains no evidence that [defendant] ever possessed or had knowledge of any source code connected with either [software product]. So far as the record shows, [defendant] never had access to that code, could not disclose any part of it to anyone else, and had no way of using it to write or improve code of its own. [Defendant] appears to have been in substantially the same position as the customer in the pie shop who is accused of stealing the secret recipe because he bought a pie with knowledge that a rival baker had accused the seller of using the rival's stolen recipe. The customer does not, by buying or eating the pie, gain knowledge of the recipe used to make it." (*Silvaco, supra,* 184 Cal.App.4th at p. 226.)

- "When a competitor hires a former employee of plaintiff who is likely to disclose trade secrets, '[i]t is a question of fact whether the competitor had constructive notice of the plaintiff's right in

the secret.' " (*Ralph Andrews Productions, Inc. v. Paramount Pictures Corp.* (1990) 222 Cal.App.3d 676, 682–683 [271 Cal.Rptr. 797], internal citation omitted.)

- "Our Supreme Court has previously distinguished solicitation--which is actionable--from announcing a job change--which is not: 'Merely informing customers of one's former employer of a change of employment, without more, is not solicitation. Neither does the willingness to discuss business upon invitation of another party constitute solicitation on the part of the invitee. Equity will not enjoin a former employee from receiving business from the customers of his former employer, even though the circumstances be such that he should be prohibited from soliciting such business.' " (*Hilb v. Robb* (1995) 33 Cal.App.4th 1812, 1821 [39 Cal.Rptr. 2d 887], internal citation omitted; but see *Morlife, Inc., supra,* 56 Cal.App.4th at p. 1527, fn. 8 ["we need not decide whether the 'professional announcement' exception … has continued vitality in light of the expansive definition of misappropriation under the UTSA"].)

- "[T]o prove misappropriation of a trade secret under the UTSA, a plaintiff must establish (among other things) that the defendant improperly 'used' the plaintiff's trade secret. Thus, under Evidence Code sections 500 and 520, the plaintiff bears the burden of proof on that issue, both at the outset and during trial." (*Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1668 [3 Cal.Rptr.3d 279], internal citation omitted.)

- "[I]nformation relative to customers (e.g., their identities, locations, and individual preferences), obtained by a former employee in his contacts with them during his employment, may amount to 'trade secrets' which will warrant his being enjoined from exploitation or disclosure after leaving the employment. [¶] It is equally clear, however, that the proscriptions inhibiting the ex-employee reach only his use of such information, not to his mere possession or knowledge of it." (*Golden State Linen Service, Inc. v. Vidalin* (1977) 69 Cal.App.3d 1, 7–8 [137 Cal.Rptr. 807], internal citations omitted.)

- "Since these 'Marks' likely encompass any trade secrets, it is reasonable to conclude that one party's use of the trade secrets that affects the other party's rights in the mark would constitute the misappropriation of the trade secrets 'of another.' " (*Morton v. Rank Am., Inc.* (C.D. Cal. 1993), 812 F.Supp. 1062, 1074 [one can misappropriate trade secret jointly owned with another].)

Secondary Sources

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

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

Edelson & Kay, eds., Trade Secret Litigation and Protection in California (State Bar of California 2005) Chs. 2, 6, 12

5018. Audio or Video Recording and Transcript

A [sound/video] recording has been admitted into evidence and a transcript of the recording has been provided to you. The recording itself is the evidence. The transcript may not be completely accurate. It may contain errors, omissions, or notations of inaudible portions of the recording. Therefore, you should use the transcript only as a guide to help you in following along with the recording. If there is a discrepancy between your understanding of the recording and the transcript, your understanding of the recording must prevail.

[[Portions of the recording have been deleted.] [The transcript [also] contains strikeouts or other deletions.] You must disregard any deleted portions of the recording or transcript and must not speculate as to why there are deletions or guess what might have been said or done.]

[For the video deposition(s) of [*name(s) of deponent(s)***], the transcript is the official record that you should consider as evidence.]**

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Directions for Use

Give this instruction if an audio or video recording was played at trial and accepted into evidence. Include the second paragraph if only a portion of the recording was received into evidence, or if parts of the transcript have been redacted out. Give the last paragraph if a transcript of a deposition was provided to the jury. (See Code Civ. Proc., § 2025.510(g); see also CACI No. 208.).

Sources and Authority

- "Defendant contends the trial court erred in permitting the prosecution to provide the jury with a written transcript of the tape recording, because the transcript was not properly authenticated as an accurate rendition of the tape recording. [¶] Following the testimony of [witness] during the prosecution's case- in-chief, the prosecutor proposed to play the tape recording to the jury. Defense counsel suggested the jury should be informed that portions of the tape recording were unintelligible. When the trial court observed that a transcript of the tape recording would be submitted to the jury, defense counsel voiced concern that the jury would follow the transcript rather than independently consider the tape recording. The trial court indicated it would listen to the tape recording and, in the event the court determined that the transcript would assist the jury in its understanding of the interview, a copy of the transcript would be provided to the jury at the time of its deliberations. … The trial court instructed the jury that in the event there was any discrepancy between the jury's understanding of the tape recording and the typed transcript, the jury's understanding of the recording should control." (*People v. Sims* (1993) 5 Cal.4th 405, 448 [20 Cal.Rptr.2d 537, 853 P.2d 992], internal citation omitted.)

- " 'To be admissible, tape recordings need not be completely intelligible for the entire conversation as long as enough is intelligible to be relevant without creating an inference of

speculation or unfairness.' [¶] Thus, partially unintelligible tape is admissible unless the audible portions of the tape are so incomplete the tape's relevance is destroyed. The fact a tape recording 'may not be clear in its entirety does not of itself require its exclusion from evidence since a witness may testify to part of a conversation if that is all he heard and it appears to be intelligible.' " (*People v. Polk* (1996) 47 Cal.App.4th 944, 953 [54 Cal.Rptr.2d 921], internal citations omitted.)

- "[T]ranscripts of admissible tape recordings are only prejudicial if it is shown they are so inaccurate that the jury might be misled into convicting an innocent man." (*People v. Polk, supra,* 47 Cal.App.4th at p. 955.)

- "During closing arguments all counsel cautioned the jury the transcript was only a guide and to just listen to the tape. Before the jury left to deliberate, the court again instructed it to disregard the transcript and sent that instruction into the jury room. We presume the jurors followed the court's instructions regarding the tape and the use of the transcript." (*People v. Brown* (1990) 225 Cal.App.3d 585, 598 [275 Cal.Rptr. 268].)

Secondary Sources