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Preface

Real property remedies are fundamental to any real estate practice and often arise in a general law practice. The first edition of CEB's California Real Property Remedies Practice was published in 1982, in part using materials modified from abundant handouts for a series of CEB programs on real property remedies in the late 1970s. The first edition of the Remedies book provided a much-needed, comprehensive resource on the substance and procedures of the most widely applied real property remedies in California. Uniquely arranged by type of remedy, and focusing on real property sales remedies, it guided attorneys through every stage of the most commonly used causes of action.

Between 1980 and 2000, real property transactions became more complex with the expansion of disclosure obligations, increased buyer due diligence, alternative financing, and a rise in tenancy-in-common ownership arrangements. Real property litigation became more intricate, expensive, risky, and varied with more black letter law, additional court rules, the comprehensive revision of the lis pendens statutes, the proliferation of contractual binding arbitration, and the widespread imposition of alternative dispute resolution in court actions.

The dynamics of real property remedies also affect the most basic transactions. In drafting transactional documents, lawyers must be aware of the remedies available on default. The lawyer may want to expand or restrict those remedies or add alternative dispute resolution requirements, but should do so only with a clear and complete understanding of how those remedies work.

This new, second edition builds on the strengths of the first edition, not only retaining its chapter organization, depth, broad scope, and primary focus on sales remedies, but also expanding the coverage of remedies pertinent to other real property transactions. The new edition includes important enhancements to address the developments of the last 20 years:

- A full chapter on lis pendens procedures adapted from CEB's California Lis Pendens Practice (2d ed Cal CEB 1994);
- Discussion and strategies on the use of title company products and title insurance in prosecuting and defending real property actions;
- A new chapter on landslide and subsidence liability adapted from CEB's Landslide and Subsidence Liability (Cal CEB 1974), see chap 12;
- Multitheory complaint forms to reflect the realities of modern real property litigation practice;
- State-of-the-art forms for litigating a partition action to final judgment;
- New Practice Tips and litigation strategies in every chapter;
- An expanded chapter on remedies for nuisance and trespass;
- A new chapter on ADR emphasizing real property disputes and actions; and
- Organizational changes to make the material more accessible.

CEB is extremely fortunate to have expert real property litigators as the authors of this new edition, drawn as equally as possible from both plaintiff and defense bars. The authors are named on the title page, the Contents page and the first page of each chapter; their biographical footnotes appear in About the Authors. CEB also wishes to thank the consulting judges and contributing editors who reviewed, commented on, and added original material to the manuscript.

CEB is very grateful to each of the following, who brought to this project their expertise both as trial judges and as real property litigators before ascending to the bench. Their valuable insights and suggestions made this new edition more thorough, accurate, practical, balanced, and reflective of California practice:

Hon. Richard A. Adler, Los Angeles Superior Court
Hon. Charlene Padovani Kiesselbach, San Francisco Superior Court
Hon. Ronald L. Styn, San Diego Superior Court

Also, CEB extends its heartfelt thanks to Charles A. Hansen and Joan M. Cambray of Wendel, Rosen, Black & Dean, Oakland, contributing editors of this new edition, who added invaluable practice tips and strategies on the crucial role of

title company products and title insurance in prosecuting and defending real property title actions. Finally, CEB acknowledges the generous assistance of Professor Roger Bernhardt of Golden Gate University School of Law, San Francisco, renowned author of CEB books on real property financing law, who reviewed and commented on portions of chapter 4, and of James Acret, Pacific Palisades, renowned author of CEB books on construction law, who recruited authors and consultants and gave much research time and supportive energy to this project.

The project manager for this book was CEB Attorney Bonnie C. Maly, who also contributed legal writing and editing, practice tips, forms, and other original material, with legal editing assistance from Robin Kojima, who also added new cases and other developments, and Crin Valley.

Legal research and analysis was provided by Alice Kostin and Marty Weis, assisted by Crin Valley, Ken Marr, Nancy Lawlor, and Timothy Shannon. Copyediting was performed by Cinda Ely. Robert W. Burke prepared the index. Akanke Peyton provided administrative assistance. The book cover was designed by Grier L. Thornburg. Composition was performed by CEB's Electronic Publishing staff.

August 2010 Update

CEB acknowledges and thanks Leslie A. Baxter of Randick O'Dea & Tooliatos, LLP, Pleasanton, and Gregory S. Nerland of Akawie & LaPietra, Walnut Creek, co-authors of the 2010 update. We extend special thanks also to David B. Dimitruk of Irvine, California, who provided additional material for chapter 4.

CEB Attorney Editor Bonnie C. Maly and Legal Editors Philip Weverka and Ken Marr contributed to this update. Kenya Denman and Nila Kanzaria provided administrative support. Joseph Curran handled copyediting and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

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Selected Developments

August 2010 Update

Under 15 USC §1635(f), the truth in lending laws, the right of rescission expires 3 years after the loan closes or on the sale of the secured property, whichever occurs earlier. The rescinding party must allege a financial capability of tendering the loan proceeds. *Gonzalez v First Franklin Loan Servs.* (ED Cal, Jan. 9, 2010, No. 1:09-CV-00941) 2010 US Dist Lexis 1657. See §§1.28, 1.35.

In rare instances, a small claims court has jurisdiction to award the remedies of rescission, reformation, and specific performance. See CCP §116.220(b), cited in §§1.40, 2.13, 5.25.

In *Flagship West LLC v Excel Realty Partners* (9th Cir 2009) 337 Fed Appx. 679 (unpublished opinion), the landlord was not judicially estopped from enforcing a "no rescission" clause in a lease, and the case was remanded for a determination of whether the lease allows for rescission. See §1.52.

Brokers and agents may be subject to discipline if they violate state mortgage statutes, which include a prohibition from receiving advance compensation for mortgage loan modifications. Any person who negotiates a residential mortgage loan modification or forbearance must make certain disclosures regarding associated fees. Bus & P C §§10026, 10085.6, 10147.6, 10177(q). See §§3.7A, 3.33A, 3.35.

Among the disclosures that a seller must complete and deliver to the buyer in the comprehensive real estate disclosure statement is the existence of any contractual assessments on the subject property. CC §§1102.6b(a)(2), 1102.155. See §§3.30, 3.31.

Sellers of residential property must disclose whether the property is in compliance with requirements for smoke detectors and hot water heaters (effective January 1, 2011) and for carbon monoxide detectors (effective July 1, 2011). CC §§1102.6, 1102.6d; Health & S C §§13113.8, 17926. See §§3.30-3.31.

Sellers of single-family residential property (effective January 1, 2017) and sellers of multifamily residential and commercial property (effective January 1, 2019) must disclose whether the property has plumbing fixtures that do not meet water conservation standards. CC §§1101.4(c), 1101.5(e), 1102.155. See §§3.30-3.31, 3.33A, 12.43.

Mortgage loan originators have new licensing, regulatory and disclosure duties under Bus & P C §§10140.6(b)(1), 10151(e), 10166.01-10166.17. See §3.33B.

The supreme court held that an amendment to Bus & P C §17200 requires a consumer suing a business under the fraud prong of the UCL to plead and prove actual reliance on the alleged misrepresentation. See *In re Tobacco II Cases* (2009) 46 C4th 298, 326, 93 CR3d 559. Similarly, a court of appeal concluded that to have standing to bring a claim under the unlawful prong of the UCL, in which the unlawful conduct is based on misrepresentations actual reliance is an essential element of the claim. *Durrell v Sharp Healthcare* (2010) 183 CA4th 1350, 1363, ___ CR3d ___. See §3.39.

In *Champlaie v BAC Home Loans Servicing, LP* (ED Cal, Oct. 22, 2009, No. S-09-1316) 2009 US Dist Lexis 102285, the court precluded a claim against a lender for civil conspiracy to commit breach of the broker's fiduciary duties because the lender, unlike the broker, owes no underlying fiduciary duty to the borrower. However, in *Yulaeva v Greenpoint Mortgage Funding, Inc.* (ED Cal, Sept. 3, 2009, No. S-09-1504) 2009 US Dist Lexis 79094 the court suggested that a conspiracy claim is not barred when some involved parties do not owe primary duty but are necessary for success of conspiracy. See §3.76.

In *Paragon Real Estate Group v Hansen* (2009) 178 CA4th 177, 182, 100 CR3d 234 the buyer sought damages against the seller's broker for failure to disclose an easement, and against her own broker for failure to properly advise her. The court allowed a buyer's broker to cross-complain for equitable indemnity against seller's broker even though the two brokers owed different duties to the plaintiff buyer. See §§3.89, 3.89B, 3.89E.

In *Leko v Cornerstone Bldg. Inspection Serv.* (2001) 86 CA4th 1109, 103 CR2d 858 the court allowed a broker to pursue indemnity against a home inspector. See §3.89.

For a recent application of the doctrine of promissory estoppel, which may serve as a substitute for consideration when detrimental reliance has occurred, see *Garcia v World Savs. Bank* (2010) 183 CA4th 1031, ___ CR3d ___ (lender's broken promise to extend trustee sale date for another week during telephone calls with loan broker, who was assisting borrower in obtaining refinancing on other real property to cure default, supported promissory estoppel as basis for quasi-contract action against lender). See §4.20.

For the purpose of awarding attorney fees, a determination of the net monetary recovery under CCP §1032 must

include an offset of any settlement funds received by the plaintiff from co-obligors under CCP §877. If the offset reduces the damages award to zero, the defendant is the prevailing party. *Goodman v Lozano* (2010) 47 C4th 1327, 104 CR3d 219. See §4.49A.

A prevailing party may recover attorney's fees from a party in forma pauperis, but the court has a duty to evaluate all elements of a lodestar analysis, including the financial ability of the losing party to pay. *Garcia v Santana* (2009) 174 CA4th 464, 476, 94 CR3d 299. See §4.49E.

The California Supreme Court held that an agreement that is otherwise illusory may be enforced if the promisor has rendered at least part performance. *Steiner v Thexton* (2010) 48 C4th 411, 423, 106 CR3d 252. See §§4.7, 4.12, 4.19, 4.21, 4.54, 5.8.

During a period of rising property values, when a seller seeks damages from a defaulting buyer, if the property has increased in value before trial and the seller resells the property at a price equal to or higher than the value of the contract, there are no longer any loss-of-bargain damages. See *Kuish v Smith* (2010) 181 CA4th 1419, 1426, 105 CR3d 475. See §§4.19, 4.69, 4.74-4.75.

When faced with mixed questions of law and equity, the parties obviated the need for a second trial by agreeing first to have court trial on an exemption affirmative defense, and after the court ruled on defense, then stipulated to all remaining issues. *Pellegrino v. Robert Half Int'l, Inc.* (review granted April 28, 2010, S180849; superseded opinion at 182 CA4th 87, 113, 104 CR3d 790). See §5.24.

The supreme court has granted review in *Clark v Superior Court* (review granted Sept. 9, 2009, S174229; superseded opinion at 174 CA4th 82, 94 CR3d 135) to determine whether the enhanced remedy under CC §3345 is available in private actions by senior citizens seeking restitution under the California Unfair Competition Law (Bus & P C §§17200-17210). See §6.9.

To assert adverse possession, written or actual notice of occupancy is not required even if the record owner is not physically present in the area. *Nielsen v Gibson* (2009) 178 CA4th 318, 338, 100 CR3d 335 (record owner residing for extended period in Ireland had constructive notice of adverse possession of California real property; occupants fenced, irrigated, improved, and built a go-cart course on land). See §7.4.

Effective January 1, 2010, an absentee owner can protect its title against adverse possession by instructing the tax collector's office to return tax payments tendered on a parcel by a party who is not the owner of record. Rev & T C §2781.5. See §7.4.

A landlocked parcel created by a federal patent will not support a claim of an easement by necessity unless there is a clear showing of the intent of the sovereign grantor to retain an easement. *Murphy v Burch* (2009) 46 C4th 157, 165, 92 CR3d 381. See §7.6.

In *Linthicum v Butterfield* (2009) 175 CA4th 259, 270, 95 CR3d 538, in a quiet title action asserted in a cross-complaint, the defendant was awarded an equitable easement for access to landlocked property, but because the defendant disclaimed a utility easement in the plaintiff's land, he was not entitled to judgment on that cause of action. See §§7.1, 7.6, 7.44.

Although a cotenant's right to have commonly owned real property partitioned is usually absolute, a court of appeal recently examined the extent to which that right can be altered or waived by agreement. See, *e.g.*, *LEG Investments v Boxler* (2010) 183 CA4th 484, 2010 Cal App Lexis 442 (right of first refusal in tenancy in common agreement without express waiver of partition right is not absolute waiver of right to partition, but requires only that selling owner first comply with right of first refusal by offering its interest to other owner before seeking partition), cited in §§8.19, 8.58.

Defendants who deposit hazardous waste at a county landfill when the act of depositing the waste is not itself negligence or intentional misconduct have not committed a nuisance. *West Coast Home Builders, Inc. v Aventis Cropscience USA, Inc.* (ND Cal, Aug. 21, 2009, No. C04-2225) 2009 US Dist Lexis 74460. See §§11.2, 11.24.

A real property owner may bring an action to abate a public nuisance against parties responsible for safety hazards and obstruction of access to sidewalk and public street. *Kempton v City of Los Angeles* (2008) 165 CA4th 1344, 1348, 81 CR3d 852. See §11.4.

A court of appeal decided that guest-invitees, who were attacked by strangers when they arrived at a party advertised on the Internet, did not adequately allege facts indicating that the owner-invitor created or assisted in creating a public nuisance See also *Melton v Boustred* (2010) 183 CA4th 521, ___ CR3d ___. See §11.7.

A lessee has a defense of consent to a cause of action for nuisance when the conduct of the lessee was lawful and authorized by the lease. *SPPI-Somersville, Inc. v TRC Cos., Inc.* (ND Cal, Aug. 3, 2009, No. C04-2648) 2009 US Dist Lexis 71463. See §§11.17, 11.24, 11.44.

A lack of evidence of an ability to repair or abate by a reasonable means and at a reasonable cost precluded a determination that the nuisance was continuing, resulting in a time bar based on a 16-year-old complaint that started the 3-year statute of limitation period for property damage under CCP §338(b). *McCoy v Gustafson* (2009) 180 CA4th 56, 103 CR3d 37. See §§11.13-11.16, 11.40, 11.41.

In *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442, 459, 102 CR3d 32 the court held that in a trespass action nonresident owners cannot recover damages for annoyance and discomfort. The plaintiff intended, because it was his only meaningful alternative, to restore the property as his primary residence, and the court affirmed an award of restoration costs which exceeded the value of the property by 67 percent. Attorney fees were also recoverable under CCP §1021.9 even if the land was not being used for livestock or cultivation at the time of the trespass, because there was an intent to do so. See §§11.29-11.30, 11.32, 12.31, 12.84, 12.86.

Civil Code §§3485 and 3486 that allow for the city attorney or district attorney of certain counties to file an eviction action against a tenant if the nuisance involves the use of weapons or controlled substances has been extended to January 1, 2014. See §11.50.

In *Union Oil Co. v Greka Energy Corp.* (2008) 165 CA4th 129, 138, 80 CR3d 738 the court applied equitable estoppel to stop the running of the statute of limitations when the defendant repeatedly engaged in settlement talks and asked plaintiff to withhold litigation until they resolved dispute. Equitable estoppel applied where an insurer, required by law to inform plaintiff parties of an impending statute of limitations, failed to do so. *Superior Dispatch, Inc. v Insurance Corp.* (2010) 181 CA4th 175, 188, 104 CR3d 508. See §12.79.

In evaluating a large corporation's liability for punitive damages arising from the actions of a manager, the court examined whether the offending manger had "broad authority" over corporate policy, affecting many employees, so that the manger's actions were likely to come to the attention of corporate leadership. The court also reduced punitive damages to an amount roughly equal to compensatory damages. *Roby v McKesson Corp.* (2009) 47 C4th 686, 715, 101 CR3d 773. See §12.87.

In *Park 100 Inv. Group II v Ryan* (2009) 180 CA4th 795, 812, 103 CR3d 218 the court rejected a slander of title theory and an intentional interference with prospective economic advantage claim regarding recordation of lis pendens in easement enforcement action. See §§13.5, 13.72, 13.82.

The filing of a lawsuit is essential before recordation of a lis pendens. *Manhattan Loft, LLC v Mercury Liquors, Inc.* (2009) 173 CA4th 1040, 93 CR3d 457 (arbitration proceeding without companion court case will not support lis pendens). See §§13.4, 13.18, 13.21, 14.11, 14.28.

In *Ricketts v McCormack* (2009) 177 CA4th 1324, 1333 n9, 99 CR3d 817 the court denied the plaintiff's claim that the county failed to enter a reconveyance into the recorder's general index, noting that certified copies of the recorded notice should be available if the attorney has the recording number assigned to the notice. See §13.40.

A new California Residential Purchase Agreement and Joint Escrow Instructions (CAR form RPA-CA, rev 4/10) was released by the California Association of Realtors. Among other items, the arbitration clause now states: "Enforcement of this agreement to arbitrate shall be governed by the Federal Arbitration Act." See §§14.11, 14.17, 14.38C.

A dispute between the insured and the insurer regarding valuation was properly the subject of arbitration. Further, the existence of a relationship between an appraiser unilaterally appointed by a party and that party's attorney will not alone suffice to disqualify the appraiser; the court must evaluate whether the relationship would cause a reasonable person to doubt the impartiality of the party appointed appraiser. *Mahnke v Superior Court* (2009) 180 CA4th 565, 103 CR3d 197. See §§14.13, 14.43.

A court of appeal held that CC&Rs are not an effective means for a builder to obtain an enforceable agreement to arbitrate the homeowners' association's construction defect claims. See *Villa Vicenza Homeowners Ass'n v Nobel Court Dev., LLC* (2010) ___ CA4th ___, 2010 Cal App Lexis 774. See §14.21.

The supreme court granted review on a court of appeal decision in *Tarrant Bell Prop. v Superior Court* (review granted Feb. 18, 2010, S179378; superseded opinion at 179 CA4th 1283, 102 CR3d 235) which recognized that the trial court had discretion to deny enforcement of a judicial reference agreement if there was a possibility of conflicting rulings or other circumstances related to judicial economy, similar to the discretion to deny enforcement of an arbitration agreement. See §§14.21, 14.26, 14.35, 14.39A.

In *Toal v Tardif* (2009) 178 CA4th 1208, 101 CR3d 97, a stipulation signed only by attorneys for parties was not sufficient to obligate parties without evidence beyond agreement showing that objecting party had expressly authorized attorney to sign it. See §§14.26, 14.40.

After judgment is entered against a defendant, postjudgment mediation may not be enforced under CCP §664.6, because there is not any pending litigation, and enforcement under §664.6 would violate the two judgment rule. *Walton v Mueller* (2009) 180 CA4th 161, 102 CR3d 605. See §14.27.

For a recent court of appeal case interpreting choice-of-law provisions in a real property purchase form contract, see *Valencia v Smyth* (2010) ___ CA4th ___, ___ CR3d ___, 2010 Cal App Lexis 789 (concluding that by adopting federal law for contract interpretation, parties did not displace California procedural rules; both federal and California law employ same principles of contract interpretation; thus, trial court had authority to deny arbitration and order all parties joined in single court action), cited in §14.38C. See also *Parada v Superior Court* (2009) 176 CA4th 1554, 98 CR3d 743 (declining to apply FAA in interpreting arbitration clause).

In *Thompson v Toll Dublin, LLC* (2008) 165 CA4th 1360, 81 CR3d 736 an arbitration provision that was part of preprinted form contract, presented on take-it-or-leave-it basis, and buried in almost 800 pages of documents given to plaintiffs as part of condominium purchase agreement was unenforceable. See §14.42B.

Unconscionability was proven in *Lhotka v Geographic Expeditions, Inc.* (2010) 181 CA4th 816, 104 CR3d 844, a wrongful death action brought by survivors of a client on a hiking expedition, where the court found the provisions to be substantively and procedurally unconscionable. The participants had no meaningful choice but to sign the release. See §14.42B.

In *Parada v Superior Court* (2009) 176 CA4th 1554, 98 CR3d 743, the court found an arbitration provision to be both substantively and procedurally unconscionable, that the process was unreasonably expensive, and that the defendant intended to discourage any dispute resolution procedures. See §14.42B. See also *Thompson v Toll Dublin, LLC* (2008) 165 CA4th 1360, 81 CR3d 736 (arbitration provisions were part of preprinted form contract, presented on take-it-or-leave-it basis, and were buried in almost 800 pages of documents given to plaintiffs as part of condominium purchase agreement).

In *Granite Rock Co. v International Brotherhood of Teamsters* (9th Cir 2008) 546 F3d 1169, the court concluded that a party who initiated a suit on a contract containing an arbitration clause (without independently challenging the arbitration clause or its scope) could not object to a motion by the defendant to submit the formation dispute to arbitration, because that party admitted the existence of the contract and the agreement to arbitrate by filing suit. See §14.42D.

In *Gilbert St. Developers LLC v La Quinta Homes* (2009) 174 CA4th 1185, 1192, 94 CR3d 918, the arbitration agreement incorporated the rules of the American Arbitration Association. The court refused to impose on the parties a postagreement revision of the AAA rules, because the arbitration agreement was not clear enough to put the parties on notice of this departure from the ordinary rule that the court decides the scope of arbitrability. See §14.42E.

Although parties may expressly provide in their arbitration agreement for judicial review of legal error in the arbitration award, a court of appeal recently decided that the language was not sufficient to invoke judicial review of the award. See *Gravillis v Coldwell Banker Residential Brokerage Co. (Gravillis II)* (2010) 182 CA4th 503, 106 CR3d 70 (agreement did not specifically and unambiguously provide for judicial review of award for legal error), cited in §14.44.

In an arbitration over an encroachment, the court vacated an arbitration award which included damages for diminution in value and the costs to move a fence and a pool. *Burlage v Superior Court* (2009) 178 CA4th 524, 100 CR3d 531. The court found that the arbitrator's refusal to admit evidence that before the hearing a title company paid for a lot line adjustment that provided fee simple title to the buyers so that the fence and pool could stay where they were substantially prejudiced the seller's ability to dispute damages. See §14.46.

In *Valley Casework, Inc. v Comfort Constr., Inc.* (Ct. App. 1999) 76 CA4th 1013, 90 CR2d 779, a court of appeal rejected a nonsignatory insurer's attempt to compel a signatory to a contract containing an arbitration clause to submit to binding arbitration on the theory that the insurer had the right, under the doctrine of equitable subrogation, to enforce its insured's contractual rights. See §14.50.

A constructive trust may be imposed on funds in the hands of a defendant resulting from the sale of real property if the property was transferred by mistake. See *Teselle v McLoughlin* (2009) 173 CA4th 156, 177, 92 CR3d 696. See §15.8.

August 2009 Update

An aggrieved seller's recordation of a notice of rescission or a lis pendens under the Home Equity Sales Contracts Act (CC §§1695-1695.17) is a protected act in furtherance of the seller's rights, under CCP §425.16(e). See *Salma v Capon* (2008) 161 CA4th 1275, 1285, 74 CR3d 873. See §§1.22, 13.82.

Class actions are not allowed under the federal Truth-in-Lending Act. *LaLiberte v Pacific Mercantile Bank* (2007) 147 CA4th 1, 53 CR3d 745; *Andrews v Chevy Chase Bank* (7th Cir 2008) 545 F3d 570. See §1.28.

The California Supreme Court reiterated the rule that to create a fiduciary duty, a person must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship, such as a contract, that imposes the obligation as a matter of law. See *City of Hope Nat'l Med. Ctr. v Genentech, Inc.* (2008) 43 C4th 375, 75 CR3d 333 (fiduciary duty did not arise from contract between hospital and biotechnology company under which hospital entrusted secret invention to company to develop, patent, and market product; consequently court set aside punitive damages). See §§3.27, 3.61, 3.63, 12.87.

In *Alfaro v Community Hous. Improvement Sys. & Planning Ass'n, Inc.* (2009) 171 CA4th 1356, 89 CR3d 659, multiple plaintiffs were allowed to proceed to trial on their claims for damages but not to invalidate deed restrictions limiting homeowner equity, if they prove that they were induced to perform by the sellers' failure to disclose the deed restrictions. See §§3.15, 3.39-3.40, 3.61-3.62, 6.17.

Sellers' duties to disclose property conditions such as natural hazards, including floods, fires, earthquakes, and

proximity to airports, farms, or ranches were expanded by statutory amendment to CC §§1103-1103.14. See §3.31.

In addition to remedies the principals may pursue individually, the Commissioner of the Department of Real Estate may discipline real estate agents who fail to disclose their dual agency to the parties in a transaction under a recent amendment to Bus & P C §10176(d). See §§3.7A, 3.32C, 3.32F, 3.35.

Recent amendments to statutes regulating the conduct of real estate licensees require them to disclose if they will undertake to arrange financing or if the arranger of financing will also act as an agent for a party to a sale. Bus & P C §10177.6. See §3.33.

If previously accurate representations become false because of a change in circumstances, the person who made them (seller or broker) must disclose the new circumstances. In *Blickman Turkus, LP v MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 76 CR3d 325, however, the court sustained a demurrer because the plaintiff could not plead or prove the element of reliance on the nondisclosure because the plaintiff had already signed the lease when the circumstances changed. See §§3.42, 3.61.

Also in *Blickman Turkus, LP v MF Downtown Sunnyvale, LLC, supra,* the court declined to award attorney fees to the landlord who had defeated the procuring broker's action for a commission on the lease because the procuring broker was not a party to the listing agreement containing the attorney fee clause. See §§3.56, 4.49.

The Ninth Circuit in *State of California v Altus Finance S.A.* (9th Cir 2008) 540 F3d 992, reversed a jury award of punitive damages in a case involving fraudulent conspiracy during insurance insolvency proceedings. Even though the restitutionary award was substantial, the court reasoned that California law requires an award of actual damages to support an award of punitive damages. See §§3.55, 12.87.

In *Prince v PG&E* (2009) 45 C4th 1151, 90 CR3d 732, the supreme court held that because equitable indemnity is derivative and subject to whatever immunities or other limitations on liability are available against the injured party, the immunity granted by CC §846 barred an equitable indemnity action against a utility company by the property owner who was sued for personal injuries sustained by recreational invitee. See §3.89C.

Throughout chapter 3, cross-references were added to aid the reader in finding more discussion of issues involving rights, duties, and liabilities of real estate licensees in the new CEB book California Real Estate Brokers: Law and Litigation (Cal CEB 2009).

In *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366, a suit for specific performance of a real estate option contract, the supreme court unanimously held that a purchase contract is enforceable despite its lack of terms of time and manner of payment; reasonable terms may be implied for both. See §§4.14, 4.18, 4.52-4.53, 5.9-5.10, 5.13.

In *California Golf, LLC v Cooper* (2008) 163 CA4th 1053, 78 CR3d 153, the court allowed the beneficiary of a nonjudicial foreclosure sale to sue the purchasers for breach of warranty damages after the purchasers stopped payment on the cashier's checks tendered for the purchase by falsely swearing in an affidavit that the checks were lost. See §§4.28, 4.90A.

The presumption that a breach of an agreement to sell real property cannot be adequately compensated by money damages extends to contracts that require the buyer to do environmental cleanup after the sale closes. *Union Oil Co. v Greka Energy Corp.* (2008) 165 CA4th 129, 80 CR3d 738. See §§5.2, 5.7A, 5.37.

A court may grant specific performance of lease obligations despite the potential for compensatory damages. *Clear Channel Outdoor, Inc. v Erkelens* (ND Cal 2008) 2008 US Dist Lexis 79702 (allowed lessee to remove billboard sign on refusal of lessor to renew lease; monetary remedy would have improperly benefited breaching lessor; court also refused to apply defense of forfeiture). See §§5.7B, 5.40.

For a case awarding attorney fees to the prevailing party in an action for specific performance, see *Baugh v Garl* (2006) 137 CA4th 737, 40 CR3d 539 (specific enforcement of water rights in settlement agreement). See §§5.2, 5.30.

In a judgment for cancellation of a promissory note that has been fully paid, the court may award compensatory and punitive damages to the borrower against the lender for refusing to clear title after repeated requests, and attorney fees according to the note and deed of trust. *Kachlon v Markowitz* (2008) 168 CA4th 316, 85 CR3d 532. See §§6.3, 6.41, 7.6, 7.57-7.58, 9.13.

In *Kachlon v Markowitz, supra,* the court allowed factual issues to be tried first by a jury in an advisory capacity and then ruled on the equitable remedies. See §§7.9, 7.13-7.14.

The Elder Abuse and Dependent Adult Civil Protection Act (Welf & I C §§15600-15660) was amended to provide additional remedies for "financial abuse" as defined in Welf & I C §15610.30. They include prejudgment writ of attachment, mandatory attorney fees, and mandatory costs, including conservator fees for litigating an elder abuse claim. Welf & I C §§15657.01, 15657.5. See §§6.9, 6.22.

A fee owner may quiet title against a neighbor who claims a different boundary under an ambiguous survey. *Claudino v Pereira* (2008) 165 CA4th 1282, 82 CR3d 464. See §§7.4, 7.6.

An owner of land abutting a street may bring an action for declaratory relief and to quiet title to an access easement over the street if a governmental agency attempts to vacate part of the street without following the proper statutory

procedures. *Zack's, Inc. v City of Sausalito* (2008) 165 CA4th 1163, 81 CR3d 797. See §§7.6, 7.14.

Also in *Zack's, Inc. v City of Sausalito, supra,* a city's closure of a public street without complying with statutory procedures and that impairs an abutting lot owner's street access may be both a public and a private nuisance against which an injunction may lie. See §§11.7, 11.9, 11.12.

The supreme court held that the 1-year period to bring a quiet title action following a tax sale under Rev & T C §3275 is subject to tolling until the owners receive notice of the right to recover excess sale proceeds and the notice correctly identifies the owners by name. See *Mayer v L & B Real Estate* (2008) 43 C4th 1231, 78 CR3d 62, cited in §7.45.

In *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 87 CR3d 602, the court held that an apartment tenant who suffered from childhood asthma and chronic allergies was not precluded from suing to abate a public nuisance created by owner's failure to limit secondhand smoke in outdoor common areas. See §§11.7, 11.12.

An action to abate a public nuisance is equitable, and does not include a right to a jury trial. *People v Bhakta* (2008) 162 CA4th 973, 76 CR3d 421. See §§11.20, 12.91.

Interest-rate differential damages, from the loss of a property's value as collateral for a loan, are a form of diminution in value damages and are not recoverable in continuing nuisance cases. *Gehr v Baker Hughes Oil Field Operations, Inc*. (2008) 165 CA4th 660, 81 CR3d 219. See §11.25.

Because of the unique character of most forest land, for which market value cannot be established, the court in *U.S. v Union Pac. R.R. Co*. (ED Cal, April 30, 2008, No. Civ S-06-1740) 2008 US Dist Lexis 35338, ruled that diminution in value was not the proper measure of damages after a forest fire, but allowed damages for separate injuries to trees, to the soil, and pre-merchantable timber, for loss of use of habitat, and for reforestation costs. See §§11.29, 12.84.

A public nuisance declaration was upheld in *Golden Gate Water Ski Club v County of Contra Costa* (2008) 165 CA4th 249, 80 CR3d 876 (development over several decades without requesting necessary permits violated county land use codes). See §§11.7, 11.37, 11.42.

In abatement actions brought by public entities, the property owner is liable for all costs of abatement and, if the city or county ordinance requires it, attorney fees as well. In *County of Sacramento v Sandison* (2009) 174 CA4th 646, 95 CR3d 30, a court of appeal determined that the amount of the attorney fee award to property owners who successfully defended a county's nuisance abatement action was not limited under Govt C §25845 to the amount of fees incurred by the county. See §11.20.

In *San Diego Unified Sch. Dist. v County of San Diego* (2009) 170 CA4th 288, 87 CR3d 796, the court held the statute of repose for latent construction defects did not bar the district's other claims because the district sufficiently pled independent contractual and statutory theories for environmental remediation. See §11.40A.

In *Koponen v PG&E* (2008) 165 CA4th 345, 81 CR3d 22, the court recognized (1) that the PUC enabling statute did not bar property owners' claims for damages resulting from unauthorized uses of the utility's rights of way located on their property, and (2) that the owners were entitled to seek injunctive relief against invasion of their property rights by the utility's grant of leases or licenses allowing others to use the rights of way. See §11.48.

When a builder is liable to the homeowner under the Builders Right to Repair Act, the builder may bring an equitable indemnity action against the product manufacturer to recover economic losses caused by the manufacturer's violation of the standards in the Act, but the builder may not recover for these losses in a negligence action against the manufacturer. *Greystone Homes, Inc. v Midtec, Inc.* (2008) 168 CA4th 1194, 86 CR3d 196. See §12.31.

Amendments to the law governing judgment creditor's rights in the "Recovery Account" of the Real Estate Fund now allow, for claims against the fund filed after January 1, 2009, as the maximum amounts $50,000 per transaction and $250,000 per licensee under Bus & P C §10474. See §12.35.

By legislative amendment, the protection of the contractor's statutory licensing bond extends to homeowners and home improvement contracts, to a property owner and related contract to construct a single-family home, as well as to any person damaged "by the fraud of the licensee in the execution or performance of a construction contract" under Bus & P C §7071.5(c). See §12.37.

An action against a contractor's licensing bond must be brought within 2 years after the end of the license period when the act occurred, or if the license was inactivated, cancelled, or revoked after the wrongful act or omission, then within 2 years after the date the active license would have expired, had it not been inactivated cancelled, or revoked. Bus & P C §7071.11(c). See §12.37.

An arbitration proceeding without a companion court case in superior court is not an action allowing the recordation of a lis pendens and may risk liability for slander of title. *Manhattan Loft, LLC v Mercury Liquors, Inc.* (2009) 173 CA4th 1040, 93 CR3d 457, interpreting CCP §405.20. See §§13.4, 13.18, 13.21.

California lis pendens statutes do not authorize a party who has a pending action in another state court to record a lis pendens in a California county recorder's office. *The Formula, Inc. v Superior Court* (2008) 168 CA4th 1455, 86 CR3d 341. See §§13.6A, 13.18, 13.22A, 13.37.

In *Treo @ Kettner Homeowners Ass'n v Superior Court* (2008) 166 CA4th 1055, 83 CR3d 318, the court reviewed the validity of an ADR provision in CC&Rs requiring submission to judicial reference pursuant to CCP §638. The court refused to order judicial reference because the developer-drafted provision was not a written contract sufficient to waive the right to trial by jury. See §§14.3, 14.25.

Under CCP §1281.8, the courts have the power to order provisional remedies, such as preliminary injunctions, after commencement of arbitration proceedings. *Jay Bharat Developers, Inc. v Minidis* (2008) 167 CA4th 437, 84 CR3d 267. See §14.26.

To effectively waive the confidentiality provisions of Evid C §1119, all parties must fully execute the mediation agreement. *Rael v Davis* (2008) 166 CA4th 1608, 83 CR3d 745. See §§14.32B, 14.87.

The United States Supreme Court ruled in *Preston v Ferrer* (2008) 552 US 346, 169 L Ed 2d 917, 128 S Ct 978, that compelling arbitration is proper when an arbitration clause extends to all disputes even if state laws vest primary jurisdiction of some disputes in an administrative agency. See §14.38D.

The United States Supreme Court will not allow a lower federal court to apply the Federal Arbitration Act (FAA) (9 USC §§1-16) as a piecemeal procedure by focusing on only part of a controversy that is federally preempted and ignoring an entirely state-based cause of action. See *Valden v Discover Bank* (2009) ___ US ___, 173 L Ed 2d 206, 129 S Ct 1262. See §14.38D.

In *Winter v Window Fashions Professionals, Inc.* (2008) 166 CA4th 943, 83 CR3d 89, an arbitration provision in a franchise agreement specified that the provision might not be enforceable in California. The court of appeal ruled that this uncertainty indicated there was no meeting of the minds on the agreement to arbitrate. See §14.40.

A court of appeal in *Sanchez v Western Pizza Enters., Inc*. (2009) 172 CA4th 154, 90 CR3d 818 concluded that an arbitration agreement could not be enforced because it was permeated with unlawful purpose by including a class action waiver and unfair arbitration selection provisions. See §§4.3, 14.38C, 14.42B.

In *Ontiveros v DHL Express (USA), Inc.* (2008) 164 CA4th 494, 79 CR3d 471, a court of appeal found an employment arbitration clause to be substantively unconscionable because it allowed the arbitrator to decide enforceability issues, required the employee to pay a portion of the costs, and severely limited discovery. See §14.42B.

When a contract includes a broad arbitration clause and both parties consent to arbitration by their conduct, the arbitrator must hear challenges to contract formation as well as disputes about the contract as a whole, such as breach of contract. *Granite Rock Co. v International Brotherhood of Teamsters* (9th Cir 2008) 546 F3d 1169. See §14.42C.

Case law distinguishes between the rights of parties who have agreed to arbitration and those of nonparties to have a court review an arbitrator's discovery orders. In *Berglund v Arthroscopic & Laser Surgery Ctr.* (2008) 44 C4th 528, 79 CR3d 370, *e.g.,* the supreme court held that discovery disputes involving a nonparty, such as compliance with a subpoena, must be submitted first to the arbitrator. The nonparty may then appeal the arbitrator's decision. See §14.42D.

The supreme court ruled that if the parties to an arbitration agreement expressly provide in that agreement for judicial review of legal error in the arbitration award, the award may be vacated or corrected on appeal to a court of competent jurisdiction. *Cable Connection, Inc. v DIRECTV, Inc.* (2008) 44 C4th 1334, 82 CR3d 229. See §14.44.

In *Christensen v Smith* (2009) 171 CA4th 931, 90 CR3d 57, the court of appeal interpreted an arbitration agreement providing that the arbitrator must render an award in accordance with substantive California law and concluded that it did not permit appellate review on the merits. See §14.44.

The Federal Arbitration Act does not allow the parties to contract for judicial review of legal error. See *Hall Street Assoc. v Mattel, Inc.* (2008) 552 US ___, 170 L Ed 2d 254, 128 S Ct 1396. See §14.44.

In *Simmons v Ghaderi* (2008) 44 C4th 570, 80 CR3d 83, the supreme court held that a party may not waive mediation confidentiality provided by statute unless there is an express waiver agreement; there can be no implied waiver. See §§14.53, 14.87.

Chapter 15 was expanded to cover constructive trust as a remedy attaching against monetary proceeds from real property transactions involving fraudulent conduct. See §§15.1, 15.4, 15.7-15.8, 15.32.

August 2008 Update

In *Cassel v Globerson (In re Kolb)* (ND Cal, May 29, 2007, No. 97-32321) 2007 Bankr. Lexis 1896, the court held that a fraudulent concealment of facts tolls the statute of limitations until the existence of the cause of action is discovered. See §§1.8A, 2.37.

Citing CC §1668, which invalidates contractual provisions that attempt to exempt anyone from responsibility for fraud, whether willful or negligent, a court of appeal ruled that an exculpatory clause in a real property purchase agreement did not preclude the buyers as a matter of law from introducing evidence that they reasonably relied on the broker's affirmative misrepresentations that the lot could be split. *Manderville v PCG&S Group, Inc.* (2007) 146 CA4th 1486, 55 CR3d 59. See §§1.14, 3.39-3.40, 3.78, 12.52.

With gifts or conveyances, the susceptibility to imposition, the extreme age and infirmity, of the grantor, and evidence of circumstances inferring that the instrument was the product of coercion will shift the burden and require the beneficiary to show affirmatively that the transaction was fair and free from influence. *Longmire v Kruger* (1926) 80 CA 230, 238, 251 P 692. See §1.15.

The 5-day cooling-off period of a home-equity sales contract does not begin to run until the seller signs a contract that complies with the Act. If the purchaser fails to comply with the rescission notice provisions of the Act, the seller's right to rescind survives the closing, a subsequent unlawful detainer judgment, and a broad release of claims under CC §1542. *Hoffman v Blum* (ND Cal, Feb. 1, 2008, Nos. C 06-2416, C 07-2417) 2008 US Dist Lexis 7643. See §1.22.

The requirement of the Home Equity Sales Contracts Act which necessitates that the equity purchaser be bonded has been held void for vagueness. *Schweitzer v Westminster Invs.* (2007) 157 CA4th 1195, 68 CR3d 472. See §1.22.

In *NMSBPCSLDHB v County of Fresno* (2007) 152 CA4th 954, 61 CR3d 425, after the buyer developed property in a manner inconsistent with the sales agreement, the seller brought an action for monetary damages based on profit that seller could have made through other uses of property. The court held that an action for monetary damages based on the profit that a seller could have made through other uses of property was equitable as a form of rescission, and triable by the court, not a jury. See §§1.41, 1.47.

In *Michel v Moore & Assocs., Inc.* (2007) 156 CA4th 756, 67 CR3d 797, the court held that fiduciary duties are much broader than the statutory duties required of brokers, and a buyer's agent has a duty to disclose all material information regardless of how it is obtained. See §§3.17, 3.21-3.23, 3.27, 3.32.

If property transferred after January 1, 2008 is subject to a transfer fee, that the transferor must provide notice of the fee at the time of the delivery of the transfer disclosure statement. CC §1102.6e. See §3.30.

In *Gravillis v Coldwell Banker Residential Brokerage Co.* (2006) 143 CA4th 761, 776, 49 CR3d 531, the court confirmed that emotional distress resulting from ordinary fraud is not an allowable element of damages under CC §3343. Further, the court held that the Federal Arbitration Act does not procedurally govern a motion to compel arbitration. See §3.53, 14.38C, 14.42D.

A third party beneficiary may recover attorney fees if the contract was made for the third party beneficiary's benefit. *Loduca v Polyzos* (2007) 153 CA4th 334, 62 CR3d 780. See §3.56.

While mortgage loan brokers owe a fiduciary duty of disclosure and good faith toward borrowers for whom they negotiate loans and may be held liable for fraud for breaching that duty by giving the borrower materially misleading and incomplete information, in *Stetler v Greenpoint Mortgage Funding* (ED Cal, Jan. 23, 2008, No. 1:07cv0123 DLB) 2008 US Dist Lexis 4880 the court refused to extend liability in a loan transaction in which a loan broker made no affirmative misrepresentations. See §3.74.

In *Castillo v Express Escrow Co*. (2007) 146 CA4th 1301, 53 CR3d 485, the buyer of a mobilehome copied the escrow agent with a letter to the seller complaining of structural damage to the mobilehome. The court held that the letter was sufficient notice to the escrow holder to require it to hold funds in escrow under Health & S C §18035(f). In response to *Castillo*, Health & S C §18035(f) was amended to require the escrow agent to inform a party, at the opening of escrow and upon notification of a dispute, of the right submit a request to hold funds in escrow. See §3.75.

In *City and County of San Francisco v Cambridge Integrated Servs. Group* (ND Cal, Jul. 2, 2007, No. 04-1523) 2007 US Dist Lexis 51376, the court held that equitable indemnity is available in an underlying action for negligent performance under a professional services contract. See §3.89B.

If a selling party does not meet its burden to rebut the statutory presumption that monetary damages are adequate, the court will grant specific performance. *Real Estate Analytics v Vallas* (2008) 160 CA4th 463, 72 CR3d 835. See §5.6.

Under Corp C §16301(2), if an agreement to sell is made by a partner, the partner must have written authorization to sell for the partnership if the sale is not in the usual course of business. *Elias Real Estate, LLC v Tseng* (2007) 156 CA4th 425, 67 CR3d 360. See §5.36.

If a plaintiff is claiming that the defendant is liable for financial abuse of an elder the plaintiff may seek a prejudgment writ of attachment. Welf & I C §15657.01. See §6.28.

In *Preciado v Wilde* (2006) 139 CA4th 321, 42 CR3d 792, a tenant in common's exclusive use of property was not enough to establish adverse possession; the claimant must physically exclude the other owner from entering the property or must otherwise affirmatively challenge title. See §7.4.

Res judicata may not be available after an unlawful detainer verdict. *Stein v Braum Inv. & Dev.* (9th Cir 2007) 244 Fed. Appx. 816. See §7.44.

In *McFarland v Norton* (9th Cir 2005) 425 F3d 724, the court held that neither the federal government's mild interference with the use of an easement nor an action regulating access to the easement commences the running of the statute of limitations on an action to quiet title. See §7.45.

The litigation privilege under CC §47(b) applies to a constitutionally based privacy cause of action. A communication

is authorized by law if it is included in a category of publications permitted by law; the specific publication need not be permitted. *Jacob B. v County of Shasta* (2007) 40 C4th 948, 961, 56 CR3d 477 See §9.8.

Whether communication regarding prospective litigation is subject to the litigation privilege is a question of fact. The person sending such communication is protected only if suit is contemplated in good faith and under serious consideration. *Action Apartment Ass'n v City of Santa Monica* (2007) 41 C4th 1232, 63 CR3d 398. See §9.8.

In discussing the litigation privilege under CC §47(b), the distinction between communicative or noncommunicative conduct hinges on the gravamen of the action. *Rusheen v Cohen* (2006) 37 C4th 1048, 1058, 39 CR3d 516. See §§9.8, 9.12.

In *Gallanis-Politis v Medina* (2007) 152 CA4th 600, 61 CR3d 701, the court held that an investigation made in relation to discovery requests is communicative conduct. See §9.12.

The continuous dumping of water into unlined ponds on defendant's property constitutes a continuing trespass even though the ponds are permanent. If restoration is not possible or economically impractical the plaintiff can recover for diminution of value. The intent of the law is to eliminate financial incentives for trespass by eradicating the benefit of using another's land. Under the "benefits obtained" test, damages may include profits enjoyed by the trespasser that are directly linked to the wrongful trespass. Attorney fees are also recoverable where there is subsurface trespass to land under cultivation. *Starrh & Starrh Cotton Growers v Aera Energy* (2007) 153 CA4th 583, 63 CR3d 165. See §§11.16, 11.27, 11.32, 11.41, 12.79.

In *City & County of San Francisco v Jen* (2005) 135 CA4th 305, 37 CR3d 454, the owner of an uninhabited building that endangered nearby residents was ordered to pay costs and attorney fees. See §11.20.

In *Bailey v Outdoor Media Group* (2007) 155 CA4th 778, 66 CR3d 322, the plaintiff was entitled to the net profits received by the trespasser, not the gross revenue. See §11.27.

Discussion of statutory defenses to nuisances has been expanded to include defenses relating to recreational use of real property. See §11.34A.

In *Castillo v Pacheco* (2007) 150 CA4th 242, 58 CR3d 305, the court held that an anti-SLAPP motion is not available in an action seeking to enjoin conduct furthering the right of free exercise of religion. See §11.49.

The sum of the bond that an applicant or licensee is required to have on file as a condition precedent to issuance or renewal of a contractor's license is $12,500 regardless of the classification. Bus & P C §7071.6. See §12.37.

In reducing a $4.5 billion punitive damages award to $2.5 billion, the court in *Exxon Valdez v Exxon Mobile Corp.* (9th Cir 2007) 490 F3d 1072 performed a thorough analysis of the relationship of a defendant's reprehensible conduct to the amount of the punitive damages award. See §12.87.

After the California Supreme Court ordered a court of appeal to reconsider its award of a 33:1 ratio of punitive to compensatory damages, the court of appeal remanded for a new trial on the amount of punitive damages requiring a jury instruction that "punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff." *Bullock v Phillip Morris USA* (2008) 159 CA4th 655, 71 CR3d 775. See §12.87.

An action for injunctive and declaratory relief to enforce an agreement prohibiting the construction of permanent structures in an easement area supports the recordation of a lis pendens. *Woodridge Escondido Prop. Owners Ass'n v Nielsen* (2005) 130 CA4th 559, 30 CR3d 15. See §13.72.

The presumption under CC §3387 that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation has survived amendments to lis pendens statute in 1992. *Real Estate Analytics v Vallas* (2008) 160 CA4th 463, 72 CR3d 835. See §13.99.

On the issue of defending against an arbitration agreement on the basis of unconscionability, the buyer's knowledge and consent and the delivery of the document containing the arbitration provision are crucial. *Bruni v Didion* (2008) 160 CA4th 1272, 73 CR3d 395; *Adajar v RWR Homes, Inc.* (2008) 160 CA4th 563, 73 CR3d 17. See §§14.21, 14.42A-14.42B.

Due to the one-sided nature of an arbitration clause as it concerns brokers in a real property sales contract, the buyer's broker could successfully compel buyers, but not the listing broker, to arbitrate. *Nguyen v Tran* (2007) 157 CA4th 1032, 68 CR3d 906. See §§14.38, 14.50.

To incorporate another document by reference, the subject document must contain a clear and unequivocal reference to the fact that the terms of the document are incorporated. *Amtower v Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 71 CR3d 361. See §14.42A.

When making a motion to compel arbitration, the moving party has the burden of proving the existence of an arbitration provision in a document incorporated by reference by introducing it into evidence. *Adajar v RWR Homes, Inc.* (2008) 160 CA4th 563, 73 CR3d 17. See §14.42A.

A finding of procedural unconscionability is a prerequisite to determining that the arbitration agreement as a whole is unconscionable; after making that finding, the court will scrutinize the substantive terms of the contract to ensure they are not unfair or one-sided. *Gentry v Superior Court* (2007) 42 C4th 443, 469, 64 CR3d 773. See §14.42B.

When a party resisting a motion to compel arbitration disproves the legality of the underlying agreement, it is a complete defense to enforcing the arbitration clause. *Duffens v Valenti* (2008) 161 CA4th 434, 74 CR3d 311. See §14.42C.

In *Wagner Constr. Co. v Pacific Mechanical Corp.* (2007) 41 C4th 19, 58 CR3d 434, the court held that the applicability of statute of limitations defense is for the arbitrator to decide; the court may not adjudicate that issue on a motion to compel arbitration. See §14.42D.

August 2007 Update

A real estate broker is liable for actual and constructive fraud if the broker uses a client's funds to purchase a home in the broker's or another's name and refuses to convey title to the client as promised. Absence of a written contract is not a defense when a fiduciary commits fraud. The defrauded client may quiet title against the legal owner and recover damages. *Warren v Merrill* (2006) 143 CA4th 96, 49 CR3d 122. See §§1.12, 3.18, 3.27, 3.53, 3.58, 7.21, 15.7, 15.13, 15.33, 15.37.

Two new sections were added to chap 1 to address rescission of real property secured loans based on common law and statutory fraud (see §1.8A) and a summary of special statutory remedies for predatory lending (see §1.8B). A third section summarizes the related holder-in-due-course defense. See §1.54A.

Sellers must complete and deliver to the buyer a comprehensive real estate disclosure statement under Civil Code §§1102.1-1102.17. The requirement under §1102.18 (that releases of illegal controlled substances be disclosed) was repealed and was deleted from §3.30 and other pertinent sections of the book.

Six new section were added to chap 3 to summarize a real estate broker's duties to disclose and confirm agency relationships and remedies for the breach of those duties. See §§3.32A-3.32F.

Implied waiver operates more as equitable estoppel than as traditional waiver, which generally rests on party's intent. Implied waiver may be determined as matter of law if the facts are susceptible to only one conclusion about the waiving party's intent. The waiver rule does not require that the party affirming the contract receive greater consideration than the opposing party, or that the fact finder weigh and compare benefits received by each party. One who ratifies an allegedly fraudulent contract by entering into a new contract will waive the right to assert that assent to the original contract was fraudulently induced. *Oakland Raiders v Oakland-Alameda County Coliseum, Inc.* (2006) 144 CA4th 1175, 51 CR3d 144. See §§3.84, 3.85.

In a breach of contract action, the buyer's damages are limited to the difference between the sales price and the value at the time of the breach regardless of market conditions, so lost profits on a subsequent resale are not allowed. See *Horning v Shilberg* (2005) 130 CA4th 197, 29 CR3d 717. See §4.13.

Despite the net monetary recovery requirement in CCP §1032, a court of appeal ruled that the plaintiff/buyer was the prevailing party for purposes of attorney fees even though offsets from a settlement reduced plaintiff's net recovery of damages to zero. *Wakefield v Bohlin* (2006) 145 CA4th 963, 52 CR3d 400. See §4.16.

A court of appeal in *House of Prayer v Evangelical Assn. for India* (2003) 113 CA4th 48, 54, 7 CR3d 24 held that real property sale agreements are enforceable without specifying a time of performance and that term is not essential under the Statute of Frauds. See §§4.19-4.20.

A new section was added to chap 4 to summarize the seller's defense to an action for breach of the purchase contract based on the broker's lack of authority to bind the seller. See §4.22A.

A purchase contract made in the name of an agent may be enforced against an undisclosed principal, and extrinsic evidence is admissible to identify the principal. The Statute of Frauds does not require a written contract. A note or memorandum "subscribed by the party to be charged" is adequate and satisfies the Statute if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with reasonable certainty. *Sterling v Taylor* (2007) 40 C4th 757, 765, 55 CR3d 116. See §§4.20, 5.10, 5.36.

The absence of the buyers' signatures on a counteroffer for the purchase of property signed by the sellers did not preclude the buyers' action for specific performance. See *Ulloa v McMillan Real Estate & Mortgage, Inc.* (2007) 149 CA4th 333, 57 CR3d 1. See §§4.53, 5.36.

A lis pendens filed in an action by a buyer for specific performance of a real property sale agreement does not impart notice of a potential attorney fee award to subsequent transferees or lienholders, and if the buyer succeeds on the action, any attorney fee award the buyer obtains in the judgment cannot be deducted from the purchase price as an offset. *Behniwal v Mix* (2007) 147 CA4th 621, 54 CR3d 427. See §§5.21, 5.30, 5.45, 13.4, 13.6, 13.83.

In quiet title actions, all potential defendants whose disputed claims are of record, actually known to the plaintiff, or apparent from an inspection of the property must be named in the complaint at the time of filing and properly served, or they will not be bound by the judgment. See *Carr v Kamins* (2007) 151 CA4th 929, 60 CR3d 196, cited in §§7.3, 7.28, 7.33, 7.38.

Intervening interests, such as a mechanics' lien claim may operate as a defense in a quiet title action. *Wachovia*

Bank v Lifetime Indus., Inc. (2006) 145 CA4th 1039, 52 CR3d 168. See §7.44.

Although punitive damages awards cannot be used to punish defendants for harm inflicted on nonparties, such harm can be used to show that the defendant's conduct was reprehensible. In *Philip Morris USA v Williams* (2007) ___ US ___ 166 L Ed 2d 940, 127 S Ct 1057, a case brought by a smoker's widow, the Court held that a $79.5 million punitive damages award amounted to an unconstitutional taking of property from the defendant without due process, because it sought to punish the defendant for injury that it inflicted on nonparties. See §12.87.

A bona fide purchaser who closes escrow after a lis pendens is filed but before it is indexed does not have constructive notice of the pending claim. *Dyer v Martinez* (2007) 147 CA4th 1240, 54 CR3d 907. See §§13.8-13.9, 13.40.

While an appeal after judgment against a claimant is pending, the trial court must grant a motion to expunge a lis pendens unless it finds it more likely than not that the appellate court will reverse the judgment. In deciding a writ petition under CCP §405.39 after judgment and pending appeal, an appellate court must assess whether it is more likely than not the real property claim will prevail at the end of the appellate process. *Amalgamated Bank v Superior Court* (2007) 149 CA4th 1003, 1015, 57 CR3d 686. See §§13.50, 13.87, 13.93, 13.106, 13.110.

A party seeking review of an attorney fees award in connection with a motion to expunge a lis pendens must petition for a writ of mandate under CCP §405.39. *Shah v McMahon* (2007) 148 CA4th 526, 55 CR3d 792. See §§13.55, 13.106.

A lis pendens is not available in action to recover money obtained by undue influence and used for remodeling defendant's house, despite the possibility of the court imposing a constructive trust or equitable lien against the house. *Campbell v Superior Court* (2005) 132 CA4th 904, 34 CR3d 68. See §§13.67, 13.69, 15.44.

Relying on evidence of the effects on interstate commerce of a real property residential construction and sale, another California court of appeal held that CC §1298.7 is preempted by the Federal Arbitration Act. *Shepard v Edward Mackay Enters.* (2007) 148 CA4th 1092, 56 CR3d 326, cited in §§14.21, 14.26.

To be enforceable, a settlement agreement prepared as a product of mediation must state, under Evid C §1123, that the document is binding. *Fair v Bakhtiari* (2006) 40 C4th 189, 51 CR3d 871. See §§14.27, 14.32B, 14.42, 14.87.

The trial court does not have authority to order parties in complex litigation to pay for private mediation. *Jeld-Wen, Inc. v Superior Court* (2007) 146 CA4th 536, 53 CR3d 115. See §§14.36, 14.56, 14.57.

Private mediations are not governed by a specific set of standards for mediators, but the Rules of Court encourage mediators to abide by them. See *Travelers Cas. & Surety Co. v Superior Court* (2005) 126 CA4th 1131, 1140, 24 CR3d 751. See §14.32.

An arbitration clause in a title insurance policy that was referenced in a preliminary report was not enforceable, because the arbitration was not mentioned in the report and the company issued a different title policy than referenced in the report. *Kleveland v Chicago Title Ins. Co.* (2006) 141 CA4th 761, 46 CR3d 314. See §§14.23, 14.42A.

An arbitration clause is unconscionable if it requires a franchisee to arbitrate while allowing the franchisor unilateral right to litigate rather than arbitrate. *Nagrampa v MailCoups* (9th Cir 2006) 469 F3d 1257. See §14.42B.

When a real estate purchase agreement provides that the prevailing party cannot recover attorney fees unless that party mediates before bringing an action, a prevailing defendant does not have to initiate mediation in order to claim attorney fees. *Van Slyke v Gibson* (2007) 146 CA4th 1296, 53 CR3d 491. See §14.56.

On January 1, 2007, an extensive reorganization of the California Rules of Court took effect. A complete concordance table is available on http://www.ceb.com.

August 2006 Update

Under 2005 amendments to CC §§1689.5-1689.15, which regulate home solicitation contracts, contracts that strictly meet the definition of a "service and repair contract" may not be rescinded after the buyer receives a signed and dated copy of the contract and the work commences. CC §1689.15. Also, contracts for emergency repairs to protect people or property are not subject to rescission if the buyer expressly waives the right to cancel in a separate document. CC §1689.13. Except for specified events, a waiver of rescission rights or a confession of judgment is void. CC §1689.12. See §§1.20, 1.59.

For an unpublished opinion discussing core issues in a commercial lease rescission, see *Flagship West LLC v Excel Realty Partners* (ED Cal, Sept. 30, 2005, No. CV-05200 OWW DLB) 2005 US Dist Lexis 29623, cited in §§1.8, 1.17, 1.46, 1.52.

A court of appeal decision illustrates the risks of "dual agency" and recognizes that neither the out-of-pocket nor the benefit-of-the-bargain measure of damages applies in some situations involving fiduciary fraud. See, *e.g., Strebel v Brenlar Invs., Inc.* (2006) 135 CA4th 740, 37 CR3d 699, cited in §§3.15-3.16, 3.43, 3.57B, 3.72, 4.14.

Advertising that misleads or misrepresents the safety of a product installed in real property may give rise to a fraud cause of action. *County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 40 CR3d 313. See §§3.11, 3.36,

3.40.

Disclosure duties of real property sellers now include whether the property is subject to liens under the Mello-Roos Community Facilities Act of 1982 (Govt C §§53311-53368.3) or the Improvement Bond Act of 1915 (Str & H C §§8500-8887), and that the sale will result in a county property tax revaluation and potential supplemental assessment billings. CC §1102.6b-1102.6c. See §3.31.

A party may not recover attorney fees solely because an opposing party claims to be entitled to such fees. *Hasler v Howard* (2005) 130 CA4th 1168, 30 CR3d 714. See §3.56.

Using multiple preprinted counteroffer forms and addendums in a single transaction may cause confusion about whether a contract was actually formed. See, *e.g., Behniwal v Mix* (2005) 133 CA4th 1027, 35 CR3d 320 (concluding that signatures on addendum showed acceptance of specific provisions of counteroffer). The court also held that the Statute of Frauds defense was not available to the sellers, even though they did not sign the purchase contract; their later signatures on the disclosure forms bound them as a ratification. See §§4.20, 4.22, 4.22A, 5.9, 5.15, 5.36.

An oral settlement agreement entered into the court record, and otherwise complying with CCP §664.6, is not subject to the Statute of Frauds. *Pietrobon v Libarle* (2006) 137 CA4th 992, 40 CR3d 718. See §5.36.

The presence of lead paint in municipal buildings was held to be an actionable nuisance (but not a trespass) when brought on behalf of the public for remediation of a public health hazard in *County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 40 CR3d 313. Such a claim must allege actual physical injury to the public. See §§11.2, 11.7-11.8, 11.10, 11.17, 11.20.

In *Cook v City of Buena Park* (2005) 126 CA4th 1, 23 CR3d 700, the court of appeal invalidated as a violation of due process a municipal ordinance that attempted to address public nuisance issues by requiring eviction of tenants suspected of criminal activity and requiring the landlord to prevail in the unlawful detainer action or face fines, misdemeanor punishment, property liens, or civil penalties. See §11.7.

Violation of a residential development's covenants, conditions, and restrictions may constitute a nuisance if the restrictions provide that violations are a nuisance. *Woodridge Escondido Prop. Owners Ass'n v Nielsen* (2005) 130 CA4th 559, 30 CR3d 15. See §§11.9, 11.45.

In *City of Malibu v California Coastal Comm'n* (2005) 128 CA4th 897, 27 CR3d 501, the court denied a nuisance claim that alleged by speculation that persons using adjacent beach access might litter and trespass private real property. See §11.10.

When a plaintiff alleges that an activity is a nuisance solely because it violates a statute, ordinance, or regulation, courts may defer to the interpretation by the government entity charged with enforcement. *Pallco Enters., Inc. v Beam* (2005) 132 CA4th 1482, 1499, 34 CR3d 490. See §11.12.

Nuisance and trespass (statutory actions) and inverse condemnation (constitutionally-based actions) are frequently pleaded as alternatives in a single suit, but the courts often limit the availability of inverse condemnation. See, *e.g., Herzberg v County of Plumas* (2005) 133 CA4th 1, 34 CR3d 588. See §§11.16A-11.17.

A court of appeal denied recovery for the loss of use of the real property resulting from a trespass because the trespass did not result in financial advantage for the trespasser in *Watson Land Co. v Shell Oil Co.* (2005) 130 CA4th 69, 29 CR3d 343 (oil leak onto private property did not benefit oil company; court allowed only remediation damages). See §11.27.

When a landowner knows or should know of a concealed hazardous condition, which the contractor does not know and cannot reasonably discover, and the owner fails to warn the contractor, the owner may be liable to an injured worker of the contractor. *Kinsman v Unocal Corp.* (2005) 37 C4th 659, 36 CR3d 495. See §§12.10.

A court of appeal held that a lis pendens (arising from a dismissed court action to cancel a deed of trust) that had not been formally withdrawn or expunged extended the time period under CC §882.020 for enforcing the power of sale in the deed of trust. See *Slintak v Buckeye Retirement Co.* (2006) 139 CA4th 575, 43 CR3d 131, which opined that even after judgment, a lis pendens effectively remains on the record unless a statutory ground for expungement is established. See §§13.5, 13.14, 13.66, 13.73, 13.112.

Common interest developments are specifically regulated by statute for prelitigation ADR. See discussion of new amendments to CC §§1363.810-1363.850, 1369.510-1369.590, summarized in §14.3.

Incomplete and ambiguous language in a contact (*i.e.,* language that does not adequately define the scope of the arbitration clause) may prevent enforcement of the arbitration clause. *Villacreses v Molinari* (2005) 132 CA4th 1223, 34 CR3d 281. See §§14.11, 14.17, 14.42D.

Contract provisions purporting to waive the right to a jury trial are unenforceable, except for judicial reference and arbitration clauses, which the legislature specifically endorsed. *Grafton Partners v Superior Court* (2005) 36 C4th 944, 32 CR3d 5. See §14.25.

A challenge to an arbitration agreement that was not raised in opposition to a motion to compel arbitration or during arbitration cannot be raised in proceedings on appeal. *Cummings v Future Nissan* (2005) 128 CA4th 321, 27 CR3d 10.

§§14.26, 14.44-14.45.

On the effect of an arbitration provision in a home improvement agreement that expressly referenced the Federal Arbitration Act (FAA), see *Rodriguez v American Technols., Inc.* (2006) 136 CA4th 1110, 39 CR3d 437, discussed in §§14.26, 14.38C.

Procedural enforcement of an arbitration clause is a different concept than a general contract defense, such as fraud, duress, or unconscionability. See *Discover Bank v Superior Court* (2005) 36 C4th 148, 30 CR3d 76. Thus, even if the clause is procedurally governed by federal law, a court may apply state law to adjudicate the issue of unconscionability. See §§14.26, 14.38B-14.38C, 14.42B.

A party may not rescind a settlement agreement resulting from a mediation procedure on the basis that the other party did not consent in writing. See *Stewart v Preston Pipeline, Inc.* (2005) 134 CA4th 1565, 36 CR3d 901, cited in §§14.27, 14.32A-14.32B, 14.81, 14.87.

When a real property purchase contract stated that buyer, seller, and agent all agree that disputes under the agreement "shall be settled by final, binding arbitration," on the agent's petition to compel arbitration of the buyers' fraud claim, the court of appeal ordered arbitration even though the agent did not sign the contract or initial the clause. See *Westra v Marcus & Millichap Real Estate Inv. Brokerage Co.* (2005) 129 CA4th 759, 766, 28 CR3d 752, cited in §§14.38B, 14.50.

In this update, several new sections were added to chap 14 that address special challenges to mediating broker cases. See §§14.85A-14.85G.

August 2005 Update

A case in which the plaintiff succeeded on a theory of promissory fraud in a real property sale and obtained a jury verdict of $1.7 million (ratio of 340:1 punitive to compensatory damages) was reversed and remanded by the California Supreme Court in *Simon v San Paolo U.S. Holding Co.* (2005) 35 C4th 1159, 29 CR3d 379. See §§3.18, 3.55, 5.22, 12.87.

Home solicitation contracts, including home improvement contracts and service and repair contracts, have newly amended cancellation notice requirements. Cancellation rights do not apply when the home solicitation contract is for emergency repairs or repairs needed to immediately protect persons or property and the contract meets specified conditions. See CC §§1689.7(a)(1)-(5), 1689.13, cited in §1.20.

In *Persson v Smart Inventions, Inc.* (2005) 125 CA4th 1141, 1153, 23 CR3d 335, a court of appeal allowed a defrauded party to rescind only the release clause in the contract and sue for damages for the underlying fraud. See §§1.29, 3.58.

A court of appeal ruled that a jury trial on the legal remedy of damages would be unnecessary if the court first decides the equitable issues that effectively dispose of the legal issues. *Nwosu v Uba* (2004) 122 CA4th 1229, 19 CR3d 416. See §§1.29, 1.41, 3.10, 7.9, 7.29.

The California Supreme Court declined to apply the economic loss rule to fraud and misrepresentation arising from contract because the tort claim existed independently of the contract claim. See *Robinson Helicopter Co. v Dana Corp.* (2004) 34 C4th 979, 22 CR3d 352, cited in §§3.8, 3.55, 12.36, 12.87.

The statutory duties of real estate licensees under CC §2079 and CC §1102.6 apply exclusively to prospective purchasers. Only the ultimate purchaser can recover from a broker or agent for a breach of these duties. *Coldwell Banker Residential Brokerage Co. v Superior Court* (2004) 117 CA4th 158, 165, 11 CR3d 564. See §§3.32, 3.72.

In special circumstances, an estoppel defense may be based on the negligence of the plaintiff, which is (as a matter of law) equivalent to acting with an intent to deceive, but only if the plaintiff owes a duty to the party asserting estoppel. *Honeywell v WCAB* (2005) 35 C4th 24, 37, 24 CR3d 179. See §3.84.

Under Health & S C §§18070-18070.7, a purchaser or seller of a manufactured home may recover unsatisfied monetary judgments against a manufactured home manufacturer, dealer, or salesperson, or other seller or purchaser, from the Manufactured Home Recovery Fund. Affected persons may file a claim with the Department of Housing and Community Development. See §3.90A.

A real estate listing agreement providing for attorney fees in an action between the seller and broker "regarding the obligation to pay compensation" under the listing agreement does not support an award of fees in an action concerning the sale "arising from the listing agreement." *Hasler v Howard* (2004) 120 CA4th 1023, 1027, 16 CR3d 217. See §4.16.

Employees of a law firm may recover attorney fees under CC §1717 when represented on a pro bono basis by the attorneys in the firm. *Moran v Oso Valley Greenbelt Ass'n* (2004) 117 CA4th 1029, 1036, 12 CR3d 435. See §4.16.

In a suit for specific performance, the court may consider extrinsic evidence, such as standard features sheets, site plans, floor plans, elevation plans, and tract maps, to determine whether the purchase agreement is sufficiently definite for enforcement. *Blackburn v Charnley* (2004) 117 CA4th 758, 766, 11 CR3d 885. See §5.10.

In *Blackburn v Charnley* (2004) 117 CA4th 758, 768, 11 CR3d 885, a court of appeal affirmed an award of attorney

fees despite a prelitigation mediation requirement; the mediation clause contained an express exception allowing the plaintiffs to file an action to enable recordation of a lis pendens. See §§5.30, 7.58.

By legislative amendment the standard of proof was changed from clear and convincing to a preponderance of the evidence in financial elder abuse cases. Attorney fees and limits on damages may be modified if the plaintiff proves by clear and convincing evidence that the defendant is guilty of recklessness, oppression, fraud, or malice. See §6.41.

A borrower whose obligation is secured by a deed of trust may bring an action to quiet title against the secured lender who wrongly withholds a certificate of discharge of the mortgage. *Gibbo v Berger* (2004) 123 CA4th 396, 19 CR3d 829. See §7.6.

If properly served defendants have not appeared in a quiet title action, a default judgment may be entered only after a full evidentiary prove-up hearing. See *Yeung v Soos* (2004) 119 CA4th 576, 14 CR3d 502, cited in §7.50.

Attorney fees are fully recoverable by the plaintiff in a quiet title action if the defendant is granted relief on a cross-complaint as a good faith improver. *Tremper v Quinones* (2004) 115 CA4th 944, 9 CR3d 672. See §7.58.

Although a court does not have the authority to award a brokerage commission on a partition sale that is not confirmed, a court exercised its equitable powers and awarded reasonable compensation to the referee who had agreed to act as the broker on the sale for a commission. *Sullivan v Dorsa* (2005) 128 CA4th 947, 27 CR3d 547. See §§8.73, 8.79, 8.83-8.84.

In drafting complaints for trespass and nuisance, the statute of limitations may be problematic. For strategies on alternative causes of action, see *Harrison v Welch* (2004) 116 CA4th 1084, 1097, 11 CR3d 92, and *Kapner v Meadowlark Ranch Ass'n* (2004) 116 CA4th 1182, 11 CR3d 138, discussed in §11.27.

A court of appeal held that design engineers engaged by a subcontractor as consultants for retaining walls for a construction project owed no duty of care to either the owner or the general contractor in *Weseloh Family Ltd. Partnership v K. L. Wessel Constr. Co*. (2004) 125 CA4th 152, 22 CR3d 660. See §§12.9A, 12.12, 12.36.

The term "specific real property" as defined in the lis pendens statutes is strictly construed. See, *e.g., Gale v Superior Court* (2004) 122 CA4th 1388, 19 CR3d 554. See §13.17.

Under the post-1992 "probable validity" standard on lis pendens expungement motions, unless the trial judge would reverse the judgment on appeal, the trial court must expunge the lis pendens if the recording party loses the case on its merits and the defending party requests expungement after judgment is entered, even before judgment is final. *Mix v Superior Court* (2004) 124 CA4th 987, 21 CR3d 826. See §§13.49-13.50, 13.110.

The supreme court in *Kirkeby v Superior Court* (2004) 33 C4th 642, 15 CR3d 805, ruled that fraudulent conveyance claims support a lis pendens, but declined to rule on other types of constructive trust and equitable lien claims. The court also stated that a trial court must engage in a demurrer-like analysis to decide whether an action asserts a real property claim to sustain the lis pendens. Noting the potential for abusing the lis pendens procedure, the court observed that many other statutory grounds exist for seeking expungement. See §§13.59, 13.67-13.71, 13.91, 15.7, 15.45.

In dissolution proceedings under the Family Code, the petitioner or respondent may record a lis pendens if the petition, response, or preliminary disclosure adequately states a "real property claim" by alleging or identifying a community interest in specific real property. *Gale v Superior Court* (2004) 122 CA4th 1388, 19 CR3d 554. See §13.75.

In *Frei v Davey* (2004) 124 CA4th 1506, 22 CR3d 429, the court of appeal reversed a large attorney fee award because the prevailing party in a trial had refused to mediate before the litigation commenced. See §§14.3, 14.11, 14.56.

A California court of appeal ruled that CCP §1298, which requires specific warning language and format to be used with binding arbitration clauses in contracts to convey real property, including marketing contracts and deposit receipts, is preempted by federal law in transactions involving interstate commerce. *Hedges v Carrigan* (2004) 117 CA4th 578, 11 CR3d 787. See §§14.16, 14.38C.

A court of appeal considered who may be subject to judicial reference in construction defect actions arising from new-home purchases and concluded that only signatories to the contract can be bound. *Greenbriar Homes Communities, Inc. v Superior Court* (2004) 117 CA4th 337, 11 CR3d 371. See §14.21.

The supreme court clarified the effect of federal arbitration law on CCP §1281.2(c). In *Cronus Invs., Inc. v Concierge Servs.* (2005) 35 C4th 376, 381, 25 CR3d 540, the general choice-of-law clause provided that the agreement would be "construed and enforced" under California law, but the arbitration clause stated that the designation of California law did not preclude application of federal arbitration law. The court held that this language did not prevent the application of §1281.2(c). See §§14.26, 14.38C.

In *Fiege v Cooke* (2004) 125 CA4th 1350, 23 CR3d 496, the court granted a motion to compel settlement under CCP §664.6 despite a defendant's lack of consent because all defendants were insured under policies that gave their insurers the right to settle without the defendants' consent. See §§14.32, 14.68, 14.73, 14.81.

Two court of appeal cases considered whether arbitration agreements were unenforceable because of

unconscionability. See *Crippen v Central Valley RV Outlet* (2004) 124 CA4th 1159, 22 CR3d 189, and *Harper v Ultimo* (2003) 113 CA4th 1402, 7 CR3d 418, cited in §14.42B.

A court of appeal reversed the trial court's order denying a motion to compel arbitration because the party opposing arbitration lacked evidence that it had been defrauded in the inception or execution of the arbitration agreement. See *Larian v Larian* (2004) 123 CA4th 751, 19 CR3d 916, cited in §14.42C.

If an arbitration agreement provides for a specified number of arbitrators, the court will usually uphold that portion of the agreement. *Parker v McCaw* (2005) 125 CA4th 1494, 24 CR3d 55. See §14.42D.

The California Supreme Court ruled that everything prepared for the mediation, including raw test data, photographs, witness statements, and statements made by parties, witnesses, or counsel in the course of or pursuant to mediation, is protected by the mediation privilege in Evid C §1119. See *Rojas v Superior Court* (2004) 33 C4th 407, 15 CR3d 643, cited in §14.53.

Strategies for documenting a settlement agreement after a mediation are described in a new section of chap 14. See §14.87.

August 2004 Update

Book Enhancements. In 2004, a new chapter, "Constructive Trusts, Resulting Trusts, and Equitable Liens," was added to the book; it rounds out the coverage on equitable remedies in real property disputes arising from common law and adds significant strategic tools for real property litigators. See chap 15.

Also in the update, two new multitheory attorney-drafted complaint forms were added to the end of chaps 3 and 4 to assist litigators in preparing and filing in the courts complex suits arising from real property sales disputes.

New Cases. When a buyer is unable to close escrow on a real property sale by the required date because the seller did not perform its escrow obligations, the buyer's performance is excused, and the seller may not unilaterally rescind the purchase contract. *Ninety Nine Invs. v Overseas Courier Serv. (Singapore) Private, Ltd.* (2003) 113 CA4th 1118, 6 CR3d 891 (seller's failure to submit certain documents into escrow prevented buyer's lender from depositing purchase funds by anticipated closing date). See §§1.17, 4.8, 5.15.

The property disclosures required under CC §§1102-1102.18 and 2079-2079.24 in residential real property sales cannot be waived; consequently a seller who does not deliver the disclosure statements cannot obtain specific performance of the purchase contract or damages from the prospective buyer. See *Realmuto v Gagnard* (2003) 110 CA4th 193, 1 CR3d 569, discussed in §§1.23, 3.30, 4.7, 4.47, 5.15, 5.20, 14.40A.

Reformation is equitable in nature and not restricted to the exact situations listed in CC §3399; a court may order reformation of a substitution of the trustee under a deed of trust. See, *e.g.*, *Jones v First Am. Title Ins. Co.* (2003) 107 CA4th 381, 131 CR2d 859 (trustee foreclosure sale mistakenly conducted by former trustee validated over trustor's objection through reformation), cited in §§2.2, 2.4, 2.6, 2.9, 2.12.

A real estate licensee who violates Bus & P C §10176(g) (requiring brokers and agents to disclose to their principals any anticipated compensation, commission, or profit resulting from the agency relationship) also violates its fiduciary duty owed to the principal and will be liable in the full amount of the undisclosed benefit. *Roberts v Lomanto* (2003) 112 CA4th 1553, 5 CR3d 866. See §§3.27, 3.33.

The Court of Appeal for the Second District has held that damages for fraud by fiduciary should not be limited to out-of-pocket losses. See *Fragale v Faulkner* (2003) 110 CA4th 229, 1 CR3d 616. The court relied on both CC §§1709 and 3333, and quoted from *Salahutdin v Valley of Cal., Inc.* (1994) 24 CA4th 555, 29 CR2d 463. Courts of appeal in California are divided on this issue. See §3.57.

A party who refuses an offer to settle before trial under CCP §998 and then fails to get a more favorable judgment may have to pay the other party's attorney fees and costs (such as expert witness fees). A recent example of a real property action upholding fees and costs awarded under §998 is *Vick v Dacorsi* (2003) 110 CA4th 206, 1 CR3d 626, cited in §3.88A.

If the seller waives the buyer's timely performance under a real property purchase contract, the buyer may obtain specific performance if it tenders the purchase funds within a reasonable time after the closing date specified in the contract and before the seller reestablishes time conditions by giving notice to the buyer. *Galdjie v Darwish* (2003) 113 CA4th 1331, 7 CR3d 178. See §§4.6, 5.15.

In a defaulted real property sales transaction subject to a settlement agreement under CCP §664.6, a court of appeal applied the liquidated damages statute (CC §1675(d)) and denied to the seller recovery of a buyer's deposit that exceeded 3 percent of the purchase price. See *Timney v Lin* (2003) 106 CA4th 1121, 131 CR2d 387, cited in §4.37.

The defendant in a quiet title action who has affirmative relief claims may either file a cross-complaint or bring them in a separate action, because quiet title actions are exempt from the compulsory cross-complaint rule in CCP §426.30(a). Declaratory relief and quiet title remedies are similar in nature and may be treated as the same type of action for limited procedural purposes. See *Marchbrook Building Co. v Souchek* (2003) 112 CA4th 315, 4 CR3d 874,

cited in §§7.14, 7.49.

Slander of title liability may result from an improperly recorded lis pendens. See *Palmer v Zaklama* (2003) 109 CA4th 1367, 1 CR3d 116 (rejecting absolute privilege defense because recording party did not establish lis pendens was supported by real property claim), cited in §§9.9, 9.15, 13.5, 13.111.

Because tenants in common have the right to share equally in the possession of the entire property, when one cotenant unlawfully excludes other cotenants from part of commonly owned land by erecting a fence, an action for possession (rather than trespass) and injunctive relief is appropriate. See *Kapner v Meadowlark Ranch Ass'n* (2004) 116 CA4th 1182, 1187, 11 CR3d 138. See §§11.17, 11.19, 11.23, 11.45.

The late-discovery rule applicable to most statutes of limitations does not apply to the statutes of repose, which establish time limits for filing suits at 4 or 10 years after a project's completion date. Absent fraud or conduct justifying equitable estoppel, the repose period is not extended while the seller makes promises or attempts to make repairs. *Lantzy v Centex Homes* (2003) 31 C4th 363, 2 CR3d 655. See §§11.40, 12.24-12.27.

When a claimant withdraws the lis pendens while a motion to expunge is pending, the moving party is not automatically entitled to recover statutory attorney fees on the motion. But the trial court must determine which party realized its objectives in the proceeding, by considering the merits of the motion and whether the claimant acted with substantial justification in withdrawing the lis pendens, or whether, in light of the circumstances, the imposition of fees would otherwise be unjust. *Castro v Superior Court* (2004) 116 CA4th 1010, 10 CR3d 865. See §13.55.

A court of appeal held that a disclosure in a title company's preliminary report, stating that the title insurance policy was available for review by the insured at the insurer's office before the policy was issued, was sufficiently conspicuous to enforce against the insured the mandatory arbitration of disputes clause in the policy. See *Wolschlager v Fidelity Nat'l Title Ins. Co.* (2003) 111 CA4th 784, 4 CR3d 179. See §14.42.

Before an attorney agrees to serve for compensation as a mediator in a dispute, the attorney must disclose all facts and circumstances that in the attorney's honest judgment may influence any party to the dispute in choosing the attorney as the mediator. See *Furia v Helm* (2003) 111 CA4th 945, 4 CR3d 357. See §14.70A.

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Rescission

Perry D. Mocciaro

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§1.1 I. INTRODUCTION

Rescission is the extinguishment of a contract. See CC §1688. Rescission relates back to the formation of a contract or agreement, and negates its existence as though it had never been made. See *Long v Newlin* (1956) 144 CA2d 509, 301 P2d 271. The rescinded agreement becomes a nullity; its terms cease to exist and are not enforceable against the other party. *Holmes v Steele* (1969) 269 CA2d 675, 75 CR 216. Rescission terminates further liability and restores the parties to their former positions by requiring each to return whatever consideration was received. *Tippett v Terich* (1995) 37 CA4th 1517, 44 CR2d 862, overruled on other grounds in *Cortez v Purolator Air Filtration Prods. Co.* (2000) 23 C4th 163, 171, 96 CR2d 518.

Rescission can occur without litigation by the parties' mutual consent. Rescission can also be available as a litigation remedy both on account of failure to form a contract because of lack of mutual assent (*e.g.*, grounds of fraud, mistake) and the material failure of consideration for a validly formed and otherwise enforceable contract. See, *e.g., Rodriguez v Barnett* (1959) 52 C2d 154, 338 P2d 907 (failure of consideration); *Crocker-Anglo Nat'l Bank v Kuchman* (1964) 224 CA2d 490, 36 CR 806 (mistake); *Lombardi v Sinanides* (1925) 71 CA 272, 235 P 455 (fraud).

This chapter discusses the nature of rescission in §§1.2-1.8, its grounds in §§1.9-1.28, tactical considerations in §§1.29-1.31, notice of rescission in §§1.32-1.36, and actions for relief in §§1.37-1.57. Checklists for rescission actions are in §§1.58-1.63.

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II. NATURE OF REMEDY

§1.2 A. Statutory Basis

Civil Code §§1688-1693 provide the only methods of effecting a rescission under current law. Under CC §1691 a party to a contract may rescind unilaterally by giving notice of rescission and offering to restore the consideration received. *Runyan v Pacific Air Indus., Inc.* (1970) 2 C3d 304, 85 CR 138. Buyers may also rescind home solicitation contracts under CC §§1689.5-1689.15. See §§1.20, 1.59. In an action for relief based on rescission, the parties are restored generally to the position they occupied before formation of the contract by (1) restitution of all benefits conferred as a result of the transaction, and (2) an award of any consequential damages (see §§1.46-1.48). CC §1692.

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B. Distinguished From Other Remedies

§1.3 1. Cancellation of Instrument

When a written instrument may, if left outstanding, cause serious injury to a person against whom it is void or voidable, that person may bring an action to cancel it under CC §§3412-3413. See chap 6. Rescission and cancellation are similar remedies, which may be invoked in the same action, but there are important differences between them.

Cancellation is a judicial remedy, and only a court can order an instrument canceled (CC §3412); rescission can be effected either without suit by mutual consent of the parties or by adjudication following a unilateral notice with an offer to restore from the rescinding party (CC §1689; *Runyan v Pacific Air Indus., Inc.* (1970) 2 C3d 304, 85 CR 138). Cancellation terminates only the written instrument canceled (CC §3412); rescission terminates the entire contract (CC §1688). Cancellation leaves the parties as they are at the time of cancellation (*Mamula v McCulloch* (1969) 275 CA2d 184, 79 CR 571); rescission restores the parties to their original positions by requiring the return of the consideration each received (*Tippett v Terich* (1995) 37 CA4th 1517, 44 CR2d 862, overruled on other grounds in *Cortez v Purolator Air Filtration Prods. Co.* (2000) 23 C4th 163, 171, 177, 96 CR2d 518; *Sanborn v Ballanfonte* (1929) 98 CA 482, 277 P 152). When an instrument is merely voidable rather than void, however, the canceling party must offer to restore any consideration received, less any damages that party sustained. *Loud v Luse* (1931) 214 C 10, 3 P2d 542; *Bastajian v Brown* (1943) 57 CA2d 910, 135 P2d 374.

Both rescission and cancellation may be appropriate in a particular situation, and the grounds for rescission overlap considerably with the grounds on which an instrument may be found voidable and therefore subject to cancellation (compare §§1.10-1.18 with chap 6). In some cases, it is appropriate to rescind an entire contract and, in order to clear the record, to record an order canceling or rescinding recorded documents (*e.g.,* a deed) which are a part of the contract (see §§1.5-1.8). See also Practice Tip in §1.5.

For discussion of rescission in the title insurance context, see California Title Insurance Practice, chaps 6 (Factors That Do Not Affect Unmarketability), 11 (Rescission-Fraud of Insured) (2d ed Cal CEB 1997). For discussion of rescission or reformation of insurance contracts generally, see California Liability Insurance Practice: Claims & Litigation, chaps 5 (When Rescission or Reformation Remedies Apply to Insurance Contract), 21 (Rescission and Reformation) (Cal CEB 1991).

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§1.4 2. Reformation

When a court grants the judicial remedy of reformation, it issues a judgment correcting an instrument or contract to reflect the parties' true agreement. CC §§3399-3402. See chap 2. Reformation contemplates a continuing contractual relationship between the parties, unlike rescission, which is a retroactive extinguishment of the agreement.

Reformation and relief based on rescission may be pursued in the alternative in the same action (see, *e.g., Mahony v Standard Gas Engine Co.* (1921) 187 C 399, 202 P 146), but an election of remedies must be made before the case is finally submitted to the decision maker (judge or jury). Only one remedy can be ultimately granted because of the inconsistent natures of the remedies. See also §1.29.

In general, the parties must have reached a mutual understanding on all essential terms of the agreement for reformation to be available. *Lemoge Elec. v County of San Mateo* (1956) 46 C2d 659, 297 P2d 638; *Shupe v Nelson* (1967) 254 CA2d 693, 62 CR 352. An innocent party can either rescind or obtain reformation if he or she entered into the transaction as the result of a mutual mistake or a unilateral mistake that was known or should have been known to the other party, or was induced to enter into the contract by the other party's fraudulent representation that the written agreement would reflect the actual agreement. CC §§1689, 3399; see *Lane v Davis* (1959) 172 CA2d 302, 342 P2d 267. If there is no fraud concerning the contents of the contract or no mutual mistake, or if the plaintiff's mistake was not reasonably known or suspected by the other party, reformation is usually not available, although rescission may be (see §§1.10-1.13).

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C. Application to Real Property Contracts

§1.5 1. Purchase Agreements

In real property transactions, rescission is often a useful remedy to unwind a purchase and sale agreement executed by the buyer and the seller of real property. See, *e.g., Hastings v Matlock* (1985) 171 CA3d 826, 217 CR 856; *Reed v King* (1983) 145 CA3d 261, 193 CR 130. An oral out-of-court settlement agreement for rescission of a written contract for the sale of real property is not subject to the Statute of Frauds and need not be in writing. 171 CA3d at 837. See California Real Property Sales Transactions (4th ed Cal CEB 2007) on purchase and sale agreements.

Rescission may be appropriate for other commonly used real property sale related contracts, such as the listing agreement between seller and broker, or escrow instructions between buyer and seller (see, *e.g., Pothast v Kind* (1933) 218 C 192, 24 P2d 771; *Edmunds v Hysong* (1931) 110 CA 746, 294 P 1078), especially when the instructions and purchase agreement are combined in one document. See Real Property Sales, chap 2 (brokers), and Real Property Sales, chap 15 (escrow).

PRACTICE TIP: Rescission of a real estate contract can create significant title insurance issues; among them are issues of unmarketability of title and the insurer's duty to defend. See, *e.g.,* Safeco Title Ins. Co. v Moskopoulos (1981) 116 CA3d 658, 172 CR 248. For further discussion of the issues in *Moskopoulos*, see California Title Insurance Practice, chap 6 (2d ed Cal CEB 1997). On other rescission issues in the title insurance context (*e.g.*, rescission of policy based on fraud of insured), see Title Ins, chap 11.

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§1.6 2. Instruments of Conveyance

Occasionally rescission may be used to challenge a fraudulently obtained deed, although the general rule in California is that rescission of a deed is not the appropriate remedy when the other party fails to perform (see, *e.g., Lavely v Nonemaker* (1931) 212 C 380, 298 P 976; *Norby v Pister* (1952) 114 CA2d 510, 250 P2d 633). Exceptions to the general rule were created for limited situations, such as when the deed itself contains a condition subsequent that has not been met (*Downing v Rademacher* (1901)133 C 220, 65 P 385) or when there was mistake or fraud in the inception of the transfer so that the grantor did not understand the nature of the deed (*Bland v Kelley* (1945) 69 CA2d 116, 158 P2d 206).

Thus, in the usual real property sale, rescission is more properly directed at the underlying purchase and sale agreement (see §1.5), because the deed is merely the instrument by which the seller performs. See 1 Witkin, Summary of California Law, Contracts §933 (10th ed 2005). See also *Engle v Farrell* (1946) 75 CA2d 612, 171 P2d 588. If the party wishes to attack only the deed and not the underlying contract, the appropriate remedy is usually cancellation under CC §§3412-3414. See, *e.g., Steiner v Steiner* (1958) 160 CA2d 665, 325 P2d 109. See chap 6 on cancellation.

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§1.7 3. Installment Land Contracts

Rescission may also be a remedy for breach of contract or for fraud or mistake in an installment land contract, which is essentially a security device by which the seller retains title until the buyer completes the agreed-on payments. See, *e.g., Brimmer v Salisbury* (1914) 167 C 522, 140 P 30 (buyer sued to rescind). See California Real Property Sales Transactions §§9.14-9.17 (4th ed Cal CEB 2007) for discussion of installment land contracts. By contrast, rescission is generally not much use to a seller under an installment land contract, either because the contract contains the remedy of a power of sale (see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 2 (4th ed Cal CEB 2009), or because the seller retains a remedy such as quiet title (see chap 7) or specific performance (see chap 5) followed by a judicial foreclosure and unlawful detainer action (see Mortgage Deed of Trust Foreclosure, chap 3), which will force the sale of the property when the buyer fails to perform and ultimately remove the buyer from the property.

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§1.8 4. Leases

Rescission may sometimes be useful to a tenant under a lease. Like any contract, a lease is subject to rescission on grounds of fraud (*Pohl v Mills* (1933) 218 C 641, 24 P2d 476), mistake (*Hannah v Steinman* (1911) 159 C 142, 112 P 1094), or material breach of the lease by the other party (*Medico-Dental Bldg. Co. v Horton & Converse* (1942) 21 C2d 411, 132 P2d 457). The doctrine of constructive eviction provides a tenant with a remedy similar to rescission. See California Landlord-Tenant Practice §3.15B (2d ed Cal CEB 1997).

In contrast, rescission is not likely to be of much use to the lessor, who typically wants to pursue either the more efficient remedy of an unlawful detainer action if the tenant is still in possession (CCP §§1161-1179a) or damages if the tenant has breached and vacated. Breach of an agreement to lease (as distinct from breach of a lease) occurs when a party fails to execute a formal lease in accordance with the terms of an agreement to do so; the nonbreaching party may then rescind the agreement to lease. See *Lewis v James* (1955) 134 CA2d 15, 285 P2d 86.

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4. Secured Loans

§1.8A a. Common Law and Statutory Fraud

Special theories or causes of action on which loan rescission or damages may be based are fraud, mistake, and material failure of consideration; these may apply in both consumer and commercial transactions. California statutes address fraud both as a tort and as an aspect of contract law. See, *e.g.,* CC §§1709-1710, 1572-1573.

Theories of actual fraud (see CC §1572) may be asserted against lenders (and, when facts indicate a high level of involvement in the lending process, their assignees) with regard to loan origination, loan administration, or loan workouts. See, *e.g*., *River Colony Estates Gen. Partnership v Bayview Fin'l Trading Group* (SD Cal 2003) 287 F Supp 2d 1213; *Auerbach v Great W. Bank* (1999) 74 CA4th 1172, 88 CR2d 718; *Kruse v Bank of America* (1988) 202 CA3d 38, 248 CR 217.

Constructive fraud (see CC §1573) is more difficult to prove; the borrower may have an uphill battle establishing that the lender is a fiduciary of the borrower merely by virtue of the lender-borrower relationship. See *River Colony Estates Gen. Partnership v Bayview Fin'l Trading Group, supra*. Loan brokers may be liable for constructive fraud (see *Wyatt v Union Mortgage Co.* (1979) 24 C3d 773, 157 CR 392), and their liability may be imputed to the funding lender in the proper situation. For further discussion of these cases and other bases for lender liability, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 7, 12 (4th ed Cal CEB 2009).

Closely related to breach of contract is promissory fraud. In loan transactions, complaints for promissory fraud typically allege that the lender made a promise to restructure a loan, without intending to perform, to induce the borrower to grant additional collateral or take other actions that would benefit the lender at the expense of the borrower. Likewise, oral communications of the parties that directly contradict language in the deed of trust, coupled with conflicting provisions in the note and deed of trust, may support a cause of action for promissory fraud. See, *e.g.*, *Fischer v First Int'l Bank* (2003) 109 CA4th 1433, 1 CR3d 162. Although these types of cases are always fact specific, appellate courts are paying increased attention to the essential elements of the tort, particularly causation and justifiable reliance. For further discussion, see chap 3.

A property owner defrauded by a lender, who deliberately misapplied loan funds after representing they would be used to pay off a prior mortgage, may sue to rescind the note and deed of trust, even if the loan is sold and foreclosure is pending. See *Daniels v Williams* (1954) 125 CA2d 310, 270 P2d 556. Similarly, when a seller has financed the purchase of real property, but misrepresented to the buyer the value and the amount of rents collectible from the tenants, the buyer may sue to rescind the sale and the financing agreement (note and deed of trust). *Stockton v Newman* (1957) 148 CA2d 558, 307 P2d 56.

PRACTICE TIP: In both *Daniels* and *Stockton*, the borrowers obtained preliminary injunctions to restrain foreclosure on the fraudulent loans. On enjoining foreclosure proceedings, see Mortgage Deed of Trust Foreclosure, chap 7.

The statute of limitations for fraud and related theories begins to run on the date of discovery of the injury, rather than the transaction closing date. For example, the 3-year statute for tort actions based on fraud or mistake provides that the cause of action does not accrue until the plaintiff discovers the facts constituting the fraud or mistake. CCP §338(d). Similar rules apply for contract rescission. See CCP §§337(3) (4-year statute applicable to written contracts), 339(3) (2-year statute applicable to oral contracts).

But the late discovery standard is limited by an objective test. Accordingly, the statute begins to run when the plaintiff becomes aware of facts that would cause a reasonably prudent person to discover the fraud or mistake. *Jefferson v Pietroroia* (1936) 5 C2d 222, 54 P2d 7; *Citizens Cas. Co. v Otis Clark & Co.* (1971) 19 CA3d 294, 96 CR 838. If the failure to read an agreement is caused by a fiduciary's misrepresentation, however, the plaintiff's usual duty of diligence to discover facts does not apply. *Bennett v Hibernia Bank* (1956) 47 C2d 540, 305 P2d 20. See *Butcher v Truck Ins. Exch.* (2000) 77 CA4th 1442, 92 CR2d 521; *Cassel v Globerson (In re Kolb)* (ND Cal, May 29, 2007, No. 97-32321) 2007 Bankr. Lexis 1896 (fraudulent concealment of facts tolls statute of limitations until existence of cause of action is discovered).

For further discussion of statute of limitations defense, see §1.51.

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§1.8B b. Predatory Lending; Statutory Remedies

The term "predatory lending" is frequently used to describe a range of "abusive and aggressive lending practices" targeting the elderly, persons with limited income, or those in deep debt. See, *e.g.*, *American Fin. Servs. Ass'n v City of Oakland* (2005) 34 C4th 1239, 1244, 23 CR3d 453. A common misconception is that predatory lending is a recent phenomenon in subprime consumer loans made by noninstitutional lenders. But institutional lenders with respectable reputations in the banking industry can be guilty of lending abuses, and their victims may be sophisticated borrowers. See, *e.g.*, *Auerbach v Great W. Bank* (1999) 74 CA4th 1172, 88 CR2d 718; *State Nat'l Bank v Farah Mfr. Co.* (Tex App 1984) 678 SW2d 661, cause dismissed by agreement (Mar. 6, 1985).

Common law remedies for predatory lending based on fraud are discussed in §1.8A. California has a few statutory protections directed specifically to predatory lending. For example, if the borrower is an elder or dependent adult and the loan was made as a result of "fiduciary abuse," as defined in Welf & I C §15610.30, in addition to all other remedies provided by law, the borrower is entitled to a prejudgment writ of attachment, and to recover attorney fees, litigation costs, and fees for the services of a conservator ad litem. If the borrower further shows by clear and convincing evidence that the defendant is guilty of recklessness, oppression, fraud, or malice, the plaintiff is also entitled to other enhanced remedies, including punitive damages. See Welf & I C §§15657-15657.5. For further discussion, see California Elder Law Litigation: An Advocate's Guide, chap 6 (Cal CEB 2003).

Also, in California, the Consumer Loan Protection Law (Fin C §§4970-4979.8) prohibits predatory lending practices for residential real property secured loans in an amount that does not exceed the most current conforming loan limit for a single-family first mortgage established by the Federal National Mortgage Association.

For further discussion, including federal statutory remedies for predatory lending, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 8, 12 (4th ed Cal CEB 2009). See also §1.28.

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III. GROUNDS FOR RESCISSION

§1.9 A. Mutual Consent (CC §1689(a))

A contract may be rescinded by the consent of all parties, regardless of its express terms. See CC §1689(a); *Rackliff v Coronet Constr. Co.* (1958) 157 CA2d 419, 321 P2d 50. If there is mutual consent, no cause or grounds are needed. Mutual consent to rescission need not be written (*Martin v Butter* (1949) 93 CA2d 562, 209 P2d 636; *San Roque Props. v Pierce* (1937) 18 CA2d 379, 63 P2d 1198), and it may be implied from the parties' conduct (*Bush v Vernon* (1955) 135 CA2d 33, 286 P2d 903). See also *Hastings v Matlock* (1985) 171 CA3d 826, 837, 217 CR 856. Mutual cancellation of both sides' executory rights and obligations under a written contract constitutes sufficient consideration for mutual rescission. *Honda v Reed* (1958) 156 CA2d 536, 319 P2d 728.

PRACTICE TIP: Once mutual consent has occurred, a binding agreement to rescind is created. The rescission remains effective, even if one of the consenting parties then changes his or her mind. This means that a party giving notice of rescission merely as one of several alternative counts in a complaint (see, *e.g.*, complaint in chap 3) will be bound to a rescission if the other side accepts rescission in its answer.

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B. Unilateral Rescission (CC §1689(b))

1. Mistake

§1.10 a. Mistake May Be Mutual or Unilateral

An agreement may be rescinded if the rescinding party's consent is based on a mistake or misunderstanding of facts or law, and the other party either shares the misunderstanding or contributes to it by misrepresentation, even if innocently. CC §1689(b)(1); *Crocker-Anglo Nat'l Bank v Kuchman* (1964) 224 CA2d 490, 36 CR 806. In the past, a mistake of fact or law had to be mutual to constitute grounds for rescission. *Hannah v Steinman* (1911) 159 C 142, 112 P 1094; *Merced County Mut. Fire Ins. Co. v State* (1991) 233 CA3d 765, 284 CR 680. The current tendency, however, is to allow rescission even for a unilateral mistake. Rescission may lie, for example, when one party underestimates or miscalculates a material term and the other party knows of or suspects the error and takes advantage of it. See *White v Berrenda Mesa Water Dist.* (1970) 7 CA3d 894, 87 CR 338. Some courts have held that mistakes in value and quantity are not material, however, because the parties assume these risks in entering into an agreement. See, *e.g.*, *Vickerson v Frey* (1950) 100 CA2d 621, 224 P2d 126.

Rescission of contract for a unilateral mistake is allowed when the unilateral mistake is known to the other contracting party and is encouraged or fostered by that party. Reliance on a unilateral mistake not encouraged or fostered by the other party is not reasonable when the plaintiff could have ascertained the truth by exercising reasonable diligence. *Brookwood v Bank of America* (1996) 45 CA4th 1667, 53 CR2d 515. The mistake must be material and cannot be the result of conduct by the rescinding party that rises to the level of neglect of a legal duty. *White v Berrenda Mesa Water Dist., supra; Roller v California Pac. Title Ins. Co.* (1949) 92 CA2d 149, 206 P2d 694.

One court of appeal allowed a purchaser of property from a public entity to rescind that contract on the ground of unilateral mistake under CC §1689. See *Schultz v County of Contra Costa* (1984) 157 CA3d 242, 203 CR 760. The case law is split, however, on whether remedies provided by Rev & T C §§3725-3731 (which provide only for rescission against a public entity in instances involving fraud) are exclusive. See authorities discussed in *Van Petten v County of San Diego* (1995) 38 CA4th 43, 44 CR2d 816.

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§1.11 b. Pleading and Proof Requirements for Mistake

The facts supporting the claimed mistake must be pleaded specifically in an action based on rescission. See *Stock v Meek* (1950) 35 C2d 809, 221 P2d 15. (See §§1.44-1.45 on the essential allegations and the complaint form.) Facts supporting innocent misrepresentation also support a claim of mistake as the basis for rescission. See §§1.10-1.11. See also *Wood v Kalbaugh* (1974) 39 CA3d 926, 114 CR 673.

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2. Fraud

§1.12 a. Fraud May Be Actual or Constructive

When a party has been induced by fraud or mistake to enter into a contract, the party may have the contract set aside and seek restitution of those benefits lost to him by the transaction. See CC §1689(b)(1); *Reveles v Toyota by the Bay* (1997) 57 CA4th 1139, 67 CR2d 543, disapproved on other grounds in *Snukal v Flightways Mfg., Inc.* (2000) 23 C4th 754, 775, 98 CR2d 1. Fraud, either actual or constructive, constitutes a ground for rescinding an agreement. CC §1689(b)(1); see *Lombardi v Sinanides* (1925) 71 CA 272, 235 P 455.

Constructive fraud arises from breach of a duty by which one party gains an advantage over another (CC §1573); it includes breach of duty in a confidential relationship and is frequently encountered in real property transactions in the context of the broker-principal dealings because brokers are in a confidential relationship with their principals. See *Warren v Merrill* (2006) 143 CA4th 96, 49 CR3d 122. See also California Real Property Sales Transactions, chaps 2, 4 (4th ed Cal CEB 2007). Constructive fraud often arises from silence that otherwise might not be actionable, when a confidential relationship is of a kind that imposes a duty of full disclosure. Constructive fraud need not be based on a strict fiduciary relationship; it may be established when one party uses superior knowledge to gain an unreasonable advantage or stands in some confidential relationship to the rescinding party. *Bank of America v Sanchez* (1934) 3 CA2d 238, 38 P2d 787.

Actual fraud, as distinct from constructive fraud, can arise in a mere arm's-length, nonconfidential contractual relationship (CC §1572) and may include the following:

- Affirmative misrepresentation (the suggestion of a fact as true by one who does not believe it to be true (CC §1572(1); see CC §1710(1); *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800; *Hale v Wolfsen* (1969) 276 CA2d 285, 81 CR 23; *Stockton v Newman* (1957) 148 CA2d 558, 307 P2d 56));
- Negligent misrepresentation (assertion of a fact as true without reasonable basis for believing it to be true (CC §1572(2); see CC §1710(2); *Doran v Milland Dev. Co.* (1958) 159 CA2d 322, 323 P2d 792));
- Concealment or nondisclosure (suppression of a fact by one with knowledge of, or belief in, the fact (CC §1572(3); see CC §1710(3); *Herzog v Capital Co.* (1945) 27 C2d 349, 164 P2d 8; *Reed v King* (1983) 145 CA3d 261, 193 CR 130; *Lingsch v Savage* (1963) 213 CA2d 729, 29 CR 201));
- Promissory fraud (making a promise with no intent to perform) (CC §1572(4); see CC §1710(4); *Daniels v Williams* (1954) 125 CA2d 310, 270 P2d 556); and
- Any other conduct "fitted to deceive" (CC §1572(5); see *Wells v Zenz* (1927) 83 CA 137, 256 P 484).

An innocent misrepresentation, made in good faith and with a reasonable belief in its truth, is not actionable fraud but may give rise to a right to rescind on the ground of mistake (see §§1.10-1.11). *Wood v Kalbaugh* (1974) 39 CA3d 926, 114 CR 673.

Sellers are not liable for defects in the quality or condition of commercial property sold "as is" when the property is not new and the sale is made in good faith and without fraudulent misrepresentation or concealment. *Shapiro v Hu* (1986) 188 CA3d 324, 233 CR 470. This holding, however, is based on narrow facts and does not overrule *Lingsch v Savage, supra,* which held that an "as is" provision in a residential real estate transaction will not shield a seller who fraudulently misrepresents or conceals known defects. See also *Galen v Mobil Oil Corp.* (CD Cal 1996) 922 F Supp 318 ("as is" language in a contract did relieve seller of liability for nuisance and trespass claims even though any fraud claim against seller was time barred).

For discussion of rescission based on fraud and related theories in the context of real property lending, see §§1.8A-1.8B.

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§1.13 b. Pleading and Proof Requirements for Fraud

To obtain relief based on rescission for fraud, the rescinding party must plead and prove the following (*Gonsalves v Hodgson* (1951) 38 C2d 91, 237 P2d 656; *Ach v Finkelstein* (1968) 264 CA2d 667, 70 CR 472):

- Defendant misrepresented or concealed a material fact,
- The representation was false and defendant knew or should have known of its falsity,
- The misrepresentation or nondisclosure was committed with intent to induce plaintiff to enter into the transaction,
- Plaintiff reasonably relied on the representation or ignorance of the concealed fact, and
- Plaintiff suffered injury as a result of this reliance.

A fraud action requires that the plaintiff plead facts that "show how, when, where, to whom, and by what means" the representations were made. *Stansfield v Starkey* (1990) 220 CA3d 59, 73, 269 CR 337.

PRACTICE TIP: Fraud is difficult to prove and should be approached with great care and only after detailed and sufficient facts have been gathered. Before filing the complaint, counsel should review California fraud and deceit jury instructions in CACI 1900-1908 (see also BAJI 12.30-12.57) to ascertain the type of fraud applicable to the facts and whether the facts are sufficient to establish all necessary elements.

Specific pecuniary loss need not be proved as a basis for rescission for fraud as long as the rescinding party shows substantial injury. *Dunn v Stringer* (1940) 41 CA2d 638, 107 P2d 411. There is even some authority that rescission may be based on the mere existence of fraud without a showing of injury or damage. *Earl v Saks & Co.* (1951) 36 C2d 602, 226 P2d 340; *Rodes v Shannon* (1963) 222 CA2d 721, 35 CR 339. The elements of fraud, like those of mistake, must be pleaded specifically in an action for relief based on rescission. *Harding v Robinson* (1917) 175 C 534, 166 P 808. However, in order to escape from its obligation the aggrieved party must *rescind* by prompt notice and offer to restore the consideration received, if any. A party who delays in seeking the remedy of rescission may forfeit the right to rescind if the delay substantially prejudiced the other party. *Citicorp Real Estate, Inc. v Smith* (9th Cir 1998) 155 F3d 1097.

The parol evidence rule does not bar evidence of fraudulent inducement to form a contract through alleged misrepresentations of fact. See Jefferson's California Evidence Benchbook, chap 34 (4th ed CJA-CEB 2009). Evidence of such fraud is admissible in an action for rescission because it does not go to contradict the terms of the parties' integrated agreement, but to show that the purported instrument has no legal effect; see CC §1689(b)(1). *Edwards v Centex Real Estate Corp.* (1997) 53 CA4th 15, 61 CR2d 518. This exception to the parol evidence rule does not apply if the evidence is offered to show a promise contradicting the written agreement itself. *West v Henderson* (1991) 227 CA3d 1578, 1583, 278 CR 570, following *Bank of America Nat'l Trust & Sav. Ass'n v Pendergrass* (1935) 4 C2d 258, 48 P2d 659.

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§1.14 c. Exculpatory Provisions

In written agreements, sellers often attempt to limit claims of misrepresentations and rescission by pointing to integration clauses, in which purchasers have agreed that no reliance was placed in any warranties or representations not contained in the agreement. Because fraud renders the agreement voidable, however, a party to an agreement who is "induced by fraudulent misrepresentations or nondisclosures is entitled to rescind, notwithstanding the existence of purported exculpatory provisions contained in the agreement." *Danzig v Jack Grynberg & Assocs.* (1984) 161 CA3d 1128, 1138, 208 CR 336; see also *Manderville v PCG&S Group, Inc.* (2007) 146 CA4th 1486, 1501, 55 CR3d 59. Only a limited disclosure is required of sellers or others conducting foreclosure sales, because foreclosure is exempt from the disclosure requirements in CC §1102.2(c). *Assilzadeh v California Fed. Bank* (2000) 82 CA4th 399, 98 CR2d 176.

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§1.15 3. Undue Influence

An agreement may be rescinded if the rescinding party's consent was obtained through duress or undue influence. CC §1689(b)(1); *Leeper v Beltrami* (1959) 53 C2d 195, 1 CR 12. Undue influence consists of any of the following (CC §1575):

- Using a confidential relationship with a person, or a real or apparent authority over a person, to obtain an unfair advantage over that person;
- Taking advantage of another's weakness of mind; or
- Taking a grossly unfair and oppressive advantage of another's necessities or distress.

PRACTICE TIP: Undue influence is often an issue when an elderly or infirm person enters into a transaction or when a transfer is made to someone who is close to the person or on whom the person relies. See, *e.g.,* California Elder Law Resources, Benefits, and Planning: An Advocate's Guide, chap 2 (Cal CEB 2003); California Elder Law Litigation: An Advocate's Guide, chap 6 (Cal CEB 2003).

In determining whether undue influence was used to obtain the rescinding party's consent, the court examines whether it appears from the entire context that the party was induced to do an act he or she would not otherwise do, or refrained from doing an act he or she would do, if left to act freely. *Keithley v Civil Serv. Bd.* (1970) 11 CA3d 443, 89 CR 809. With gifts or conveyances, the susceptibility to imposition, the extreme age and infirmity of the grantor, and evidence of circumstances inferring that the instrument was the product of coercion will shift the burden and require the beneficiary to show affirmatively that the transaction was fair and free from influence. *Longmire v Kruger* (1926) 80 CA 230, 238, 251 P 692.

Factors that courts may consider in determining the existence of undue influence include:

- Whether the consideration was adequate (*McDougall v Roberts* (1919) 43 CA 553, 185 P 483),
- Whether the plaintiff acted with a free mind (*Anderson v Nelson* (1927) 83 CA 1, 256 P 294),
- Whether the transaction took place at arm's length (*Mills v Kopf* (1963) 216 CA2d 780, 31 CR 80),
- Whether a confidential relationship existed between the parties (*O'Neil v Spillane* (1975) 45 CA3d 147, 119 CR 245; *Kloehn v Prendiville* (1957) 154 CA2d 156, 316 P2d 17), and
- Whether the plaintiff acted voluntarily (*Channell v Anthony* (1976) 58 CA3d 290, 129 CR 704).

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§1.16 4. Duress and Menace

Duress and menace are set forth as grounds for rescission in CC §1689(b)(1) and are defined in CC §§1569-1570. Duress consists of an unlawful act of confinement or detention of a person or property that compels assent through fear. CC §1569; *Keithley v Civil Serv. Bd.* (1970) 11 CA3d 443, 89 CR 809. A threat to exercise a valid legal right, however, is not duress. *Miller v Walden* (1942) 53 CA2d 353, 127 P2d 952. Nor is it duress or menace to threaten litigation or nonperformance of a contract. *U.S. Hertz, Inc. v Niobrara Farms* (1974) 41 CA3d 68, 116 CR 44.

Menace is a threat of duress or of injury to the person, property, or character of another. CC §1670; *Odorizzi v Bloomfield Sch. Dist.* (1966) 246 CA2d 123, 54 CR 533. An obvious example is threatening bodily harm to induce a party to sign a contract. A threat of criminal prosecution is a threat of injury to the character and constitutes menace. *Shasta Water Co. v Croke* (1954) 128 CA2d 760, 276 P2d 88.

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§1.17 5. Failure of Consideration

Apart from circumstances in which valid mutual assent is lacking, a contract may also be rescinded if the consideration for the rescinding party's obligation does any of following:

- Fails, in whole or in part, through the fault of the other party (CC §1689(b)(2));
- Becomes entirely void for any reason (CC §1689(b)(3)); or
- Fails in a material respect before being rendered to the rescinding party (CC §1689(b)(4)).

Thus, if a contract fails without fault or breach by either party, rescission for failure of consideration may be the only appropriate remedy. CC §1689(b)(3); see, *e.g., Rodriguez v Barnett* (1959) 52 C2d 154, 338 P2d 907.

For example, a buyer's failure to secure a loan commitment by the date provided in the purchase contract may justify rescission. *Fowler v Ross* (1983) 142 CA3d 472, 191 CR 183. Although the contract did not provide that time was of the essence, the court in *Fowler* held that the buyer was required to secure a loan commitment within a reasonable time after the contractual date had expired. Similarly, if a contract does not specify a performance date, a reasonable time is permitted under CC §1657. See §5.9. The reasonableness of time for performance is a question of fact. *Eidsmore v RBB, Inc.* (1994) 25 CA4th 189, 30 CR2d 357.

When the buyer is unable to close escrow by the required date because the seller did not perform its escrow obligations, however, the buyer's timely performance is essentially excused, and the seller may not unilaterally rescind the purchase contract. *Ninety Nine Invs. v Overseas Courier Serv. (Singapore) Private, Ltd.* (2003) 113 CA4th 1118, 6 CR3d 891 (seller's failure to submit certain documents into escrow prevented buyer's lender from depositing purchase funds by anticipated closing date).

The failure of consideration must be material. See, *e.g.*, *Medico-Dental Bldg. Co. v Horton & Converse* (1942) 21 C2d 411, 132 P2d 457; *Fountain v Semi-Tropic Land & Water Co.* (1893) 99 C 677, 34 P 497; *Integrated, Inc. v Alec Fergusson Elect. Contractor* (1967) 250 CA2d 287, 58 CR 503. The buyer's failure to pay the first installment when due is a material failure of consideration that entitles the seller to rescission (*Smith v Blandin* (1901) 133 C 441, 65 P 894), as is the failure to tender marketable title when the purchase and sale agreement matures (*Post v Palpar, Inc.* (1960) 184 CA2d 676, 7 CR 823). Delay in performance is a material failure of consideration only if the contract expressly makes time of the essence (*Henck v Lake Hemet Water Co.* (1937) 9 C2d 136, 69 P2d 849) or if the delay goes beyond what is reasonable (*Mettler v Vance* (1916) 30 CA 499, 158 P 1044). A breach of an exclusive use clause in a shopping center lease may be grounds for rescission as a material breach of the lease. See *Flagship West LLC v Excel Realty Partners* (ED Cal, Sept. 30, 2005, No. CV-05200 OWW DLB) 2005 US Dist Lexis 29623, vacated (9th Cir 2009) 337 Fed Appx 679 (unpublished opinion).

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§1.18 6. Illegality; Prejudice to Public Interest

Rescission is available as a remedy if the contract is unlawful for causes not appearing in its terms and if the parties are not equally at fault. CC §1689(b)(5); see *Colby v Title Ins. & Trust Co.* (1911) 160 C 632, 117 P 913. The court will weigh the parties' relative fault if the subject matter of the contract is merely a prohibited wrong; if it is inherently wrong, the court may consider the parties equally blameworthy and refuse any relief. See *Smith v Bach* (1920) 183 C 259, 191 P 14.

A party may be permitted to rescind a contract if the public interest would be prejudiced by allowing the contract to stand. CC §1689(b)(6). Generally, rescission is available on this ground only if the contract is still executory (*Glos v McBride* (1920) 47 CA 688, 191 P 67), but if the equities and facts warrant, rescission may be proper even if the contract has been executed (*People ex rel Mosk v Barenfeld* (1962) 203 CA2d 166, 21 CR 501).

WARNING: Illegality issues usually arise in the real estate context surrounding issues of licensure, as with brokers and contractors. The defense of illegality may be raised at almost any procedural stage. Because this defense can result in the failure of an otherwise successful case, particular attention should be given to the issue of licensure and illegality before committing extensive resources to a case.

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§1.19 7. Enumerated Statutes

A party may rescind a contract under any of the circumstances provided for in several enumerated sections of the Civil, Corporations, and Insurance codes, or in any other statute. CC §1689(b)(7).

One such enumerated statute that might apply in a real property context is CC §39, which provides for rescission if the rescinding party was of unsound mind at the time the contract was entered into. A rebuttable presumption affecting the burden of proof that the person was of unsound mind exists if the person is substantially unable to manage his or her own financial resources or to resist fraud or undue influence; however, substantial inability may not be proved solely by isolated incidents of negligence or improvidence. See also *Deasy v Taylor* (1918) 39 CA 235, 178 P 538. The ground of unsound mind frequently involves the same kinds of proof relevant to undue influence cases; the two are frequently pursued together (see §1.15).

Also of possible usefulness is CC §1930, which permits rescission of a contract to hire a thing, including real property, for a particular purpose if the hirer uses it for some other purpose. See *Keating v Preston* (1940) 42 CA2d 110, 108 P2d 479.

PRACTICE TIP: Many statutes permit rescission. Attorneys should be especially mindful to research all possible applicable statutes and regulations in "consumer" transactions, as described in §§1.20-1.28.

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C. Special Statutory Grounds for Rescission

1. Home Solicitation Contracts

§1.20 a. California Law

Civil Code §§1689.5-1689.15 regulate home solicitation contracts, and under CC §1689.6, a buyer who has executed such a contract may cancel (*i.e.,* rescind) it without cause within 3 business days. These provisions cover any contract or offer made at other than appropriate trade premises for $25 or more, including service or interest charges. *Louis Luskin & Sons v Samovitz* (1985) 166 CA3d 533, 212 CR 612.

Contracts which strictly meet the requirements of a "service and repair contract," as defined in Bus & P C §7159.10, may not be rescinded after the buyer receives a signed and dated copy of the contract and the work commences. CC §1689.15.

The right to cancel extends at least until midnight of the third business day after the day on which the buyer signs an agreement in conformity with CC §1689.7. If, after the third business day, the buyer has not received the written contract and work has not commenced, the cancellation period is extended. CC §1689.6(a)(3). The contract must be written in the same language, *e.g.,* Spanish, as principally used in the oral sales presentation, provide a statement in at least 10-point boldface type of the right to cancel, and include or be accompanied by a form notice of cancellation. CC §1689.7(a).

NOTE: Home improvement contracts (Bus & P C §7151.2) and service and repair contracts (Bus & P C §7159.10) have slightly different language and cancellation notice requirements. For example, the form notice of right to cancel must be in at least 12-point boldface type and include procedures for return of buyer's payments and contractor's goods. CC §1689.7(a)(4)-(5). Notwithstanding other notice periods, licensed contractors may commence work as soon as the buyer receives a signed and dated copy of a contract that complies with Bus & P C §7159.10, at which time the buyer is deemed to have waived any cancellation right provided in CC §§1689.5-1689.14. See CC §1689.15.

The cancellation period for agreements or offers to purchase a "personal emergency response unit" is 7, rather than 3, business days after the offer or agreement is signed. CC §1689.6(b). The units include in-home radio transmitter devices, including but not limited to transmitters worn on a neck chain or wrist strap, or clipped to clothing, and connected by telephone line to a monitoring station that will be alerted and summon emergency assistance. CC §1689.6(g). These units are often worn by elderly, housebound people or persons with heart conditions or other ailments that might prevent them from physically reaching a telephone in an emergency. If, however, the unit is installed with, and as part of, a home security alarm system, the cancellation period is 3 days. CC §1689.6(b). Cancellation occurs when the buyer gives written notice to the seller; notice sent through the mail is effective when mailed. CC §1689.6(d)-(e).

The right to cancel remains open indefinitely if certain requirements are not met (CC §1689.7(g)), including, *e.g.,* that the contract should be written in the same language as used in the oral sales presentation (CC §1689.7(a)(1)) and contain a statement of the right to cancel and procedures for the return of payments and goods upon cancellation (CC §1689.7(a)(1)-(5)). At the time of execution, the seller of a home solicitation contract is required to provide the buyer with a copy of the contract and to orally inform the buyer of the cancellation right and of the fact that the cancellation itself must be in writing. CC §1689.7(f). The seller must return any payments the buyer has made on a note or evidence of indebtedness within 10 days after cancellation. CC §1689.10.

Certain home solicitation contracts entered within a week after a disaster such as earthquake or flood are void. CC §1689.14. Any home solicitation contract or offer for repair or restoration of residential premises damaged by a disaster, not void under §1689.14, may be canceled by the buyer within 7 business days after the contract is signed and dated. CC §1689.6(c). For those contracts, the notice of cancellation required by CC §1689.7 must be slightly modified. See CC §1689.7(e). However, contracts initiated by the buyer or its insurer to make emergency repairs to protect people or property are not subject to rescission if the buyer expressly waives the right to cancel in a separate document. CC §1689.13.

Except for waiver pursuant to CC §1689.13, and the special situations in disasters and emergencies, any waiver of rescission rights or confession of judgment as to home solicitation contracts is void. CC §1689.12.

Cancellation rights do not apply when the home solicitation contract is (1) initiated by the buyer or buyer's insurance

representative; (2) executed in connection with emergency repairs or repairs needed to immediately protect persons or property; and (3) accompanied by a writing to the seller describing the urgent situation and expressly waiving the right to cancel. CC §1689.13.

Rescission rights under CC §1689.6 do not apply to any contract on which the buyer has a right to rescind under 15 USC §1635 of the Consumer Credit Protection Act (CCPA) (15 USC §§1601-1693r). CC §1689.5(a). See §1.21. For discussion of rescission of a home solicitation contract relating to real property, see *Williams v Kapilow & Son* (1980) 105 CA3d 156, 164 CR 176.

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§1.21 b. Federal Law

California law (see §1.20) does not govern cancellation (*i.e.,* rescission) of any contract in which the Consumer Credit Protection Act (CCPA) (15 USC §§1601-1693r) gives the buyer a right to rescind. For further discussion, see §1.28.

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§1.22 2. Home Equity Sales Contracts

Some important rescission rights are in CC §§1695-1695.17, 2945-2945.11. The Home Equity Sales Contract Act was enacted to protect homeowners who are faced with foreclosure proceedings and may find themselves at the mercy of unscrupulous individuals who "induce homeowners to sell their homes for a small fraction of their fair market values through the use of schemes which often involve oral and written misrepresentations, deceit, intimidation, and other unreasonable commercial practices." CC §1695(a); see *Boquilon v Beckwith* (1996) 49 CA4th 1697, 57 CR2d 503.

The Act seeks to regulate transactions between an equity purchaser and an equity seller resulting in the sale of residential real property in foreclosure. The agreement between buyer and seller must be in writing, with specific terms aimed at protecting the homeowner. CC §§1695.2-1695.3, 1695.5. The contract must include the total consideration given, terms of payment and of any rental agreement; a conspicuous statement of the right to cancel within 5 business days or until 8 a.m. on the day scheduled for foreclosure (cooling-off period), with an attached notice of cancellation; and a conspicuous notice that, until the right to cancel has ended, the equity purchaser may not ask the seller to sign a deed or any other documents. CC §§1695.3-1695.5. The equity purchaser must provide, and complete, a contract that complies with these terms. CC §1695.6(a). The cooling-off period begins to run only when the seller signs a contract that complies with the Act. CC §§1695.4(a), 1695.5(d). *Hoffman v Blum* (ND Cal, Feb. 1, 2008, Nos. C 06-2416, C 07-2417) 2008 US Dist Lexis 7643. During the cooling-off period, the equity purchaser may not take title to the property by written instrument or recordation, transfer or encumber any interest in the property, or pay the seller any consideration. CC §1695.6(b); see *Boquilon v Beckwith, supra*. Although the Act requires the equity purchaser to be bonded (CC §1695.17(a)(1)), that requirement has been held void for vagueness. *Schweitzer v Westminster Invs.* (2007) 157 CA4th 1195, 69 CR3d 472. (AB 1356 (2008) introduced to rectify infirmity identified in *Schweitzer*, but it did not become law.)

The Act expressly prohibits the purchaser from making untrue or misleading statements about the value of the property, any foreclosure proceeds, or the terms of sale. CC §1695.6(d). Additionally, when the seller grants the residence by an instrument purporting to be an absolute conveyance but reserves or is given an option to repurchase, the equity purchaser may not grant any interest in the property to another without the seller's written consent. CC §1695.6(e). Finally, it is unlawful to take unconscionable advantage of the property owner in foreclosure. CC §1695.13. Depending on the nature of the violation, the aggrieved seller may be entitled to rescission or other equitable relief or damages, including an award of actual damages, reasonable attorney fees, and either exemplary damages or a civil penalty of up to $2500. CC §§1695.7, 1695.14; *Boquilon v Beckwith, supra*. An aggrieved seller's recordation of a notice of rescission or a lis pendens is a protected act in furtherance of the sellers' rights under the anti-SLAPP law, CCP §425.16(e). See *Salma v Capon* (2008) 161 CA4th 1275, 1285, 74 CR3d 873. A purchaser who violates CC §1695.6 may also be subject to criminal prosecution. CC §1695.8.

If the purchaser fails to comply with the rescission notice provisions of the Act, the seller's right to rescind survives the closing, a subsequent unlawful detainer judgment, and a broad release of claims under CC §1542. *Hoffman v Blum, supra*.

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§1.23 3. Residential Purchase and Sale Contracts

Since 1987, California law has required both sellers and brokers to precisely disclose to buyers of residential property certain facts relating to the physical condition of the property. See CC §§1102-1102.18 and 2079-2079.24, which require an inspection and the completion and delivery of a statutory disclosure form before the close of escrow (discussed further in §§3.30-3.33). By a later amendment, the disclosures also apply to resales of manufactured homes as defined in Health & S C §18007 and mobilehomes as defined in Health & S C §18008. See CC §§1102(b), 2079(a).

A waiver of the required disclosure is void as against public policy. CC §1102(c). See *Realmuto v Gagnard* (2003) 110 CA4th 193, 1 CR3d 569.

NOTE: Noncompliance with CC §§1102-1102.18 does not, by itself, invalidate the transfer. CC §1102.13. However, CC §§1102.3-1102.3a provide for a time-limited right to terminate an offer to purchase if the disclosure statement is delivered after the offer is accepted and the buyer does not want to accept the property in its condition, as disclosed. See *Realmuto v Gagnard, supra*.

Another statute governing the financing of residential real estate purchases, Bus & P C §10241.4, requires disclosure of certain information to borrowers before they become obligated on certain loans providing for balloon payments secured by dwellings.

NOTE: To address the crucial issue of the need for water conservation, CC §§1101.4(c) and 1102.155 (effective January 1, 2017) and 1101.5(e) (effective January 1, 2019) require the seller or transferor to disclose whether the property has water-conserving plumbing fixtures. See §§3.30-3.31, 3.33A.

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4. Subdivided Lands Act

§1.24 a. Purchase of Lot

Any contract or agreement to purchase or lease a lot in a land project within the purview of the Subdivided Lands Act (Bus & P C §§11000-11024) may be rescinded by a buyer or a lessee, if it relied on a public report that was "forged, altered, false, or counterfeit." See Bus & P C §11020(a). The action, however, must be brought under the general rescission statute (CC §1689(b); see §§1.10-1.13) because the statute, while not specifying rescission, allows other remedies "provided by law." See Bus & P C §11020(c).

Under Bus & P C §11000.2, certain purchasers of undivided interests in a subdivision may rescind without cause within 3 days after signing the offer to purchase. See 10 Cal Code Regs §§2792.30-2792.31.

A buyer may also rescind under the common law if the developer fails to comply with the Subdivided Lands Act. *Barrett v Hammer Builders, Inc.* (1961) 195 CA2d 305, 16 CR 49. Examples of common violations of the Act include failure to file a notice of intent to sell or lease (which constitutes the application for a public report; Bus & P C §11010), failure to amend the report for a material change in the offering (Bus & P C §11012; 10 Cal Code Regs §2800), noncompliance with purchase money handling requirements (Bus & P C §§11013.2, 11013.4), failure to obtain and deliver receipts for the public report (Bus & P C §11018.1; 10 Cal Code Regs §§2795-2795.1), and using false or misleading advertising (Bus & P C §11022).

Although a buyer of a lot in a land project may rescind a contract for a violation of the Act, one who subsequently buys the land from that original buyer does not have the right to rescind the original contract between the first buyer and the seller. The subsequent buyer may rescind (if appropriate under the facts) only its own contract. *Drake v Martin* (1994) 30 CA4th 984, 36 CR2d 704.

PRACTICE TIP: A buyer who rescinds a real estate contract because of a violation of the Subdivided Lands Act may still be entitled to attorney fees under that contract (see CC §1717) if the developer is estopped from asserting that the entire contract is void. *Yuba Cypress Hous. Partners, Ltd. v Area Developers* (2002) 98 CA4th 1077, 120 CR2d 273. See also §1.49.

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§1.25 b. Purchase of Time-Share

The purchaser of a time-share estate or use in a time-share subdivision may rescind the contract within 7 days after the date of acceptance of the offer. Bus & P C §11238. The developer of the subdivision (or his or her agent) must notify the purchaser of that right and must give the purchaser a form prescribed by statute for the exercise of that right. Bus & P C 11239. In addition, a purchaser who is denied rescission by the developer, and successfully brings an action for rescission, may recover attorney fees. Bus & P C §11238(e).

PRACTICE TIP: Attorneys preparing documentation on "time-share projects" should refer to Bus & P C §11212. The definitions there are expansive and include such things as "exchange programs" permitting the exchange of time-share rights and incidental benefits that prospective purchasers of time-shares may be offered. The statute also defines a "reservation system" in which the purchaser of a time-share interest may reserve the use and occupancy in "multisite" time-share projects.

Business and Professions Code §11018.7 requires the prior written consent of the Real Estate Commissioner to amendments and modifications in the declaration of restrictions, bylaws, articles of incorporation, and other instruments controlling time-share projects. In addition, Bus & P C §11216(b) requires a subdivider of time-share projects to provide certain information to prospective buyers of memberships in any exchange program, as defined.

For further discussion of time-share interests, see Forming California Common Interest Developments, chap 5 (Cal CEB 2004).

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§1.26 5. Subdivision Map Act

A grantee, buyer, or person contracting to buy may rescind any deed of conveyance, sale, or contract to sell real property that has been divided in violation of the Subdivision Map Act (Govt C §§66410-66499.37). Govt C §66499.32. Rescission must be effected within 1 year after the date the violation is discovered. Govt C §66499.32.

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§1.27 6. Interstate Land Sales

A buyer may revoke an agreement to purchase or lease a lot in a subdivision covered by the Interstate Land Sales Full Disclosure Act (15 USC §§1701-1720) until midnight of the seventh day after its execution. 15 USC §1703(b). If the property report required by the Act has not been given to the buyer before or at the time of signing, or if the contract of sale is deficient in other specified particulars, the buyer may revoke the agreement within 2 years after the date of signing. 15 USC §1703(c)-(d).

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§1.28 7. Truth in Lending

A borrower has a limited right to rescind a consumer credit transaction covered by the truth-in-lending provisions (15 USC §§1601-1667f) of the Consumer Credit Protection Act (15 USC §§1601-1693r). For example, 15 USC §1635 permits a borrower to rescind a residential loan agreement if the lender misrepresents the written terms of the loan, fails to deliver certain forms, or does not disclose important financing terms accurately when the loan is secured by the borrower's principal dwelling. See, *e.g.*, *Grimes v New Century Mortgage Corp.* (9th Cir 2003) 340 F3d 1007. On truth-in-lending enforcement remedies, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 7, 12 (4th ed Cal CEB 2009).

Under 15 USC §1635(f), the right of rescission expires 3 years after the loan closes or on the sale of the secured property, whichever occurs earlier. See *Gonzalez v First Franklin Loan Servs.* (ED Cal, Jan. 9, 2010, No. 1:09-CV-00941) 2010 US Dist Lexis 1657. For provisions of the Act on rescission rights, see 15 USC §§1631-1649. See also Regulation Z (12 CFR pt 226) 12 CFR §§226.15, 226.23, which allow rescission rights in a consumer credit transaction (including opening or increasing the credit limit for an open-ended credit plan) in which a security interest is or will be retained in property used as the consumer's principal dwelling.

The creditor must "clearly and conspicuously" disclose the obligor's right to rescind the transaction. 15 USC §1635(a). See 12 CFR §226.23(b); *Stanley v Household Fin. Corp. (In re Stanley)* (D Kan 2004) 315 BR 602, 609. Under the Act, rescission must be effected either by midnight of the third business day following consummation of the transaction, or by the time of delivery of the disclosure statement required by the Act, whichever occurs later. 15 USC §1635(a).

Even a loan that has been paid off through a subsequent refinancing is actionable under the Act. See *Pacific Shore Funding v Lozo* (2006) 138 CA4th 1342, 42 CR3d 283. Class actions are not allowed under the Act. *LaLiberte v Pacific Mercantile Bank* (2007) 147 CA4th 1, 53 CR3d 745; *Andrews v Chevy Chase Bank* (7th Cir 2008) 545 F3d 570.

Rescission rights in foreclosure are governed by §125 of the Act. After the initiation of any judicial or nonjudicial foreclosure process on the primary dwelling of an obligor securing an extension of credit, the obligor has rescission rights if there is a failure to include the mortgage broker fee in the finance charge or if the form of notice of the rescission right is not either the approved form or a "comparable written notice." 15 USC §1635(i).

The right to rescind does not apply to (a) a purchase money first lien against the consumer's dwelling (*i.e.*, a security interest created or retained to finance the acquisition or initial construction of the dwelling), (b) a refinancing or consolidation of the principal balance owing (by the same creditor and without new advances), (c) a transaction in which a state agency is the creditor, or (d) advances under an open-ended credit plan that do not exceed the plan's existing credit limit. See 15 USC §§1602(w), 1635(e). See also 12 CFR §§226.15(a)(1), 226.23(f) for exemptions under Regulation Z.

The Act further limits the circumstances in which rescission is available as a matter of right. Specifically, if a board-approved form of notice or a "comparable written notice of the rights of the obligor" is used, rescission rights are unavailable if the claim arises solely from the form of written notice used. 15 USC §1635(h).

The measure of damages recoverable is prescribed in 15 USC §1640. A borrower who exercises the rescission right is not liable for any finance or other charge, and the creditor must return any money or property and take any action necessary to effect termination of the security agreement. 15 USC §1635(b).

Regulation Z contains specific provisions for variable-rate loans with a term exceeding 1 year and secured by the consumer's principal dwelling. Creditors are required to make certain disclosures at the earlier of the time the application form is provided or the consumer pays a nonrefundable fee. 12 CFR §§226.19(a), 226.19(b).

PRACTICE TIP: Although Regulation Z is beyond the scope of this book, practitioners should be aware that highly technical defenses often are invoked by consumers seeking rescission of loans secured by real property (*e.g.,* a 0.25 percent error in a stated annual percentage rate may give rise to rescission). Title insurance endorsements are available to provide protection, particularly for lenders, against these rescission rights. See, *e.g.,* truth in lending endorsement discussed in California Title Insurance Practice, chap 8 (2d ed Cal CEB 1997).

Other bases for rescinding secured real property loans are discussed in §§1.8A-1.8B. For comprehensive discussion of lender liability and rescission rights in secured lending transactions, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 12 (4th ed Cal CEB 2009).

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IV. TACTICAL CONSIDERATIONS: RESCISSION VERSUS DAMAGES

§1.29 A. Election of Remedies Required

When fraud occurs in a contract situation, the injured party can either rescind or recover damages. The remedies are inconsistent, however, because rescission is based on disaffirmance and extinguishment of the contract, while a damages claim rests on affirmance of the contract. At some point, therefore, an election must be made. See, *e.g.*, *Evans v Rancho Royale Hotel Co.* (1952) 114 CA2d 503, 250 P2d 283. For discussion of when election of remedies must be finally exercised, see §3.10. In some instances, however, a plaintiff may exercise its election earlier for strategic reasons.

WARNING: The danger is that a party may inadvertently waive the right to pursue one remedy by taking steps to pursue the other; counsel must ensure that (1) the available options are carefully considered and pleaded and (2) a proper and complete trial record is made in the event the matter will be appealed. See, *e.g*., *Brown v Boren* (1999) 74 CA4th 1303, 88 CR2d 758.

As a general rule, mere initiation of an action for damages (lacking a claim in the alternative for rescission) constitutes sufficient affirmation of the contract to preclude a later action based on rescission. *Gutterman v Gally* (1933) 131 CA 647, 21 P2d 1000. Acceptance of the contract's benefits with knowledge of a basis for rescission may also constitute sufficient affirmance to create a waiver of the right to rescind. *Neet v Holmes* (1944) 25 C2d 447, 154 P2d 854; *LeClercq v Michael* (1948) 88 CA2d 700, 199 P2d 343. Acceptance of the benefits will not be considered a waiver if the party had no knowledge of the facts giving rise to the right to rescind (*Union Pac. R.R. v Zimmer* (1948) 87 CA2d 524, 197 P2d 363) or if the acts constituting the claimed waiver were themselves induced by fraud (*Channell v Anthony* (1976) 58 CA3d 290, 129 CR 704).

EXAMPLE: A defrauded buyer of real property defaults on a deed of trust carried back by the seller. If the seller initiates foreclosure proceedings and the buyer sues to enjoin the foreclosure sale and reinstate the loan, it could be argued that the buyer has affirmed the contract and waived the right to rescind. The buyer might avoid the waiver by expressly reserving its rights of rescission and reformation and by including a cause of action to rescind or reform the contract.

Absent a showing that a contract is severable (see, *e.g., Persson v Smart Inventions, Inc.* (2005) 125 CA4th 1141, 1153, 23 CR3d 335), the party must rescind the entire contract and may not retain the rights under it which he or she deems desirable and repudiate the remainder. Thus, a buyer of commercial real estate could not seek both damages from the seller for breach of the sales agreement and a court decree allowing the buyer to rescind a provision in the contract under which the buyer had waived any right of action against the seller. *IMO Dev. Corp. v Dow Corning Corp.* (1982) 135 CA3d 451, 185 CR 341. But in *Persson v Smart Inventions, Inc., supra,* the court allowed a defrauded party to rescind the release clause in the contract and sue for damages for the fraud.

A key consideration in evaluating the choice between seeking damages and rescission is whether third party rights in the property have intervened that may frustrate rescission. The practitioner can obtain some protection against this risk by ordering a litigation guaranty from an appropriate title insurance company or underwritten title company. See California Title Insurance Practice, chap 9 (2d ed Cal CEB 1997).

PRACTICE TIP: Whether the intervention of third party rights will frustrate rescission (or other specific-relief remedies such as reformation or cancellation) often depends on whether the grounds for rescission are such as to render the contract or instrument fully void or merely voidable. See chap 6. This, in turn, often depends on subtle distinctions, as between fraud in the inducement (as by false promise) and fraud in the "factum," as when the party seeking rescission literally had no idea what was occurring. For a recent example of a void real estate transaction, see *Dimock v Emerald Props. LLC* (2000) 81 CA4th 868, 97 CR2d 255.

If the aggrieved party first seeks rescission, a later action for damages will not be barred automatically, but the action may be barred in certain circumstances. An unsuccessful rescission attempt will not bar a later suit for damages (*Fountain v Semi-Tropic Land & Water Co.* (1893) 99 C 677, 34 P 497) nor will an action based on rescission that has not been reduced to a final judgment on the merits (*Kramer v Associated Almond Growers* (1931) 111 CA 595, 295 P 873). If rescission has become impossible because of the actions of the other party, a court may grant other relief in equity based on a theory of affirmance. *Montgomery v McLaury* (1904) 143 C 83, 76 P 964. Giving notice of rescission

or filing an action based on rescission will not be considered an irrevocable act until it is made effectual by the other party's acceptance so as to create rescission by mutual consent (*Evans v Rancho Royale Hotel Co., supra*) or by the other party's restoration of all consideration received (*Karapetian v Carolan* (1948) 83 CA2d 344, 188 P2d 809).

WARNING: A party who really wants damages should be cautious about including a cause of action based on rescission, because the other party's acceptance of the offer to rescind (either in the answer, or later in the litigation) may bar the damage claim. This issue is particularly important when real property values are rising; the buyer may lose any appreciation if the seller accepts the rescission.

Although the remedies are exclusive, a complaint may plead a cause of action for damages based on the contract (see chap 4) or a tort action (see chap 3) as an alternative to a cause of action based on rescission (*Williams v Marshall* (1951) 37 C2d 445, 235 P2d 372), and, absent the other side's acceptance of rescission, the plaintiff cannot be compelled to make an election before or during the course of trial until the case is submitted to the judge or jury (*Roam v Koop* (1974) 41 CA3d 1035, 116 CR 539; *Stockton v Newman* (1957) 148 CA2d 558, 307 P2d 56). See multitheory complaint in chap 3. However, a jury trial on the damages claim may be unnecessary if the court first decides the equitable issues that effectively dispose of the legal issues. *Nwosu v Uba* (2004) 122 CA4th 1229, 19 CR3d 416.

Of course, even prelitigation conduct can bind a party to an election or waiver of remedies. One problematic example, which existed under prior law but has been ameliorated by *Jue v Smiser* (1994) 23 CA4th 312, 28 CR2d 242, cited in §3.40, was the rule that a party who learned of misrepresentations before closing waived any right to sue for damages if he or she proceeded to close despite such knowledge. *Jue* held that this rule would not apply if the purchasers would have faced substantial practical problems had they refused to close the escrow for the house they were to move into. Although the facts in *Jue* arose in a private party, personal residence context, its holding was not limited to consumer or personal residence situations.

PRACTICE TIP: Pleading alternative causes of action when possible is the safest course for a party who wants the maximum assurance of being able to effect some recovery.

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§1.30 B. Executory Versus Fully Executed Contracts

Both executory and fully executed contracts may be rescinded, but the extent to which an executory contract has been performed will often be determinative in a party's decision on whether to rescind because of the requirement that all consideration must be restored. Until the object of a contract has been fully performed, the contract is executory. CC §1661. A purchase and sale agreement is fully executed on close of escrow, but an installment land contract remains executory until all installment payments have been made and the seller has conveyed title, which may occur months or years after the contract is entered into. Thus, a buyer who has performed completely under an installment land contract is unlikely to seek rescission as a remedy because he or she will be required to offset the fair rental value of the property during the term of the contract against the consideration which must be restored to him or her. *Kent v Clark* (1942) 20 C2d 779, 128 P2d 868.

The fact that a contract has been fully executed is not an absolute bar to rescission (*Engle v Farrell* (1946) 75 CA2d 612, 171 P2d 588), but whether rescission will be available in a particular situation depends on the circumstances. A party who cannot restore substantially all the consideration received will be unable to rescind (*Gantner v Johnson* (1969) 274 CA2d 869, 79 CR 381); inability to restore consideration is more likely to occur when a contract has been fully performed. If the parties cannot be restored to their pretransaction status, relief based on rescission may still be granted in appropriate circumstances if the court can adjust the equities of the parties and bring about substantial justice. For example, the court can award the buyer the value of any improvements he or she has made. See *Kent v Clark, supra*. If third parties' rights have become involved and the consideration cannot be fully restored, "partial rescission" is proper and the court may grant relief to effect a fair result. *Farina v Bevilacqua* (1961) 192 CA2d 681, 13 CR 791. An executed deed may not be rescinded for failure of consideration if actual performance by the grantee was not made a condition of the deed. *Norby v Pister* (1952) 114 CA2d 510, 250 P2d 633. See §1.5.

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§1.31 C. Measure of Recovery

The attorney for an aggrieved party to a real property transaction must carefully consider the measure of recovery that will be available, depending on whether the client chooses to rescind or to pursue damages. If a buyer rescinds, the recovery is the purchase price paid plus various items of consequential damages (CC §1692; see §§1.46-1.48) less an offset for the reasonable rental value for the period the buyer was in possession (*Kent v Clark* (1942) 20 C2d 779, 128 P2d 868). The buyer may be relieved of a rent offset if the seller refuses to reassume possession. *Smith v Rickards* (1957) 149 CA2d 648, 308 P2d 758. In an action for damages, there is no rent offset, because the buyer affirms the contract and retains possession, but the seller can offset payments in arrears against the buyer's damages. *Bagdasarian v Gragnon* (1948) 31 C2d 744, 192 P2d 935.

When there is fraud, a buyer who affirms the contract and sues for damages retains the property and is entitled to a judgment for the difference between the consideration paid and the actual value of the property at the time of purchase, with an additional recovery for lost profits if the property was purchased for resale. CC §3343; see chap 3. A buyer who sues for damages for breach recovers the price paid plus certain costs and expenses of the sale, and the difference between the contract price and the actual value at the time of breach. CC §3306.

For a seller who sues for breach, the measure of recovery is the difference between the contract price and the property's value at the time of breach. CC §3307; see chap 4. Civil Code §§3306-3307 also provide for recovery of consequential damages and interest.

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V. NOTICE OF RESCISSION

A. Notice Requirements

§1.32 1. Method

Unilateral rescission is effected when one party gives notice to the other and offers to restore everything received under the rescinded agreement. CC §1691; see §1.34. The notice need not be in any particular form, but it must clearly indicate to the defaulting party that the aggrieved party considers the agreement terminated. *Whitney Inv. Co. v Westview Dev. Co.* (1969) 273 CA2d 594, 78 CR 302. Filing and service of a pleading seeking relief based on rescission are considered both notice and an offer to restore. CC §1691. Notice is unnecessary when there has been a total failure of consideration. *Holcomb v Long Beach Inv. Co.* (1933) 129 CA 285, 19 P2d 31. The aggrieved party is not bound by the grounds for rescission stated in the notice; if different, proper grounds exist, these may be relied on at a later stage. *Hull v Ray* (1930) 211 C 164, 294 P 700.

The sample form in §1.35 is drafted as a formal notice to suggest to the other party that the notice is a first step, which will be followed by legal proceedings, if necessary; an informal letter to the other party (see §1.36) would be sufficient to comply with the notice requirement, however. Elements that should be included in a rescission notice are (1) identification of the parties, (2) a full legal description of the property, (3) the date the contract was executed and other description of the contract, (4) the grounds for rescission, and (5) a tender of the return of any consideration received by the rescinding party. On grounds for rescission, see §§1.9-1.28.

PRACTICE TIP: If the performance of each party consists only of a single act, the notice could simply require return of all consideration received under the contract. CC §1691(b). If performance is complex, however, the rescinding party might prefer to specify precisely that which is to be returned to avoid future disputes over whether the other party has restored all consideration.

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§1.33 2. Delay in Giving Notice

Although CC §1691 seems to embody the earlier case law rule that the right to rescind is conditioned on giving notice promptly, CC §1693 qualifies this limitation by providing that rescission will be denied only if the delay in giving notice substantially prejudices the other party. See *Citicorp Real Estate, Inc. v Smith* (9th Cir 1998) 155 F3d 1097; *Wilke v Coinway, Inc.* (1967) 257 CA2d 126, 64 CR 845. Thus two factors must be considered in determining the promptness of the rescission: (1) the time elapsed from discovery of facts entitling the aggrieved party to rescind until notice is given (CC §1691); and (2) whether the delay amounts to laches, *i.e.,* is prejudicial to the other party's interests (CC §1693).

The following delays in giving notice have been held justifiable:

- The facts would not have put a reasonable person on inquiry about the right to rescind. *Hannah v Steinman* (1911) 159 C 142, 112 P 1094.
- Delay resulted from the aggrieved party's attempt to settle the dispute arising from the facts justifying rescission. *Gist v Security Trust & Sav. Bank* (1933) 218 C 581, 24 P2d 153.
- Delay resulted from the other party's requests for time to correct facts giving rise to the right to rescind. *Moresco v Foppiano* (1936) 7 C2d 242, 60 P2d 430.
- Delay was induced by the other party's false representations. *Lubarsky v Richardson* (1933) 218 C 27, 21 P2d 557.
- Delay was caused by the buyer's investigation of the seller's false representations. *Williams v Marshall* (1951) 37 C2d 445, 235 P2d 372.

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§1.34 3. Offer to Restore Consideration

Under CC §1691(b), a party seeking rescission must offer to restore to the other party everything received under the agreement but need not detail what items will be restored. *Smith v Rickards* (1957) 149 CA2d 648, 308 P2d 758.

Courts have fashioned exceptions to the requirement of an offer to restore in the following situations:

- If the rescinding party received nothing of value. CC §1691(b); *Realty Co. of Am. v Burton* (1958) 160 CA2d 178, 325 P2d 171.
- If the rescinding party would be entitled to retain the consideration independent of the rescinded agreement. *Sime v Malouf* (1950) 95 CA2d 82, 213 P2d 788.
- If an accounting is necessary first to ascertain the parties' respective obligations, if restoration cannot be made without injuriously affecting the rights of the rescinding party, and if the other party's rights can be fully protected by the eventual judgment. *California Farm & Fruit Co. v Schiappa-Pietra* (1907) 151 C 732, 91 P 593.
- If the consideration received consists of a check or promissory note, which the rescinding party places within the control and custody of the court at the time of trial. *Weger v Rocha* (1934) 138 CA 109, 32 P2d 417.
- If the action is for specific restitution of an item other than cash and is not based on a literal rescission; in this instance, however, the judgment directing restitution should make delivery conditional on return by the plaintiff of any consideration received. CC §1693; *Alder v Drudis* (1947) 30 C2d 372, 182 P2d 195.

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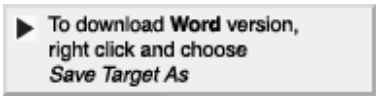
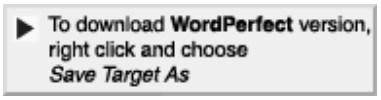
§1.35 B. Form: Notice of Rescission (General Form)





Notice of Rescission (CC §1691)

PLEASE TAKE NOTICE that _ _[*name of rescinding party*]_ _ **hereby rescinds the** _ _[*oral/written*]_ _ _ _[*specify type of contract rescinded*]_ _ **between** _ _[*name of rescinding party*]_ _ **and** _ _[*name of other party*]_ _**, dated** _ _[*date*]_ _**, under which** _ _[*name of rescinding party*]_ _ **agreed to** _ _[*summarize contractual terms*]_ _**.**

The grounds on which _ _[*name of rescinding party*]_ _ **bases this rescission under Civil Code §1689 include, without limitation,** _ _[*state grounds in specific language, e.g., false representations of specific material facts were made to rescinding party, who relied on them/the contract was based on mistake of specific terms or other material issues between the parties*]_ _**.**

_ _[*Name of rescinding party*]_ _ **hereby tenders return of all consideration received by** _ _[*him/her*]_ _**, conditional only on concurrent return of** _ _[*specify what items of consideration are to be returned by other party*]_ _**.**

Date: _ _ _ _ _ _ __[*Signature of rescinding party*]__
_ _[*Typed name*]_ _

Comment: No particular form of notice is required, although the rescinding party must clearly show intent to rescind and treat the contract as extinguished. *Hull v Ray* (1930) 211 C 164, 294 P 700; *Whitney Inv. Co. v Westview Dev. Co.* (1969) 273 CA2d 594, 78 CR 302. See §1.32. Filing and serving a pleading in an action based on rescission may serve as the required notice. CC §1691. The rescinding party must allege a financial capability of tendering the loan proceeds. *Gonzalez v First Franklin Loan Servs.* (ED Cal, Jan. 9, 2010, No. 1:09-CV-00941) 2010 US Dist Lexis 1657.

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Source: Real Property/California Real Property Remedies and Damages/1 Rescission/§1.36 C. Form: Attorney's Letter Giving Notice of Rescission (Real Property Sale)

§1.36 C. Form: Attorney's Letter Giving Notice of Rescission (Real Property Sale)

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Dear _ _[*name(s) of other party(ies) to rescinded agreement*]_ _**:**

This letter is sent on behalf of _ _[*name of rescinding party*]_ _**, in** _ _[*his/her/its*]_ _ **capacity as** _ _[*seller/buyer*]_ _**, to give notice to** _ _[*name(s) of other party(ies) to rescinded agreement*]_ _ **that** _ _[*name of rescinding party*]_ _ **hereby rescinds the** _ _[*specify title of agreement, e.g., PURCHASE AND SALE AGREEMENT AND RECEIPT FOR DEPOSIT*]_ _**, executed on** _ _[*date*]_ _**, by and between** _ _[*name of rescinding party*]_ _ **and** _ _[*name(s) of other party(ies)*]_ _ **for purchase and sale of the real property commonly known as** _ _[*street address*]_ _ **and legally described as** _ _[*insert or attach as exhibit legal description*]_ _**. This letter constitutes a rescission of this agreement in its entirety and is effective immediately without further notice or action.**

The grounds for this rescission are all grounds for rescission under California law, including but not limited to _ _[*e.g., seller's concealment and failure to disclose the presence of soil and groundwater contamination on the property; seller's failure to deliver transfer disclosure form (see §§1.9-1.28)*]_ _**.**

_ _[*Name of rescinding party*]_ _ **hereby tenders to** _ _[*name(s) of other party(ies)*]_ _ **everything received under the rescinded agreement from** _ _[*name(s) of other party(ies)*]_ _ **immediately on delivery by** _ _[*name(s) of other party(ies)*]_ _ _ _[*specify a place and a means of delivery if necessary*]_ _ **of everything received from**_ _[*name of rescinding party*]_ _ **under the rescinded agreement.**

[*Add if appropriate*]

Until everything received under the rescinded agreement is returned to _ _[*name of rescinding party*]_ _ **in full,** _ _[*name of rescinding party*]_ _ **has a purchaser's lien against the subject property and will be entitled to foreclose against it.**

[*Continue*]

Date: _ _ _ _ _ _ _ _[*Name of firm*]_ _

By: __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name of rescinding party*]_ _

Comment: Listing the exact items the parties are to return to one another under a rescission is not required in the notice (see §1.34), but such items may be added to this letter, if desired. On purchaser's liens, see §1.42.

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VI. ACTIONS FOR RELIEF

A. Procedural Considerations

§1.37 1. Type of Action

Although CC §1692 does not specify whether an action based on rescission sounds in law or in equity, courts have held that the rescinding party may seek any relief warranted by the facts and that the type of action will be governed by the relief sought. See *Runyan v Pacific Air Indus., Inc.* (1970) 2 C3d 304, 85 CR 138. When the gist of the action is recovery of money paid to the defendant, for example, the action is legal in nature (*Paularena v Superior Court* (1965) 231 CA2d 906, 42 CR 366), but when the defendant denies the existence of any basis for rescission, an award of monetary damages is merely ancillary to the equitable determination of whether the plaintiff had a basis for rescission and the action is equitable (*Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800). See §1.41 for discussion of the effect of this characterization on the right to a jury trial.

Having rescinded, the plaintiff is generally entitled to both restitution (*i.e.,* return of any consideration required to be returned by the other party as a result of the rescission) and consequential damages. CC §1692; see *Utemark v Samuel* (1953) 118 CA2d 313, 257 P2d 656. Because the goal of rescission is to restore the parties to their status preceding the transaction, courts have broad discretion to fashion appropriate relief. CC §1692; *Runyan v Pacific Air Indus., Inc., supra*. See §§1.46-1.50 for damages and attorney fees recoverable in actions based on rescission.

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§1.38 2. Asserting Rescission Defensively

Relief based on rescission is not limited to initiation of a lawsuit (see §1.37); rescission may also be asserted as an affirmative defense or in a cross-complaint. CC §1692. Defensive use of rescission usually arises when the other party affirms the contract and sues for damages for breach. The defensive pleading may also serve as notice of rescission and an offer to restore (CC §1691; see §§1.32-1.36), but the rescinding party must be careful to avoid losing the right to rescind beforehand because of delay (see §1.33) and is generally well advised not to await the other party's lawsuit to give notice. Under CC §1692, the court must give the rescinding party the relief to which he or she is entitled under the circumstances, regardless of whether rescission is asserted offensively or defensively.

WARNING: Again, any party (including a defendant or cross-complainant) giving notice or rescission in his or her pleading must be prepared to be bound to rescind on the other party's acceptance.

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§1.39 3. Defendants

All parties to a contract are indispensable parties to an action for its rescission; the courts have no jurisdiction to adjudicate the case in the absence of an indispensable party. CCP §389; *Holder v Home Sav. & Loan Ass'n* (1968) 267 CA2d 91, 72 CR 704; see California Civil Procedure Before Trial §§14.8-14.10 (4th ed Cal CEB 2004). Although not mandatory, a rescinding party may join as defendants persons with a financial interest in or involvement with the transaction (such as lending institutions and brokers) if some of the relief in the action is sought against them or if their participation enables the court to fashion comprehensive relief, even though they are not parties to the rescinded contract. See CCP §379; *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800.

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§1.40 4. Jurisdiction and Venue

Superior courts in California have subject matter jurisdiction over actions for rescission. See Cal Const art VI, §10. If the plaintiff seeks recovery of money or property exceeding $25,000, the action is characterized as an "unlimited civil case." CCP §88. Most cases in California for rescission of real property sale contracts will therefore be brought as unlimited civil cases. If the prayer for recovery of money or the value of the property does not exceed $25,000, the action is characterized as a "limited civil case." CCP §§85-86. In rare instances, a small claims court has jurisdiction to award rescission. See CCP §116.220(b). Other aspects of subject matter jurisdiction are discussed in California Civil Procedure Before Trial, chap 6 (4th ed Cal CEB 2004).

Proper venue for an action based on rescission of a contract for the purchase and sale of real property (*i.e.,* a purchase and sale agreement or an installment land contract) is governed either by CCP §395(a), which applies to transitory contract actions, or by CCP §392, which governs local actions to adjudicate a right or an interest in real property. If the action is transitory and thus subject to CCP §395, proper venue is the county in which the contract was entered into or was to be performed, or the county in which the defendant resides; if it is a local action subject to CCP §392, proper venue is the county in which the real property is located.

Actions to rescind real property contracts typically contain both transitory and local elements, and deciding proper venue thus turns on the court's assessment of which element is the "main relief" sought. See generally California Civil Procedure Before Trial, chap 8 (4th ed Cal CEB 2004). Thus, proper venue depends on the circumstances of a particular rescission action. In *Terry v Rivergarden Farms Co.* (1915) 29 CA 59, 154 P 476, the court held that the main relief sought by a buyer who had rescinded an installment land contract was recovery of the sums paid, and thus the action was transitory. Courts have held that a buyer's action based on fraud, even to rescind a real property transaction, is transitory. *Coe v Kessler* (1956) 139 CA2d 536, 294 P2d 83; *Postin v Griggs* (1944) 66 CA2d 147, 151 P2d 887. The courts' reasoning in these cases has, however, been criticized by commentators. See 3 Witkin, California Procedure, *Actions* §§156, 788 (5th ed 2008). In contrast, when a seller sues to recover title to real property after having rescinded, the action has been characterized as local and subject to the venue requirement of CCP §392. *Etter v Vollmer* (1956) 139 CA2d 718, 294 P2d 55. See also *Kejr v Construction Eng'rs, Inc.* (1952) 111 CA2d 817, 245 P2d 21.

Special rules of venue apply to any action arising from a transaction consummated as a proximate result of an unsolicited telephone call made by a seller engaged in the business of telephone solicitations or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller. Proper venue for such actions is the county in which the buyer or lessee signed the contract, resided when the contract was signed, or resides at the commencement of the action. The same venue applies to actions arising from an offer or provision of goods, services, loans, or extensions of credit for personal, family, or household use, other than an obligation described in CC §1812.10 or §2984.4. CCP §395(b).

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§1.41 5. Entitlement to Jury Trial

Whether the right to a jury trial exists in an action based on rescission depends on whether the action is classified by the court as legal or equitable in nature (see §1.37). Accordingly, attention should be paid to this issue when drafting the cause of action in the complaint (see §§1.44-1.45). If the gist of the relief sought is recovery of money paid to the defendants, the action is primarily legal in nature and the parties have the right to have it tried before a jury. *Paularena v Superior Court* (1965) 231 CA2d 906, 42 CR 366. By contrast, if the plaintiff seeks only a declaration that he or she is entitled to rescind the contract and seeks no money damages, the action is equitable and there is no right to a jury trial. *Fowler v Ross* (1983) 142 CA3d 472, 191 CR 183. However, a rescission action is an action in equity and not an action at law if the recovery sought by the plaintiff (even a money judgment) consists entirely of something other than the consideration given by the plaintiff. *NMSBPCSLDHB v County of Fresno* (2007) 152 CA4th 954, 61 CR3d 425 (action for monetary damages based on profit that rescinding seller could have made through other uses of real property was equitable).

If the defendants deny the existence of any basis for rescission, the award of monetary damages is secondary to the equitable determination of whether a basis for rescission exists, and no right to a jury trial exists on that issue. *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800. In the latter situation, jury trial should be available on the legal issues that are severable from the equitable issues. *Robinson v Puls* (1946) 28 C2d 664, 171 P2d 430. See California Civil Procedure Before Trial §41.5 (4th ed Cal CEB 2004).

PRACTICE TIP: In cases combining rescission (or other equitable causes of action) with legal causes of action, counsel should consider filing a motion to bifurcate or sever the equitable issues for trial by the court to precede the jury trial. In deciding the motion, the court has discretion to weigh factors such as convenience of both the parties and the court, avoiding prejudice, and minimizing expense and delay. See CCP §1048(b). See also CCP §598; Civ Proc Before Trial, chap 43. After the court has rendered a decision on the severed issues, jury trial issues may become moot or at least narrowed. See *Nwosu v Uba* (2004) 122 CA4th 1229, 19 CR3d 416.

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§1.42 6. Purchaser's Lien

If the seller fails or refuses to perform and the buyer rescinds, the buyer is entitled to a purchaser's (or vendee's) lien on the property (which otherwise will be restored to the seller by the rescission). The lien will secure reimbursement of any consideration the buyer paid, including the down payment and consequential expenditures for improvements, taxes, and insurance. CC §3050; *Montgomery v Meyerstein* (1921) 186 C 459, 199 P 800. The rescinding buyer may sue both for restitution and to establish and foreclose the purchaser's lien. *Harder v Allred* (1923) 61 CA 394, 214 P 1017. A foreclosure action affects title to real property, and the buyer should record a lis pendens (notice of pendency of action; see chap 13) to make the purchaser's lien enforceable against a subsequent buyer or encumbrancer. See *South San Bernardino Land & Improvement Co. v San Bernardino Nat'l Bank* (1899) 127 C 245, 59 P 699.

NOTE: The buyer of a leasehold is not entitled to a purchaser's lien, because CC §3050 applies only to sales. *Weaver v Superior Court* (1949) 93 CA2d 729, 210 P2d 246.

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§1.43 7. Lis Pendens; Third Parties' Rights

In addition to protecting its own rights (see §1.42), a plaintiff suing for rescission of a contract involving real property must consider the interests of third parties. The plaintiff will want to make sure that the remedy will be effective against subsequent purchasers and encumbrancers of the property, which is accomplished by recording a lis pendens, known as a "notice of pendency of action," under CCP §405.20. On lis pendens procedures, see chap 13. See also §2.16. The judgment relates back to the date of recording the lis pendens (see §§13.36-13.40).

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B. The Complaint

§1.44 1. Essential Allegations

The complaint in an action based on rescission is usually drafted as a cause of action to recover consideration paid (restitution), together with any consequential damages. CC §1692. See form in §1.45. The action may be pleaded as a common count for money had and received (see *Crocker-Anglo Nat'l Bank v Kuchman* (1964) 224 CA2d 490, 36 CR 806), but consequential damages might not be recoverable in such an action.

The essential allegations of a complaint for relief under CC §1692 are the following:

- Capacity and residence of the parties (see §§1.39-1.40);
- Facts to show the making of the contract, including, for real property cases, a description (preferably including a legal description) of the real property concerned;
- Facts to show the existence of grounds for rescission (see §§1.9-1.28);
- The date the plaintiff became aware of the existence of grounds for rescission (see §1.33);
- Service of the plaintiff's notice of rescission and offer to restore consideration to the defendant, or a statement that service of the complaint itself is intended to serve as notice of rescission and an offer to restore (see §§1.32-1.36); and
- An action following rescission might also include alternative or supplemental causes of action to quiet title (CCP §§760.010-764.080; see chap 7); for declaratory relief (CCP §1060); to cancel an instrument clouding title (CC §3412; see chap 6); for ejectment (see *Francis v West Virginia Oil Co.* (1917) 174 C 168, 162 P 394; chap 10); for damages for fraud (*Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800; see chap 3); and to foreclose a statutory purchaser's lien (see §1.42).

Unless counsel for the plaintiff (or cross-complainant) is certain of both the proper venue for the action and that no third parties have acquired rights in the property or transaction at issue, counsel should obtain a litigation guaranty either before filing or as soon as practicable after filing the action. See California Title Insurance Practice, chap 9 (2d ed Cal CEB 1997).

PRACTICE TIP: Because both the cost of (and the protection afforded by) such a guaranty depends on the coverage amount purchased (as reflected on the face of the litigation guaranty), counsel should carefully discuss with the client how much coverage to buy. It is tempting to use a preliminary report of title or "prelim" as a cheap and readily obtained alternative to a litigation guaranty, but counsel should avoid this practice in light of case and statutory law that effectively forbids reliance or claims on "prelims" in the absence of special circumstances. See, *e.g.*, Ins C §12340.11 and other authorities discussed in Title Ins, chaps 5, 11.

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Source: Real Property/California Real Property Remedies and Damages/1 Rescission/§1.45 2. Form: Complaint for Relief Based on Rescission

§1.45 2. Form: Complaint for Relief Based on Rescission

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	**COMPLAINT FOR**
vs	)	**RESCISSION OF**
_ _[*Name(s)*]_ _,	)	**CONTRACT**_ _[*AND*
Defendant(s)	)	*DAMAGES; OTHER CAUSES*
	)	*OF ACTION, AS*
_____	)	*APPROPRIATE*]_ _

Plaintiff alleges:

1. _ _[*State plaintiff's capacity, qualification to do business, if necessary, and residence*]_ _**.**

2. _ _[*State defendant's identity, capacity, and residence or principal place of business*]_ _**.**

3. _ _[*Fictitious name allegations, as needed*]_ _**.**

4. On or about _ _[*date*]_ _**, in** _ _[*city*]_ _**,** _ _ _ _ _ **County, California, plaintiff and defendant entered into a(n)** _ _[*written/oral/partially written and partially oral*]_ _ **contract concerning real property located in** _ _ _ _ _ **County, California, commonly known as** _ _[*street address or other common designation*]_ _ **and more particularly described as** _ _[*legal description*]_ _ **in which they agreed** _ _[*specify subject matter of contract*]_ _**.** _ _[*Describe what performance each party agreed to undertake, and, if available, attach a copy of the contract as an exhibit and incorporate it by reference.*]_ _

5. Under the terms of the contract, plaintiff has _ _[*state facts showing performance, excuse from performance, or impossibility, and state what consideration plaintiff has given defendant*]_ _**.**

6. Under the terms of the contract, defendant has _ _[*state facts showing conduct of defendant and any consideration rendered to plaintiff*]_ _**.**

7. _ _[*In this paragraph and in following subparagraphs as needed, state the facts constituting grounds for rescission, e.g., fraud, mistake, failure of consideration (see §§1.9-1.28)*]_ _**.**

8. Plaintiff became aware of the existence of the grounds for rescission alleged in Paragraph _ _ _ **on or about** _ _[*date*]_ _**, when** _ _[*state facts showing discovery of grounds for rescission, including any facts explaining and justifying late discovery*]_ _**.**

[*Add one of the following alternatives*]

[*Alternative 1: Notice of rescission given before action filed*]

9. On or about _ _[*date*]_ _**, plaintiff rescinded the contract by** _ _[*delivering/mailing*]_ _ **a notice of rescission to defendant. The notice of rescission contained an offer to restore to defendant all consideration that had passed from defendant to plaintiff, on the condition that defendant restore to plaintiff all consideration paid by plaintiff.** _ _[*If the notice specified the items of consideration to be returned by defendant, state the items specified.*]_ _ **A copy of the notice of rescission, marked Exhibit** _ _ _**, is attached to and incorporated in this complaint.**

[*Alternative 2: Complaint to serve as notice of rescission*]

9. Plaintiff intends service of this complaint to serve as notice of rescission of the contract alleged in Paragraph 4. Plaintiff hereby offers to restore to defendant all consideration that has passed from defendant to plaintiff on the condition that defendant restore to plaintiff _ _[*specify items of consideration to be restored*]_ _.

[*Add if seeking consequential damages*]

[10.] As a legal and proximate result of the events described in Paragraphs _ _ _ _ _ _, plaintiff has suffered the following consequential damages: _ _[*Set forth in concise language specific items of consequential damages incurred and the amounts; see §§1.46-1.48 on allowable items of consequential damages.*]_ _

[*Continue*]

[11.] _ _[*If other causes of action are to be included in the complaint, add paragraphs setting forth their essential allegations.*]_ _

WHEREFORE, plaintiff prays for judgment

1. Declaring and adjudicating that the contract entered into by plaintiff and defendant on or about _ _[*date*]_ _**, has been and is rescinded and ordering restitution of _ _**[*specify items of consideration to be restored*]_ _**;**

[*Add if appropriate*]

[2.] Awarding consequential damages in the sum of _ _[*dollar amount*]_ _**;**

[3.] Awarding interest as allowed by law on all sums awarded to plaintiff;

[4.] Awarding costs of suit _ _[*if a contractual or statutory basis exists, include a request for attorney fees*]_ _**; and**

[5.] Awarding such other relief that the Court considers proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Verification; see Comment*]

Copies: Original (filed with court clerk); copies for service (one for each defendant who is to be served); office copies.

Comment: A limited civil case must be identified as such in the court caption of all court-filed papers. CCP §422.30(b); Cal Rules of Ct 2.111(9). In a complaint filed as a limited civil case, immediately below the character of the action, the plaintiff must specify that the amount demanded in the complaint either does or does not exceed $10,000. Govt C §70613(b); Cal Rules of Ct 2.111(9). For a thorough discussion of the formal aspects of drafting a complaint, see California Civil Procedure Before Trial §§15.3-15.13 (4th ed Cal CEB 2004). See generally Cal Rules of Ct 2.100-2.119.

Paragraphs 8 and 9 are included to meet the requirement of CC §1691 that notice be given promptly (but see CC §1693; §1.33); they should be used if any possibility exists that the defendant may raise delay in rescinding as a defense to the action. The details of the consideration given and received by the plaintiff need not be specified, but it may be advisable that items that the defendant must restore be described particularly so that the eventual default judgment can be made specific on this point with no concern for lack of notice even if the defendant fails to respond after being served with the complaint. On notice requirements, see §§1.32-1.36; on grounds for rescission, see §§1.9-1.28; on consequential damages, see §§1.46-1.48. On attorney fees, see §1.49. For a multitheory complaint, including a cause of action for rescission, among others, see chap 3.

Verification is not required, but it can be useful to force the defendant to verify the answer and specifically deny the allegations of the complaint. See CCP §§431.30, 446. Under §431.30, answers to verified complaints need not be verified in limited civil cases governed by CCP §§90-100 (economic litigation rules). See also CCP §128.7(a), providing that verification is unnecessary unless otherwise provided by law.

WARNING: Many practitioners believe that verification should be avoided if the facts are unclear or if the complaint contains inconsistent allegations, *e.g.*, to support alternative remedies such as rescission and damages for breach. For discussion of whether and how to verify a complaint, see Civ Proc Before Trial §§15.14-15.21. On venue, see

§1.40; Civ Proc Before Trial, chap 8.

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C. Measure of Recovery

§1.46 1. Restitution and Consequential Damages

A rescinding party is entitled to both restitution of benefits conferred on the other party and to consequential damages but may not recover inconsistent or duplicate items of recovery. CC §1692; *Paularena v Superior Court* (1965) 231 CA2d 906, 42 CR 366. Because the goal of rescission is to restore the parties to their pretransaction status, §1692 grants the courts broad discretion to fashion relief by awarding compensation to either party to adjust the equities. The scope of judicial power to fashion a remedy was illustrated in *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800, in which the court ordered the guilty sellers to assume payments on an existing obligation incurred by the defrauded buyer and to hold the buyer harmless for any future defaults on the obligation as additional protection. See also *Flagship West LLC v Excel Realty Partners* (ED Cal, Sept. 30, 2005, No. CV-05200 OWW DLB) 2005 US Dist Lexis 29623, vacated (9th Cir 2009) 337 Fed Appx 679 (unpublished opinion) (extensively discussed measure of damages for lease rescission in district court opinion and remanded for further determination on enforceability of contractual limitation on recision remedy). In setting the amount of consequential damages to give "complete relief" under §1692, courts may consider whether rescission is based on fault (*e.g.,* fraud and perhaps failure of consideration caused by the defendant) or on a nonfault ground such as mistake. *Runyan v Pacific Air Indus., Inc.* (1970) 2 C3d 304, 85 CR 138.

Under the court's power to adjust the equities, the party entitled to rescission may even be required to reimburse the other party. See, *e.g.*, *Utemark v Samuel* (1953) 118 CA2d 313, 257 P2d 656. An accounting process in which the benefits received by each party are offset may be used to establish the award of damages. *Paularena v Superior Court, supra*. Thus, if a rescinding buyer's payments on the purchase price and expenses are less than the reasonable rental value for the period of occupancy, the seller may be able to recover a monetary award for the difference.

Items of consequential damages that may be recovered by a rescinding seller or buyer include the following:

- Out-of-pocket expenses incurred in the course of the transaction (see *Tampico v Wood* (1963) 222 CA2d 211, 34 CR 885);
- Interest at the legal rate on liquidated sums paid to the other party (*Smith v Rickards* (1957) 149 CA2d 648, 308 P2d 758; *Monnette v Title Guar. & Trust Co.* (1939) 30 CA2d 428, 86 P2d 848); and
- Attorney fees incurred in a prior action if the rescission is based on fraud (*Kass v Weber* (1968) 261 CA2d 417, 67 CR 876, allowing—as an element of the damage award on rescission—the attorney fees incurred by a defrauded beneficiary of a deed of trust during a prior receivership action against third party nonassuming grantees to collect the rents and preserve the real property).

For further discussion of attorney fees awarded as damages, see California Attorney Fee Awards, chap 7 (3d ed Cal CEB 2010).

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§1.47 a. Seller's Damages

A rescinding seller receives back the property but must return all payments received in connection with the sale less the fair rental value of the property during the buyer's possession. *Behrendt v Abraham* (1966) 64 C2d 182, 49 CR 292 (installment land contract); *Kent v Clark* (1942) 20 C2d 779, 128 P2d 868 (purchase and sale agreement). The seller is not entitled to rental on improvements made by the buyer. *Utemark v Samuel* (1953) 118 CA2d 313, 257 P2d 656. A rescinding seller may also seek a monetary judgment if it is not possible to return the property to a similar condition in which it was sold. In *NMSBPCSLDHB v County of Fresno* (2007) 152 CA4th 954, 61 CR3d 425, after the buyer developed property in a manner that was inconsistent with the sales agreement, the seller brought an action for rescission instead of breach of contract and did not request return of the property; instead the seller asked for monetary damages based on profit that the seller could have made through other uses of property. The trial court rejected the claim and only the jury trial issue (see §1.41) was appealed.

As items of consequential damages, the seller may recover real estate commissions paid in connection with the sale (see *Tampico v Wood* (1963) 222 CA2d 211, 34 CR 885) and costs incurred in connection with escrow, including escrow fees and title insurance premiums (*Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800).

The rescinding seller can also recover any added expenses that arise as a natural consequence of the buyer's breach (*Royer v Carter* (1951) 37 C2d 544, 233 P2d 539) and are not merely expenses attributable to normal ownership, possession, and use of real property (*Sutter v Madrin* (1969) 269 CA2d 161, 74 CR 627), such as costs of reselling the property (*Royer v Carter, supra*). See also §1.46.

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§1.48 b. Buyer's Damages

The rescinding buyer is entitled to return of the purchase price (*Tampico v Wood* (1963) 222 CA2d 211, 34 CR 885) and to reimbursement for reasonable expenses, costs of repairs and improvements, and taxes paid, minus the reasonable rental value of the premises during the period of occupancy (see *Runyan v Pacific Air Indus., Inc.* (1970) 2 C3d 304, 85 CR 138). See also *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800; §1.46. Other damages the rescinding buyer may recover include the following:

- Interest on payments made to the seller (*Potter v Contra Costa Realty Co.* (1934) 220 C 31, 29 P2d 189; *Smith v Rickards* (1957) 149 CA2d 648, 308 P2d 758; *Monnette v Title Guar. & Trust Co.* (1939) 30 CA2d 428, 86 P2d 848);
- The value of improvements made by the buyer (*Kent v Clark* (1942) 20 C2d 779, 128 P2d 868; *Tarrant v Butler* (1960) 180 CA2d 235, 4 CR 230);
- Expenses incurred in preparing the property for the buyer's intended use, *e.g.*, architect's fees and costs of a sales program (see *Perkins v Ketchum* (1962) 211 CA2d 245, 27 CR 278), even if they do little to increase the value of the property (see *Younis v Hart* (1943) 59 CA2d 99, 138 P2d 323);
- Escrow and closing costs (*Snelson v Ondulando Highlands Corp.*, *supra; Curran v Heslop* (1953) 115 CA2d 476, 252 P2d 378);
- Operating losses during the buyer's maintenance of the property (*Williams v Marshall* (1951) 37 C2d 445, 235 P2d 372; *Lobdell v Miller* (1952) 114 CA2d 328, 250 P2d 357); and
- Payments made to reduce existing encumbrances on the property (*Younis v Hart, supra*).

The seller may also be required to assume payments on an existing obligation and to execute a hold-harmless agreement as additional protection for the rescinding buyer. *Snelson v Ondulando Highlands Corp., supra*.

A defrauded buyer who has lost the property to foreclosure can still recover a restitutionary type award despite his or her inability to restore the property to the seller. In *Garrett v Perry* (1959) 53 C2d 178, 346 P2d 758, a defrauded but subsequently foreclosed buyer was awarded that part of the purchase price he had paid rather than the difference between the purchase price and market value of the property. The award was labeled "damages" because the buyer could not restore the property to the seller as a condition to restitution, even though the measure of recovery was restitutionary. See *Burkhouse v Phillips* (1971) 18 CA3d 661, 96 CR 197. The same restitutionary relief may be awarded when the buyer gives the seller a deed in lieu of foreclosure. See *McCue v Bruce Enters., Inc.* (1964) 228 CA2d 21, 39 CR 125.

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§1.49 2. Attorney Fees to Prevailing Party

A party prevailing in an action for rescission of a contract may obtain an award of attorney fees if the contract provides for them (CCP §1021; *Hastings v Matlock* (1985) 171 CA3d 826, 217 CR 856 (prevailing party entitled to fees under CC §1717 on rescission if contract does not limit available relief to particular cause of action); *Leaf v Phil Rauch, Inc.* (1975) 47 CA3d 371, 120 CR 749 (construing CC §2983.4 in rescission of conditional auto sale); see *Star Pac. Invs. v Oro Hills Ranch, Inc.* (1981) 121 CA3d 447, 176 CR 546; *Care Constr. v Century Convalescent Ctrs.* (1976) 54 CA3d 701, 126 CR 761)).

Attorney fees are also generally available in actions to invalidate or void agreements, as long as the action "involves" a contract and one side would be entitled to recover attorney fees under that contract if it prevailed. *Milman v Shukhat* (1994) 22 CA4th 538, 27 CR2d 526. This rule applies even if the party prevails by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the contract containing the attorney fees clause. *North Assocs. v Bell* (1986) 184 CA3d 860, 229 CR 305. See *Santisas v Goodin* (1998) 17 C4th 599, 611, 71 CR2d 830. Attorney fees may not be awarded, however, if the entire contract is void for illegality (*Geffen v Moss* (1975) 53 CA3d 215, 125 CR 687), unless a party is estopped from asserting that the attorney fees provision is void. For example, in *Yuba Cypress Hous. Partners, Ltd. v Area Developers* (2002) 98 CA4th 1077, 120 CR2d 273, a buyer who rescinded his real estate contract with a developer because of a violation of the Subdivided Lands Act (Bus & P C §§11000-11200) was still entitled to attorney fees under the contract. The court pointed out that if the developer were not estopped from asserting that the attorney fees provision of the contract was void, it would benefit from its own wrongdoing. For further discussion of attorney fees based on contract actions, see California Attorney Fee Awards, chaps 1-2, 4 (3d ed Cal CEB 2010).

On preparing attorney fee motions and collecting fees, see Attorney Fee Awards, chaps 11-12, 15. On obtaining attorney fees as an element of consequential damages, see §1.46.

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§1.50 3. Punitive Damages

A court may award punitive damages in an action for breach of an obligation not arising from a contract if the plaintiff proves by clear and convincing evidence that the defendant's conduct was oppressive, fraudulent, or malicious. CC §3294. For example, punitive damages may be awarded (in addition to restitution) in a rescission action based on fraud. *Mahon v Berg* (1968) 267 CA2d 588, 73 CR 356 (defrauded buyer); *Millar v James* (1967) 254 CA2d 530, 62 CR 335 (defrauded seller). Absent an independent tort, punitive damages may not be awarded for breach of contract even if the defendant's conduct in breaching the contract was willful, fraudulent, or malicious. *Applied Equip. Corp. v Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 516, 28 CR2d 475. Consequently, a rescission action based only on the failure of consideration arising from breach of the contract would not support an award of punitive damages.

Although fraud as defined in CC §§1572 and 1710 includes negligent misrepresentation or nondisclosure (see §1.12), recovery of punitive damages under CC §3294 requires proof of willful or intentional misconduct. *Simmons v Southern Pac. Transp. Co.* (1976) 62 CA3d 341, 133 CR 42; *Ebaugh v Rabkin* (1972) 22 CA3d 891, 99 CR 706. A fraud cause of action seeking punitive damages, however, need not include an allegation that the fraud was motivated by a malicious desire to inflict injury on the victim. *Stevens v Superior Court* (1986) 180 CA3d 605, 225 CR 624.

An award of actual compensatory damages, or an equivalent award, such as restitution, an offset, damages conclusively presumed by law, or nominal damages, is necessary for an award of punitive damages. *Cheung v Daley* (1995) 35 CA4th 1673, 42 CR2d 164. Although a defrauded party usually may not recover for emotional distress as consequential damages incident to rescission (*O'Neil v Spillane* (1975) 45 CA3d 147, 119 CR 245), emotional distress may constitute an element of punitive damages under CC §3294 (*James v Public Fin. Corp.* (1975) 47 CA3d 995, 121 CR 670; *Sierra Nat'l Bank v Brown* (1971) 18 CA3d 98, 95 CR 742).

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D. Defenses

§1.51 1. Statute of Limitations

The statute of limitations for an action based on rescission of a contract in writing is 4 years. CCP §337(3). The limitation period for an action based on rescission of an oral contract (or for a rescission action pleaded as a common count; see §1.44) is 2 years. CCP §339(1), (3). The time begins to run from the date on which the facts entitling the aggrieved party to rescind occurred, except that, when rescission is for fraud or mistake, the time does not begin to run until the aggrieved party discovers, or reasonably should have discovered, the facts constituting the fraud or mistake. CCP §§337(3), 339(3). For reported cases interpreting the late discovery rule, see §1.8A.

PRACTICE TIP: Without otherwise compelling reasons, plaintiff's counsel should err on the side of caution in calculating the dates. Moreover, attorneys must be aware that laches can bar an action even if the statute of limitations has not yet expired. See §1.54.

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§1.52 2. Waiver

A party who accepts benefits under an agreement with full knowledge of facts warranting rescission waives the right to rescind. See *Chan v Title Ins. & Trust Co.* (1952) 39 C2d 253, 246 P2d 632; *Schmidt v Callero* (1950) 97 CA2d 582, 218 P2d 80. Acceptance of benefits after giving notice of rescission constitutes ratification of the contract and also waives the right to rescind. *Eustace v Lynch* (1941) 43 CA2d 486, 111 P2d 372. Ratification and waiver will also be found if a party with knowledge that he or she has grounds to rescind continues to perform under the contract (*Carpenter v First Trust & Sav. Bank* (1936) 11 CA2d 668, 54 P2d 495) or if the aggrieved party affirms the contract by suing for damages or specific performance (*Price v McConnell* (1960) 184 CA2d 660, 7 CR 695). Delay in bringing the action without sufficient justification may also constitute waiver of the right to rescind. *Leeper v Beltrami* (1959) 53 C2d 195, 1 CR 12. See also §1.54 on laches.

An important issue is the enforceability of a predispute written waiver of the right to rescind a lease, which was the subject of the lower court's opinion in *Flagship West LLC v Excel Realty Partners* (ED Cal, Sept. 30, 2005, No. CV-05200 OWW DLB) 2005 US Dist Lexis 29623, vacated (9th Cir 2009) 337 Fed Appx 679 (unpublished opinion) (Ninth Circuit ruled landlord not judicially estopped from enforcing "no rescission" clause in lease; remanded for determination of whether California law allows for advance waiver in lease of rescission rights).

Waiver is an affirmative defense that must be pleaded and proved by the party asserting it. *Williams v Marshall* (1951) 37 C2d 445, 235 P2d 372.

PRACTICE TIP: Facts establishing waiver and estoppel (see §1.53) can sometimes be subtle and may not be appreciated by the parties themselves. Counsel should be particularly mindful to inquire in detail about the kinds of facts that would establish or negate these defenses.

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§1.53 3. Estoppel

A party may be estopped from rescinding an agreement if he or she defaulted in performance of an obligation under the agreement (*Integrated, Inc. v Alec Fergusson Elect. Contractor* (1967) 250 CA2d 287, 58 CR 503), or gave the other party assurances of performance and the assurances were relied on to the other party's detriment (*McCown v Spencer* (1970) 8 CA3d 216, 87 CR 213). Estoppel is an affirmative defense that must be pleaded and proved by the party asserting it. *Frank Pisano & Assocs. v Taggart* (1972) 29 CA3d 1, 105 CR 414.

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§1.54 4. Laches

Laches is an equitable defense independent of the statute of limitations (see §1.51) and bars an action when the plaintiff has unreasonably delayed assertion of an equitable claim to the prejudice of the other party. See *Ruhl v Mott* (1898) 120 C 668, 53 P 304. Mere lapse of time without prejudice to the party does not suffice to establish laches unless the delay is so long that no excuse can be shown as a matter of law. *Beverage v Canton Placer Mining Co.* (1955) 43 C2d 769, 278 P2d 694; *Ulrich v San Jacinto Estates* (1952) 109 CA2d 648, 241 P2d 262. Prompt notice of rescission seems to be required by CC §1691, but CC §1693 qualifies this requirement by providing that rescission cannot be denied because of delay in giving notice or offering to restore benefits unless the delay has substantially prejudiced the other party (see §1.33). *Wilke v Coinway, Inc.* (1967) 257 CA2d 126, 64 CR 845.

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§1.54A 5. Holder-in-Due-Course Doctrine

This defense may apply in an action seeking to rescind a real property secured loan. The assignment of such loans by loan originators to other parties, particularly in mortgaged-backed securities deals, and the engagement of separate loan servicers (collection agents) occurs more frequently now than in prior years. See, *e.g.,* California Real Estate Finance Practice: Strategies and Forms, chap 10 (Cal CEB 2000). These factors make a rescission or an action for damages more difficult.

The assignee may defend against claims arising from the acts or omissions of the originating lender by invoking the holder-in-due-course doctrine, adopted in California under Com C §3302. The doctrine allows the assignee to hold the loan contract free of claims the borrower has against the originator. See, *e.g., Wilson v Toussie* (ED NY 2003) 260 F Supp 2d 530; *Stuckey v Provident Bank* (Miss 2005) 912 So2d 859. The doctrine only applies if the sale or transfer of the loan is governed by the California Commercial Code or the Uniform Commercial Code. Assessing the applicability of this doctrine and potential exceptions to it is complex. See Eggert, *Held Up in Due Course (Part 1): Codification and the Victory of Form Over Intent in Negotiable Instrument Law,* 35 Creighton L Rev 363 (Feb. 2002); Eggert, *Held Up in Due Course (Part 2): Predatory Lending, Securitization, and the Holder in Due Course Doctrine,* 35 Creighton L Rev 50 (Apr. 2002). See also California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 1, 12 (4th ed Cal CEB 2009); California Law of Contracts §7.16 (Cal CEB 2007); Secured Transactions in California Commercial Law Practice §7.71 (2d ed Cal CEB 2001).

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§1.55 E. Insurance Considerations

Counsel for the defendant(s) or cross-defendant(s) in an action seeking rescission should always perform a coverage analysis that may identify an insurer with a duty to defend and possibly to indemnify the defendant. The most likely source of such coverage is a title insurance policy insuring the instrument or interest that the plaintiff seeks to rescind. However, conduct that typically gives rise to a rescission claim may also provide grounds to the insurer to deny coverage or even to seek to rescind the policy. For an analysis of likely defenses to coverage and arguments that the title insurer may raise, and for a systematic guide to tendering the claim and rights to a defense, see California Title Insurance Practice, chaps 11-12 (2d ed Cal CEB 1997).

Less often, the defendant may have coverage, the right to a defense by an attorney appointed and paid by the insurer, or both, under a Commercial General Liability or other type of liability policy. For an approach to identifying coverage, see California Liability Insurance Practice: Claims & Litigation, chap 3 (Cal CEB 1991).

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F. Judgment

§1.56 1. Contents

The goal of rescission is to restore the parties to their pretransaction status, and the courts have broad discretion to fashion relief that adjusts the equities of the parties toward this end. CC §1692. Counsel for the successful rescinding party should be creative in proposing to the court a judgment that will adequately protect the client's interests. For example, it is within the scope of the trial court's power to enter a judgment directing the defendants, some of whom are not parties to the original transaction, to (a) assume payments on an obligation incurred by the rescinding buyer; (b) hold the plaintiff harmless from any claims made by the lender on the obligation; and (c) reimburse the plaintiff for the down payment, closing costs, incidental expenses, and monthly payments made to the lending institution. The court may also direct the plaintiff to execute and deliver a grant deed to the property to the defendants, although a quitclaim deed might be preferable because there may be no need to burden the rescinding buyer with the warranties in a grant deed. *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800. See *Eldridge v Burns* (1982) 136 CA3d 907, 186 CR 784.

The judgment should set forth with particularity the contract or agreement rescinded, identifying it by date of execution, subject matter, and parties. It should specify the dollar amount of any monetary award made to one party or the other and any conditions, such as delivery of a deed, to which the award of damages is subject. The judgment should also designate all parties of record whose interests in the real property are affected, and it should contain a full legal description of property and a specific description of any recorded documents affected. It may direct that an escrow be established for performance of the conditions for relief, and it may retain jurisdiction in the trial court to supervise enforcement of the judgment. See *Snelson v Ondulando Highlands Corp., supra*. Delivery of a quitclaim or grant deed is generally a condition of the judgment in a real property rescission action and should be enforceable by exercise of the court's contempt power under CCP §1209(5), but no cases so holding have been found. In any event, the judgment itself should be recorded (for which reason a legal description of the property should be included) to protect the party recovering title if the other party fails to deliver a deed. See Govt C §§27280, 27282(a)(1), 27326.

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Source: Real Property/California Real Property Remedies and Damages/1 Rescission/§1.57 2. Form: Judgment Rescinding Contract

§1.57 2. Form: Judgment Rescinding Contract

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Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No. _ _ _ _ _ _**
Plaintiff(s)	)	**JUDGMENT RESCINDING**
vs	)	**CONTRACT**
_ _[*Name(s)*]_ _,	)	**Dep't:** _ _[*number*]_ _
Defendant(s)	)	**Trial judge:** _ _[*name*]_ _
_____	)	**Trial date:** _ _[*date*]_ _

This action for rescission was regularly tried on _ _[*date*]_ _**, before Dept.** _ _ _ _ **of the Court sitting without a jury, the Hon.** _ _[*name*]_ _**, Judge Presiding. Appearing as attorneys for plaintiff were** _ _[*names*]_ _ **and for defendant were** _ _[*names*]_ _**. The Court, having heard the testimony and considered the evidence, and** _ _[*a statement of decision not having been requested/having already filed its statement of decision on* _ _[*date*]_ _]_ _**, enters its judgment as follows:**

IT IS ORDERED AND ADJUDGED that

1. The contract executed on or about _ _[*date*]_ _**, by plaintiff and defendant in which** _ _[*state nature and description of contract*]_ _ **was legally rescinded by plaintiff and at all times was, is, and forever shall be of no force and effect.**

2. The real property that is the subject of the contract referred to in Paragraph 1, and of this action, is located in _ _ _ _ _ _ **County, California, is commonly known as** _ _[*street address or other common designation*]_ _**, and is more particularly described as** _ _[*legal description*]_ _**.**

[*Add one of the following alternatives*]

[*Alternative 1: If seller is rescinding party; buyer ordered to convey property back to seller*]

3. Defendant shall immediately deliver to plaintiff a duly executed and acknowledged _ _[*warranty/grant/quitclaim*]_ _ **deed to the property described in Paragraph 2, which plaintiff shall immediately record in the Office of the Recorder of** _ _ _ _ _ _ **County. If defendant fails to do so, on proper application and showing then plaintiff may request and shall be granted a further order of this Court directing the court clerk to execute such deed and deliver it to plaintiff, who shall immediately record it as set forth in this judgment.**

[*Alternative 2: If seller is rescinding party; court cancels seller's deed*]

3. The deed executed on _ _[*date*]_ _**, and recorded on** _ _[*date*]_ _**, as Instrument No.** _ _[*number*]_ _**, in the Office of the County Recorder of** _ _ _ _ _ _ **County is hereby canceled and is and shall be of no force or effect.**

[*Alternative 3: If buyer is rescinding party*]

3. Defendant shall restore to plaintiff the consideration given by plaintiff under the contract, specifically _ _[*describe consideration; usually money*]_ _**, plus interest at** _ _[*e.g., 7 percent*]_ _ **per year from and after** _ _[*date*]_ _**.**

[*Continue*]

4. Plaintiff shall immediately restore to defendant the consideration given by defendant under the contract, specifically _ _[*describe consideration, including return of any conveyance of the property*]_ _**.**

5. Plaintiff shall recover consequential damages from defendant in the sum of _ _[*dollar amount*]_ _**,** _ _[*plus interest at e.g., 7 percent, per year from* _ _[*date of default*]_ _]_ _**.**

6. Plaintiff shall recover costs from defendant in the sum of _ _[*dollar amount*]_ _, _ _[*and, as the prevailing party, shall recover attorney fees in an amount to be determined after entry of judgment*]_ _.

7. The Court shall and hereby does retain jurisdiction over this matter, with power to do all acts and issue all orders necessary or appropriate to carry out this judgment.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Copies: Original (presented to judge for signature, then filed with proof of service); certified copy for recording; conformed copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: This form is for an action tried before the judge without a jury. If the action were tried before a jury (see §1.41), the judgment would be in the form of a jury verdict. The form judgment may be adapted to meet the particular needs of a given rescission action, but the format above provides a general guideline. On preparing judgments generally, see California Trial Practice: Civil Procedure During Trial, chap 23 (3d ed Cal CEB 1995). On preparing attorney fee motions and cost bills, see Civ Proc During Trial, chaps 26-27; California Attorney Fee Awards (3d ed Cal CEB 2010).

If enforcement of the judgment for rescission requires establishing an escrow, continued court supervision, or the like (see §1.56), explicit provisions to meet these needs must be included. Because a successful party usually wants to record a copy of the judgment, it is recommended that a statement of decision, if prepared, be filed separately rather than included in the judgment unless the statement of decision is very short. On statements of decision, see CCP §632; Civ Proc During Trial, chaps 23-24.

PRACTICE TIP: For recording and "notice to the world" purposes, it is necessary that a legal description of the subject property be included and that any affected previously recorded documents be specifically identified by county, recording date, and instrument number.

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VII. RESCISSION ACTION CHECKLISTS

§1.58 A. Checklist: Facts to Ascertain Before Drafting Pleadings

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1. Facts regarding plaintiff
   - ___ a. Personal data (name, address, etc.)
   - ___ b. Plaintiff's capacity and legal status
   - ___ c. Contractual interest to be rescinded
   - ___ d. Recordation of contract or documents under it
   - ___ e. Amount of money or other consideration paid under contract or still owing
   - ___ f. Improvements made by plaintiff and their value
   - ___ g. Present fair market value of real property
   - ___ h. Rental value of real property through time of restitution
   - ___ i. Defendant's assignment of contractual interests
   - ___ j. Plaintiff's liability for deficiency judgment
   - ___ k. Grounds for rescission
   - ___ l. Factual basis of election of remedies
   - ___ m. Whether notice of rescission has been given (if so, date)
   - n. Consideration received from defendant
     - ___ (1) Returned to defendant
     - ___ (2) Retained
2. Facts regarding defendant
   - ___ a. Personal data (name, address, etc.)
   - ___ b. Defendant's capacity
   - ___ c. Amount of money or other consideration paid under contract or still owing
   - ___ d. Improvements made by defendant and their value
   - ___ e. Present fair market value of real property
   - ___ f. Rental value of real property up through time of restitution
   - ___ g. Defenses available (see §§1.51-1.54)

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Source: Real Property/California Real Property Remedies and Damages/1 Rescission/§1.59 B. Checklist: Applicability of Special Rescission Statutes

§1.59 B. Checklist: Applicability of Special Rescission Statutes

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1. Home solicitation contracts (CC §§1689.5-1689.15)
   - ___ a. Applicability of act (CC §1689.6; Bus & P C §§7151.2, 7159, 7159.10)
   - ___ b. Whether contract is in same language as oral sales presentation (CC §1689.7(a)(1))
   - ___ c. Whether contract contains statement of right to cancel in properly formatted boldface type (CC §1689.7(a))
   - ___ d. Whether notice of cancellation form is attached to the contract (CC §1689.7(c))
   - ___ e. Whether rescission period has passed (CC §§1689.6, 1689.15)
2. Service and Repair Contracts (CC §§1689.6, 1689.15; Bus & P C §§7159, 7159.10)
   - ___ a. Applicability of act (CC §1689.6; Bus & P C §7159.10)
   - ___ b. Whether the rescission period has passed (CC §1689.15)
3. Home equity sales contracts (CC §§1695-1695.17)
   - ___ a. Applicability of act (CC §1695.1)
   - ___ b. Whether rescission period (5 days after signing) has passed (CC §1695.4)
   - ___ c. Whether facts exist to rescind on grounds that equity purchaser took unconscionable advantage of owner (CC §§1695.13-1695.14)
   - ___ d. Whether statement of right to cancel and notice of cancellation were included in contract (CC §§1695.3, 1695.5-1695.6)
   - ___ e. For provisions governing seminar sales solicitation contracts, see CC §§1689.20-1689.24
   - ___ f. For buyer initiating purchase of emergency repairs: whether buyer expressly waives rescission rights (CC §1689.6)
4. Subdivided Lands Act (Bus & P C §§11000-11024)
   - ___ a. For rescission for cause (Bus & P C §11020)
   - ___ b. For rescission without cause in limited cases of undivided-interest subdivisions (Bus & P C §11000.2; 10 Cal Code Regs §§2792.30-2792.31)
   - ___ c. Whether rescission period has expired (Bus & P C §11000.2; 10 Cal Code Regs §§2792.30-2792.31)
   - ___ d. For violation of Act (see discussion in §1.24)
   - ___ e. Applicability of Act (Bus & P C §11000.1)
   - ___ f. Whether developer has applied for and received a final subdivision public report (Bus & P C §§11010, 11018)
   - ___ g. Whether buyer received a copy of the final subdivision public report (Bus & P C §§11018.1-11018.2; 10 Cal Code Regs §§2795-2795.1)
   - ___ h. Whether developer made material change to offering without amending final subdivision public report (Bus & P C §11012; 10 Cal Code Regs §2800)
   - ___ i. For rescission without cause of time-share contract (Bus & P C §11238)
5. Subdivision Map Act (Govt C §§66410-66499.37)

___ a. Applicability of Act (Govt C §§66424, 66426)

___ b. Whether final map was recorded

___ c. Whether parcel map was recorded

___ d. Time of land division, and the law at that time (Govt C §§66410-66424.6)

___ e. Number of land divisions made by seller in same area

___ f. Existing evidence of a "four by four" land division with intent to evade the Act

___ g. Whether notice of violation was recorded under Govt C §66499.36

___ h. Whether facts support rescission under Govt C §66499.32

6. Interstate Land Sales Full Disclosure Act (15 USC §§1701-1720)

___ a. Applicability of Act (15 USC §§1702-1703)

___ b. Whether sales program is intrastate to the extent that no basis for jurisdiction under the Act attaches

___ c. Whether subdivision contains 25 or more lots (15 USC §1702(a)(1))

___ d. Whether buyer received property report (15 USC §1703(a)(1)(B))

___ e. Effective date of property report (write to Office of Interstate Land Sales Registration, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410)

7. Truth in Lending Act (15 USC §§1601-1667f)

___ a. Applicability of Act (15 USC §§1601-1649; see also Regulation Z (12 CFR pt 226) 12 CFR §§226.15, 226.23)

___ b. Whether required notice of rescission was given to buyer (15 USC §1635(a))

___ c. Whether rescission period has expired (15 USC §1635(a), (i))

___ d. Exceptions (see discussion in §1.28)

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Source: Real Property/California Real Property Remedies and Damages/1 Rescission/§1.60 C. Checklist: Documents to Obtain

§1.60 C. Checklist: Documents to Obtain

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___ 1. Copy of contract to be rescinded and all relevant documents

___ 2. Evidence of current state of title (preliminary title report, litigation guaranty, or special search by title company as instructed by attorney)

___ 3. Copies of relevant documents in chain of title

___ 4. Documents showing legal description of property

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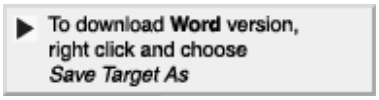
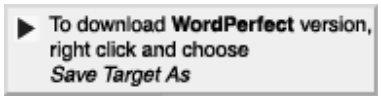
Source: Real Property/California Real Property Remedies and Damages/1 Rescission/§1.61 D. Checklist: Preliminary Investigation and Determinations

§1.61 D. Checklist: Preliminary Investigation and Determinations





___ 1. Investigate and interview witnesses

___ 2. Carefully examine all documents

___ 3. Review title and documents in chain

___ 4. Review other possible causes of action

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Source: Real Property/California Real Property Remedies and Damages/1 Rescission/§1.62 E. Checklist: Factors to Consider and Discuss With Client

§1.62 E. Checklist: Factors to Consider and Discuss With Client

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___ 1. Defendants' financial solvency

___ 2. Election of remedies (damages action may yield higher award than rescission action (see §1.29)

___ 3. Whether rescission is advisable under existing market conditions (see §1.31)

___ 4. Availability of replacement property for comparable price at projected date of judgment

5. Actions that may be joined with rescission action (see §1.37)

___ a. To reform deed or other instrument (see chap 2)

___ b. For damages for fraud or misrepresentation (see chap 3)

___ c. Quiet title (CCP §§760.010-764.080; see chap 7)

___ d. Declaratory relief (CCP §1060)

___ e. To cancel an instrument (CC §3412; see chap 6)

___ f. Ejectment (CC §3375; see chap 10)

___ g. To foreclose a purchaser's lien (CC §3050; see §1.42)

___ 6. Facts that might support or negate defenses such as waiver or estoppel

7. Possibility that court may award consequential damages in rescission action (CC §1692; see §§1.46-1.48)

___ a. Value of improvements (*Kent v Clark* (1942) 20 C2d 779, 128 P2d 868)

___ b. Expenses of preparing property for intended use (*Perkins v Ketchum* (1962) 211 CA2d 245, 27 CR 278)

___ c. Closing costs (*Curran v Heslop* (1953) 115 CA2d 476, 252 P2d 378)

___ d. Interest (*Smith v Rickards* (1957) 149 CA2d 648, 308 P2d 758)

___ e. Attorney fees, if provided for in the rescinded contract (CCP §1021; see §1.49) or as an element of damages if rescission based on fraud (*Kass v Weber* (1968) 261 CA2d 417, 67 CR 876; see §1.46)

___ 8. Exemplary damages if defendant's conduct was oppressive, fraudulent, or malicious (CC §3294; *Mahon v Berg* (1968) 267 CA2d 588, 73 CR 356); see §1.50

___ 9. Likely gain versus cost of litigation, including effect of any attorney fees clause awarding legal fees to whichever side prevails

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§1.63 F. Checklist: Procedural Considerations

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1. Venue (see §1.40)
    a. If main relief transitory
        ___ (1) County of defendant's residence (CCP §395)
        ___ (2) County in which contract entered into or to be performed (CCP §395)
        ___ (3) For certain consumer contracts, county where buyer or lessee signed contract, resided when contract entered into, or resides when action commenced (CCP §395)
    ___ b. If main relief local, county in which real property is located (CCP §392)
    ___ c. Whether the case is a limited or unlimited civil case, depending on amount in issue (see §1.40; CCP §86)
2. Essential allegations in preparing complaint (see §1.44)
    ___ a. Parties' capacity and residence
    ___ b. Making of contract; description of property
    ___ c. Grounds for rescission
    ___ d. Date plaintiff became aware of grounds
    e. Notice of rescission
        ___ (1) Plaintiff previously served on defendant notice of rescission and offer to restore consideration on condition that defendant return consideration given by plaintiff and defendant refused to do so; or
        ___ (2) Plaintiff intends service of complaint on defendant to serve as notice of rescission
3. Defendant's response and defenses
    ___ a. Defendant may answer, demur, move to strike, or cross-complain
    ___ b. Answer may set up affirmative defenses
    c. Typical defenses
        ___ (1) Statute of limitations (see §1.51)
        ___ (2) Waiver (see §1.52)
        ___ (3) Estoppel (see §1.53)
        ___ (4) Laches (see §1.54)
        ___ (5) Election of remedies (see §1.29)
        ___ (6) Other generally applicable contract and equitable defenses

___ 4. Jury trial (see §1.41) may be available, at least on legal issues (*Paularena v Superior Court* (1965) 231 CA2d 906, 42 CR 366; but see *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800)

___ 5. Statement of decision required on request following court trial (CCP §632; see §1.56)

___ 6. Judgment should be recorded to effect title (Govt C §§27280, 27282(a)(1), 27326)

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2

Reformation

Perry D. Mocciaro

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§2.1 I. INTRODUCTION

Reformation, also called revision, is an equitable remedy by which the court issues a decree correcting language of a contract or other written instrument to reflect the true agreement of the parties. CC §§3399-3402; *Lemoge Elec. v County of San Mateo* (1956) 46 C2d 659, 297 P2d 638. The grounds for reformation are discussed in §§2.7-2.12. Although CC §3399 refers to revision of a "contract," rather than reformation of a "writing" or "instrument," as discussed below (see §2.2), these different and seemingly limited nomenclatures actually mean the same thing.

This chapter discusses the nature of the remedy in §§2.2-2.12, procedural considerations in §§2.13-2.18, the complaint allegations in §§2.19-2.32, defenses in §§2.33-2.38, and hearing the case and judgment in §§2.39-2.44. A checklist appears in §2.46.

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II. NATURE OF THE REMEDY

§2.2 A. Common Law and Statutory Basis

The right to have a written instrument reformed has long been recognized as part of the court's equitable jurisdiction. *Lestrade v Barth* (1862) 19 C 660; *Seymour v Cariker* (1963) 220 CA2d 300, 33 CR 727. In 1872, the California legislature codified a portion of the common law right to reformation by enacting CC §§3399-3402. There is some suggestion in the cases that the common law right to reformation is broader than that afforded by the statute. See, *e.g., Stafford v California Canning Peach Growers* (1938) 11 C2d 212, 78 P2d 1150. Other cases note that the remedy is equitable in nature and not restricted to the exact situations specified in CC §3399. See, *e.g., Jones v First Am. Title Ins. Co.* (2003) 107 CA4th 381, 131 CR2d 859. But most cases grant reformation only when the case comes within the code provisions. See *Higgins v Parsons* (1884) 65 C 280, 3 P 881; *Security First Nat'l Trust & Sav. Bank v Loftus* (1933) 129 CA 650, 19 P2d 297.

Although CC §§3399-3402 refer to revision rather than to reformation, the courts have made no distinction between these terms and have consistently treated the statutes as providing common law reformation. *Stafford v California Canning Peach Growers, supra*.

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§2.3 B. Purpose and Type of Action

The theory behind reformation is that, when an instrument does not correctly set forth the parties' actual agreement, justice requires the court to exercise its equitable power to make the instrument reflect the parties' intent. *Bank of America v Granger* (1931) 115 CA 210, 1 P2d 479; *House v McMullen* (1909) 9 CA 664, 100 P 344. Thus, reformation assumes the existence of a valid agreement (whose written form fails to express the parties' intentions) and furthers the continuance of their relationship on the basis they intended. *Paterson v Board of Trustees of Montecito Union Sch. Dist.* (1958) 157 CA2d 811, 321 P2d 825; *Campbell v Republic Indem. Co.* (1957) 149 CA2d 476, 308 P2d 425.

In general, an understanding must have existed between the parties on all essential terms for reformation to be available; otherwise, there is no standard to which the instrument can be reformed. *Lemoge Elec. v County of San Mateo* (1956) 46 C2d 659, 297 P2d 638; *Shupe v Nelson* (1967) 254 CA2d 693, 62 CR 352. If the written agreement actually conforms to the parties' understanding, reformation is not available even if the parties acted under a mutual mistake. *Bailard v Marden* (1951) 36 C2d 703, 227 P2d 10; *Ellison v City of San Buenaventura* (1975) 48 CA3d 952, 122 CR 167. In such cases, rescission or cancellation are the remedies typically used. See §2.5.

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§2.4 C. Reformation Used Defensively

Reformation may be asserted as an equitable defense against a complaint seeking specific performance, damages, or other legal or equitable relief. See, *e.g., Lestrade v Barth* (1862) 19 C 660. If the defense appears meritorious, counsel should consider asserting it affirmatively in a cross-complaint (in addition to including it in the answer to the complaint) because the defendant may want to pursue the reformation even if the plaintiff later dismisses its complaint. See, *e.g., Jones v First Am. Title Ins. Co.* (2003) 107 CA4th 381, 131 CR2d 859.

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§2.5 D. Related Remedies

It is rare that a single cause of action complaint for reformation will be in the client's best interests. Not knowing how a court will ultimately view the often equivocal or obscure facts of a party's intent (see, *e.g.*, §2.40 for requirement of clear and convincing evidence), counsel should consider other, related causes of action. Rescission (see chap 1) and cancellation of an instrument (see chap 6) are generally inconsistent with reformation because they terminate the transaction, while reformation contemplates a continuing contractual relationship. See *Douglass v Dahm* (1950) 101 CA2d 125, 224 P2d 914; *Tetenman v Epstein* (1924) 66 CA 745, 226 P 966. Breach of contract (see chap 4) and specific performance (see chap 5) are consistent with contract reformation in some instances.

PRACTICE TIP: In a few cases, however, it might be necessary to reform a contract in conjunction with rescinding it, such as determining the amount or nature of restitution. In such cases, the complaint and prayer should clearly specify how the remedies are supposed to work with one another.

In many cases involving fraud or unilateral mistake, reformation is not available (see §§2.7, 2.10), because the existence of a valid contract cannot be proved when there was no meeting of minds. In such cases, rescission or cancellation are possible remedies.

WARNING: Contract reformation may affect and be affected by third-party rights and other factors, which counsel should investigate before advising the client on the benefits and risks of each cause of action and remedy that will be pleaded in the complaint. Sometimes a clear election of remedies (see §1.29) cannot be made until discovery is complete or until trial testimony and evidence reveal other considerations.

Reformation may be sought in conjunction with other remedies in one action. *Gardner v California Guar. Inv. Co.* (1902) 137 C 71, 69 P 844. For example, causes of action for specific performance and reformation may be joined in one action (see CC §3402), seeking performance of the reformed contract. On specific performance, see chap 5. Similarly, when a deed or other recorded document contains an error that creates a problem of title, a plaintiff may wish to join a cause of action to quiet title in the reformation action. See, *e.g., California Trust Co. v Cohn* (1932) 214 C 619, 7 P2d 297; chap 7.

Damages for breach of the reformed contract are recoverable as part of the relief in a reformation action (*Landis v Superior Court* (1965) 232 CA2d 548, 42 CR 893), and causes of action for injunctive and declaratory relief apparently may also be joined (see, *e.g., Massae v Superior Court* (1981) 118 CA3d 527, 173 CR 527). On injunctive and declaratory relief, see California Civil Procedure Before Trial, chaps 32, 35 (4th ed Cal CEB 2004).

PRACTICE TIP: When a plaintiff seeks specific performance or damages in addition to reformation, it is common to plead in the alternative, if possible, that (1) the words of the contract already have the meaning ascribed to them by the plaintiff, and (2) if the words do not have such meaning, the contract should be reformed.

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§2.6 E. Documents Subject to Reformation

Under CC §3399 (reformation for fraud or mutual mistake), a written contract may be reformed whether it is executed or executory (*Lestrade v Barth* (1862) 19 C 660; *Merkle v Merkle* (1927) 85 CA 87, 258 P 969), and regardless of whether it shows consideration on its face (*Peasley v McFadden* (1886) 68 C 611, 10 P 179).

Although CC §§3399 (reformation for fraud and mutual mistake), 3400 (equitable and conscientious intent presumed), and 3402 (reformation and specific performance) provide for reformation of a contract, and only CC §3401 (scope of court's inquiry) refers to a written instrument, the courts have applied reformation to most documents intended to indicate the parties' mutual intention to create legal rights.

In addition to contracts, other types of documents that may be reformed include the following:

- **Deeds.** *Western Title Guar. Co. v Sacramento & San Joaquin Drainage Dist.* (1965) 235 CA2d 815, 45 CR 578; *Lestrade v Barth* (1862) 19 C 660. The courts' power to reform deeds (despite CC §3399's reference to "contracts") is found in CC §1066, which provides that "grants are to be interpreted in like manner with contracts in general." *Rousselot v Spanier* (1976) 60 CA3d 238, 131 CR 438; *Paddock v Vasquez* (1953) 122 CA2d 396, 265 P2d 121. See California Real Property Sales Transactions §§11.94-11.103 (4th ed Cal CEB 2007).
- **Mortgages and deeds of trust.** *Security-First Nat'l Bank v Earp* (1942) 19 C2d 774, 122 P2d 900; *San Fernando Valley Chamber of Commerce v Thomas* (1954) 123 CA2d 348, 266 P2d 891; *Travelli v Bowman* (1907) 150 C 587, 89 P 347. A deed of reconveyance and release executed by a trustee under a deed of trust may also be reformed. *Kugler v Scarborough* (1932) 126 CA 327, 14 P2d 806. When the chain of title can be corrected without working an injustice, a mortgage or deed of trust may be reformed even after foreclosure. *Quivey v Baker* (1869) 37 C 465.
- **Substitutions of trustee.** *Jones v First Am. Title Ins. Co.* (2003) 107 CA4th 381, 131 CR2d 859 (trustee's foreclosure sale mistakenly conducted by former trustee validated over trustor's objection through equitable remedy of reformation).
- **Leases.** *Bradbury v Higginson* (1914) 167 C 553, 140 P 254; *Baines v Zuieback* (1948) 84 CA2d 483, 191 P2d 67; *Security First Nat'l Trust & Sav. Bank v Loftus* (1933) 129 CA 650, 19 P2d 297.
- **Judgments.** *Voge, Inc. v Rose* (1962) 205 CA2d 534, 23 CR 87; *Douglass v Dahm* (1950) 101 CA2d 125, 224 P2d 914. If a prior quiet title judgment includes an incorrect description brought about by the parties' mutual mistake, the judgment may be reformed to correct the error. See also *Dunning Bros. v Johnson* (1920) 47 CA 397, 190 P 829 (judgment reformed to correct erroneous description caused by mutual mistake).
- **Trusts.** *Ike v Doolittle* (1998) 61 CA4th 51, 85, 70 CR2d 887 (trust reformed, making part of trust nonrevocable to conform to trustor's intent to avoid paying taxes); *Getty v Getty* (1986) 187 CA3d 1159, 1180, 232 CR 603 (see §2.35).
- **Wills.** An important exception to the liberal applications of reformation to instruments noted above is the rule that a will *cannot* be reformed. *Kobus v San Diego Trust & Sav. Bank* (1959) 172 CA2d 574, 342 P2d 468.

NOTE: Reformation of deeds, real property secured notes and deeds of trust, or other recorded instruments can create significant title insurance coverage and defense issues. See Practice Tip in §1.5.

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F. Grounds for Reformation

§2.7 1. Fraud

Reformation is available when, because of fraud, a written contract does not truly express the parties' intent. CC §3399. See *Wolfe v Morgan* (1928) 95 CA 656, 273 P 64. The contract may be reformed to express their intention in a lawsuit filed by the affected party, as long as it can be done without prejudicing rights acquired by third persons, in good faith, and for value. CC §3399. See *Sieger v Standard Oil Co.* (1957) 155 CA2d 649, 318 P2d 479. The category of fraud that constitutes grounds for reformation is narrower than that justifying rescission (see §§1.12-1.13) and usually consists of a false representation either that the writing conforms with the intended agreement or that a writing will be made in conformity with it. See, *e.g., California Trust Co. v Cohn* (1932) 214 C 619, 7 P2d 297; *Lane v Davis* (1959) 172 CA2d 302, 342 P2d 267. If the written contract correctly states the intended agreement, however, the fact that the agreement was induced by fraud does not entitle the aggrieved party to reformation. *Lane v Davis, supra*. In that event, the remedy is either rescission (see chap 1) or damages for fraud (see chap 3).

When both parties have equal access to information and there is no confidential relationship, mere expressions of opinion on the sufficiency of title do not justify reformation of a contract entered into in reliance on that sufficiency. *Choate v Hyde* (1900) 129 C 580, 62 P 118.

When the ground for reformation is fraud, the contributory negligence of the aggrieved party is no defense (see §2.36). *Security-First Nat'l Bank v Earp* (1942) 19 C2d 774, 122 P2d 900. Note that fraud and unilateral mistake known or suspected by the other party (see §2.10) are in theory very similar and are treated similarly by the courts. See *Harding v Robinson* (1917) 175 C 534, 166 P 808; *Demetris v Demetris* (1954) 125 CA2d 440, 270 P2d 891. Because fraud and mistake are independent grounds under CC §3399, reformation may also be based on negligent misrepresentation, a species of fraud defined in CC §1572(2) as a positive assertion, "in a manner not warranted by the information of the person making it," of that which is untrue, even though the person believes it to be true. Even though negligent misrepresentation seems conceptually inconsistent with unilateral mistake, it is theoretically similar to mutual mistake in that the party making the representation mistakenly (but unreasonably) believes in the truth of the representation. On fraud in real estate transactions, see California Real Property Sales Transactions §§2.132, 2.155-2.157, 2.184-2.185 (4th ed Cal CEB 2007).

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§2.8 2. Mistake

Mutual mistake, or one party's mistake that the other party at the time either knew or suspected, are grounds for reformation if the written contract does not truly express the intention of the parties. The contract may be reformed on application of the party aggrieved to express that intention, as long as it can be done without prejudice to any rights acquired by third persons, in good faith, and for value. CC §3399. See *Lemoge Elec. v County of San Mateo* (1956) 46 C2d 659, 297 P2d 638. Because reformation is an equitable remedy, it may be denied if the mistake was the result of the want of that degree of care and diligence that would be exercised by persons of reasonable prudence in the same circumstances. *Appalachian Ins. Co. v McDonnell Douglas Corp.* (1989) 214 CA3d 1, 262 CR 716.

Mistake may be a basis for reformation even if the parties were in accord on the language to be used in the instrument. *Bank of America v Granger* (1931) 115 CA 210, 1 P2d 479. The court is not confined to inquiring what language the parties intended to put in the instrument, but it may inquire what the instrument was intended to mean and what its legal consequences were intended to be. CC §3401; *Appalachian Ins. Co. v McDonnell Douglas Corp., supra*.

If the written instrument accurately reflects the agreement of the parties, albeit an agreement based on a mistaken assumption of fact, an action for reformation does not lie. *Appalachian Ins. Co. v McDonnell Douglas Corp., supra*. Moreover, if the mistake was truly innocent and made by only one party to the agreement without the other party's knowing or suspecting it, reformation is generally not available. *Perry v Bedford* (1965) 238 CA2d 6, 47 CR 461. See *Bonaparte v Allstate Ins. Co.* (9th Cir 1994) 49 F3d 486.

PRACTICE TIP: When the basis of the reformation action is some type of negligence (*e.g.,* mistake involving the defendant's negligence), counsel for the defendant should always perform a coverage analysis to identify an insurer with a duty to defend and possibly to indemnify the defendant. One source is a title insurance policy insuring the instrument or interest that the plaintiff seeks to reform. Conduct that gives rise to a reformation claim, however, may also provide grounds to the insurer to deny coverage or rescind the policy. For analysis of likely defenses that the title insurer may raise and systematic guidance for tendering the claim, see California Title Insurance Practice, chaps 11-12 (2d ed Cal CEB 1997). The defendant may also have coverage or a potential defense under a liability policy. See California Liability Insurance Practice: Claims & Litigation (Cal CEB 1991).

Situations in which mistake provides a basis for reformation are discussed in §§2.9-2.12.

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§2.9 a. Mutual Mistake

Reformation lies if the agreement's failure to express the parties' intent arose from a mutual mistake. *Lemoge Elec. v County of San Mateo* (1956) 46 C2d 659, 297 P2d 638; *Jefferson v Pietroroia* (1936) 5 C2d 222, 54 P2d 7. For mutual mistake to provide a basis for reformation, there must have been a common intention to which the contract can be reformed. *Paterson v Board of Trustees of Montecito Union Sch. Dist.* (1958) 157 CA2d 811, 321 P2d 825.

A mistake about the legal effect of a document can constitute mutual mistake under CC §3399. *Stafford v California Canning Peach Growers* (1938) 11 C2d 212, 78 P2d 1150. Mutual mistake may be found in situations in which both parties shared the same misconception (*Renshaw v Happy Valley Water Co.* (1952) 114 CA2d 521, 250 P2d 612; *National Auto. Ins. Co. v Industrial Acc. Comm'n* (1938) 27 CA2d 225, 80 P2d 1024), and in which, through the inadvertence of both, the written contract or instrument fails to express the parties' intention (*Lemoge Elec. v County of San Mateo, supra; Lestrade v Barth* (1862) 19 C 660).

Mutual mistake is established by undisputed evidence that at the time of a transaction or transfer all parties believed that the documents were sufficient to carry out the intent of the parties. *Jones v First Am. Title Ins. Co.* (2003) 107 CA4th 381, 131 CR2d 859.

If at the time of the agreement both parties are mistaken about a fact (*e.g.,* the extent of plaintiff's interest in the property), and the defendant discovers before signing all transaction documents that the plaintiff's interest is greater but does not disclose that fact, then reformation is justified on the basis of either mutual or unilateral mistake. *Cleghorn v Zumwalt* (1890) 83 C 155, 23 P 294.

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§2.10 b. Unilateral Mistake

Reformation is also available when the agreement fails to express the parties' intent because one party acted under a mistake known or suspected at the time by the other party. CC §3399; *Stare v Tate* (1971) 21 CA3d 432, 98 CR 264; *Baines v Zuieback* (1948) 84 CA2d 483, 191 P2d 67. The plaintiff must establish the defendant's knowledge or suspicion of a unilateral mistake in order for reformation to be granted. *Petersen v Ridenour* (1955) 135 CA2d 720, 287 P2d 848. But the plaintiff need not show that the plaintiff was weak-minded, that the consideration was inadequate, or that the defendant fraudulently concealed a material part of the agreement or prevented the plaintiff from understanding it. *Wilson v Moriarty* (1891) 88 C 207, 26 P 85. If the plaintiff received no consideration, the requirement of knowledge or suspicion may be relaxed. See *Tyler v Larson* (1951) 106 CA2d 317, 235 P2d 39.

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§2.11 c. Third-Party Mistake

A mistake made by a third person acting for both parties can constitute a ground for reformation. *Martinelli v Gabriel* (1951) 103 CA2d 818, 230 P2d 444; *Mills v Schulba* (1950) 95 CA2d 559, 213 P2d 408. This basis for reformation arises when a scrivener or drafter fails to express the parties' intentions in putting their agreement in writing. *California Pac. Title Co. v Moore* (1964) 229 CA2d 114, 40 CR 61 (title company clerk mistakenly conveyed more land than had been agreed on). See also *Strauss v Bruce* (1934) 139 CA 62, 33 P2d 71. Note that a mistake by an escrow holder might constitute grounds for reformation because the escrow holder is, at least initially, the agent of both parties. See, *e.g., Oldenburg v Brody* (1956) 139 CA2d 543, 293 P2d 844. When a tenant's insurance agent failed to name the landlord as a co-insured as required in the lease, a court of appeal allowed the landlord to bring an action to reform the tenant's policy. See *Jackson v Aetna Life & Cas. Co.* (1979) 93 CA3d 838, 155 CR 905.

PRACTICE TIP: If the third-party mistake also constitutes an actionable tort, the attorney fees that the aggrieved party expends in the reformation action may be recoverable as damages in a separate cause of action (or a completely separate lawsuit) against the third party. See authorities cited in California Attorney Fee Awards, chap 7 (3d ed Cal CEB 2010).

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§2.12 d. Examples of Terms Revised by Reformation Action

A document may be reformed to correct the following mistakes in transcription: omission of the appropriate date (*Waratah Oil Co. v Reward Oil Co.* (1914) 23 CA 638, 139 P 91); failure to fill in blanks in a printed form (*Calhoun v Downs* (1931) 211 C 766, 297 P 548); and incorrect or misspelled names of parties or omitted property description (*Jones v First Am. Title Ins. Co.* (2003) 107 CA4th 381, 131 CR2d 859; *Oatman v Niemeyer* (1929) 207 C 424, 278 P 1043).

An erroneous property description may be corrected to express the parties' intention (*California Pac. Title Co. v Moore* (1964) 229 CA2d 114, 40 CR 61; *Tyler v Larson* (1951) 106 CA2d 317, 235 P2d 39; *Merkle v Merkle* (1927) 85 CA 87, 258 P 969) as long as doing so will not prejudice the rights of innocent third parties (CC §3399). When necessary to implement the parties' intent, a description completely omitted from a deed may be inserted. *Oatman v Niemeyer, supra; Mills v Schulba* (1950) 95 CA2d 559, 213 P2d 408.

A written instrument that incorrectly reflects the character or extent of the estate or interest intended to be conveyed may be reformed. *Cleghorn v Zumwalt* (1890) 83 C 155, 23 P 294 (incorrect description of fractional interest); *Berendsen v McIver* (1954) 126 CA2d 347, 272 P2d 76 (incorrect statement of nature of cotenancy interests); *Roeder v Roeder* (1953) 118 CA2d 572, 258 P2d 581 (incorrect characterization of estate conveyed). A lease written by one party that incorrectly and deliberately (or mistakenly) provides for a longer lease term than the parties agreed to may be reformed. *Wilson v Moriarty* (1891) 88 C 207, 26 P 85.

Reformation of a usurious loan provision is allowed if the parties did not intend to create a usurious transaction. *First Am. Title Ins. & Trust Co. v Cook* (1970) 12 CA3d 592, 90 CR 645. But see §2.34 on illegal contracts.

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III. PROCEDURAL CONSIDERATIONS

§2.13 A. Jurisdiction

Superior courts in California have subject matter jurisdiction over actions for reformation. See Cal Const art VI, §10. If the plaintiff seeks recovery of money or property exceeding $25,000, the action is characterized as an "unlimited civil case." CCP §88. Most cases in California for reformation of real property sale contracts will therefore be brought as unlimited civil cases. If the prayer for recovery of money or the value of the property does not exceed $25,000, the action is characterized as a "limited civil case." CCP §§85-86. In rare instances, a small claims court has jurisdiction to decree a reformation. See CCP §116.220(b). Other aspects of subject matter jurisdiction are discussed in California Civil Procedure Before Trial, chap 6 (4th ed Cal CEB 2004).

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§2.14 B. Venue

Proper venue for a reformation action involving real property depends on the facts and the relief sought in a particular case. One line of cases has held that an action to reform a written instrument is a transitory or personal action, and that venue therefore is controlled by CCP §395 and lies in the county where a defendant resides. See, *e.g., Jacobs v C. H. Smith Lumber Co.* (1928) 206 C 128, 273 P 571; *Mettler v Hedley* (1959) 170 CA2d 277, 338 P2d 489; *Martinez v Martinez* (1950) 99 CA2d 425, 221 P2d 986. Another line of cases, however, has held that an action to reform an instrument and adjudicate a right or an interest in real property is a "local" action under CCP §392 that must be tried in the county where the real property is located. *Franklin v Dutton* (1889) 79 C 605, 21 P 964; *Cohen v Hellman Commercial Trust & Sav. Bank* (1933) 133 CA 758, 24 P2d 960. This latter line of cases was followed by the court in *Massae v Superior Court* (1981) 118 CA3d 527, 173 CR 527, holding that an action to reform the power of sale clause in a deed of trust was a "local" action properly tried in the county in which the real property was located, even though the prayer also sought damages and injunctive and declaratory relief.

Code of Civil Procedure §395(b) provides special rules of venue for actions arising from a transaction consummated because of an unsolicited telephone call made by a seller engaged in telephone solicitations or a telephone call or electronic transmission made by the buyer or lessee in response to a solicitation by the seller. See §1.40.

On venue generally, see California Civil Procedure Before Trial, chap 8 (4th ed Cal CEB 2004).

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C. Parties

§2.15 1. Plaintiffs

A "party aggrieved" under CC §3399 need not be an original party to the contract or instrument. Anyone, such as a successor to an original party, who has been prejudiced or has suffered a monetary loss as a result of the misstatement of the true agreement may maintain an action for reformation. *Shupe v Nelson* (1967) 254 CA2d 693, 62 CR 352. A party who would be able to recover as a third party beneficiary is generally able to maintain a reformation action. For example:

- A broker may sue to reform a real property purchase and sale agreement so that his or her name and the amount of the commission are inserted in blanks in the contract form (*Calhoun v Downs* (1931) 211 C 766, 297 P 548);
- An escrow holder or a title insurer may bring an action to reform an instrument that it erroneously prepared for a real property sales transaction between two other parties (*First Am. Title Ins. & Trust Co. v Cook* (1970) 12 CA3d 592, 90 CR 645 (note prepared by escrow holder included usurious interest rate that was not in escrow instructions); *California Pac. Title Co. v Moore* (1964) 229 CA2d 114, 40 CR 61 (title insurer erroneously put wrong description in deed));
- The personal representative of an estate or a devisee may seek reformation of an instrument (other than a will) to which the testator was a party before his or her death (see *Tyler v Larson* (1951) 106 CA2d 317, 235 P2d 39; *Ferguson v Ash* (1915) 27 CA 375, 150 P 657).

The plaintiff must nonetheless have some title to or interest in the property in order to maintain a reformation action. *Auerbach v Healy* (1916) 174 C 60, 161 P 1157; *Wilson v Shea* (1924) 194 C 653, 229 P 945. A purported grantee who failed to obtain title because the deed was not legally delivered lacks standing to maintain an action to reform the deed. *Johns v Scobie* (1939) 12 C2d 618, 86 P2d 820.

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§2.16 2. Defendants

All persons whose interests in the property will be affected by the decree and all parties to a contract sought to be reformed must be joined as parties to a reformation action, or they may intervene. *Wilson v Shea* (1924) 194 C 653, 229 P 945; *Cohen v Hellman Commercial Trust & Sav. Bank* (1933) 133 CA 758, 24 P2d 960. If the different interests created under a contract are severable, however, those whose interests will not be affected by the reformation need not be joined. *Ward v Waterman* (1890) 85 C 488, 24 P 930. For example, if a lessor's rights are not affected by an action to reform a sublease, the lessor need not be joined. *Baines v Zuieback* (1948) 84 CA2d 483, 191 P2d 67.

A cause of action for reformation may be maintained against both the original parties to an agreement and those claiming under the original parties. *Oatman v Niemeyer* (1929) 207 C 424, 278 P 1043 (administrator); *Stonesifer v Kilburn* (1898) 122 C 659, 55 P 587 (subsequent grantee); *Holt v Holt* (1898) 120 C 67, 52 P 119 (mortgagee).

An important limit on reformation is that it may not be granted if doing so would prejudice rights acquired by third persons in good faith and for value. See CC §3399. Thus, reformation may not be obtained against a bona fide purchaser for value who acquires an interest after the instrument sought to be reformed was executed. *Baines v Zuieback, supra*. A third person, however, who takes with actual or constructive notice of the plaintiff's claim is not protected. *Shupe v Nelson* (1967) 254 CA2d 693, 62 CR 352. When a corporation that was an original party to an agreement merges with another corporation, the resulting corporation is not a third person entitled to protection under CC §3399. *Treadaway v Camellia Convalescent Hosps.* (1974) 43 CA3d 189, 118 CR 341.

PRACTICE TIP: Unless counsel for the plaintiff is certain that no third parties have acquired rights in the property or transaction at issue, a litigation guaranty should be obtained either before, or as soon as practicable after, filing the action. On third party rights and ordering litigation guaranties, see §§1.29, 1.44.

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§2.17 D. Jury Trial

Because reformation is an equitable remedy (*Martinez v Martinez* (1950) 99 CA2d 425, 221 P2d 986), an action to reform a contract is triable by the court, without entitlement to a jury under CCP §592 (see *Loftus v Fischer* (1896) 113 C 286, 45 P 328). The court may, however, empanel a jury as an exercise of its discretion. *Union Ice Co. v Doyle* (1907) 6 CA 284, 92 P 112. If legal issues such as recovery of damages are joined with equitable issues in the same action, the parties are entitled to a jury trial of the legal issues. See, *e.g., Robinson v Puls* (1946) 28 C2d 664, 171 P2d 430. For further discussion, see California Civil Procedure Before Trial, chap 41 (4th ed Cal CEB 2004).

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§2.18 E. Lis Pendens

Under CCP §§405-405.61, the claimant in any action concerning real property, or affecting title to or right of possession of real property, may record a "notice of the pendency of the action," commonly known as a lis pendens. The effect of a recorded lis pendens is that any subsequent purchaser or encumbrancer takes subject to the rights of the person recording the lis pendens. *Ahmanson Bank & Trust Co. v Tepper* (1969) 269 CA2d 333, 74 CR 774.

Under CCP §405.20, a party can record a notice of pendency of the action (lis pendens) in which a "real property claim" is alleged. A "real property claim" means a cause or causes of action that, if meritorious, affect (a) title to, or the right to possession of, specific real property or (b) the use of an easement identified in the pleading, other than an easement obtained pursuant to statute by a regulated public utility. CCP §405.4. Many actions to reform real property-related contracts or other instruments thus fall within the broad coverage of CCP §§405-405.61. See, *e.g., Kendall-Brief Co. v Superior Court* (1976) 60 CA3d 462, 131 CR 515.

But not all actions involving real property will support a lis pendens. See, *e.g., Urez Corp. v Superior Court* (1987) 190 CA3d 1141, 235 CR 837 (plaintiff's action was not one that affected title or possession of property at issue); *Allied E. Fin. v Goheen Enters.* (1968) 265 CA2d 131, 71 CR 126 (lis pendens limited to actions whose outcome will affect title to, or right to possession of, real property).

PRACTICE TIP: Counsel filing or defending a reformation action should check the statutory requirements for (and consider the tactical advantages of) recording or expunging a lis pendens. See chap 13.

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IV. THE COMPLAINT

§2.19 A. Allegations

Although the complaint in a reformation action is relatively simple, it must allege facts sufficient to constitute a cause of action. *Pascoe v Morrison* (1933) 219 C 54, 25 P2d 9; *Petersen v Ridenour* (1955) 135 CA2d 720, 287 P2d 848. To avoid confusion, different grounds for reformation (see §§2.7-2.12) may be pleaded in separate causes of action (see *Taff v Atlas Assur. Co.* (1943) 58 CA2d 696, 137 P2d 483); a complaint that adequately alleges one ground is not fatally defective for failing to allege another ground with sufficient specificity (*Gardner v California Guar. Inv. Co.* (1902) 137 C 71, 69 P 844). Thus, all possible grounds should usually be pleaded, and the complaint may be amended during or after discovery with specific facts not known when the complaint was filed. Allegations are discussed in §§2.20-2.31.

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§2.20 1. Facts Concerning Agreement

The complaint should include facts about the existence of an actual agreement between the parties before it was put in writing, the terms of the agreement, and the nature of the plaintiff's interest in the subject matter of the agreement. When the agreement concerns real property, the complaint should contain both the legal property description and the street address or other common designation. If the action seeks reformation of a deed, the complaint should allege the actual prior agreement to which the deed was intended to conform on delivery.

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§2.21 2. Incorrect Representation by Writing

The manner in which the written instrument incorrectly states the real understanding should be alleged, and a copy of the written instrument to be reformed usually should be attached to the complaint. In the typical action to reform a contract or an agreement, one usually alleges the existence of an oral agreement that differs from the written instrument sought to be reformed. If the action is one to reform a deed, however, the allegation may be that the deed does not conform to a previous written agreement, and in that event, one should allege the existence and terms of the prior written agreement. This paragraph or another should also contain a description of the real property and should allege the plaintiff's interest in the property.

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§2.22 3. Pleading Grounds for Reformation

Care should be taken to plead with a fair degree of specificity the facts on which fraud or mistake is based. The complaint may be held insufficient if it does not clearly recite the facts showing the occurrence of mistake or fraud. *Girard v Miller* (1963) 214 CA2d 266, 29 CR 359; *McClure v Cerati* (1948) 86 CA2d 74, 194 P2d 46.

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§2.23 a. Mutual Mistake

If the complaint does not allege facts showing the existence of the grounds on which reformation is sought, it may be held to be insufficient. *Girard v Miller* (1963) 214 CA2d 266, 29 CR 359. Counsel should be sure to provide a recitation of the necessary facts showing the existence of mistake and not simply plead its existence in conclusory language. See §2.9.

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§2.24 b. Unilateral Mistake

Like other grounds for reformation, unilateral mistake should be alleged with specificity to avoid subjecting the complaint to demurrer. The complaint should state no cause of action without alleging facts to show that the mistake was known or suspected by the defendant. *City of Cypress v New Amsterdam Cas. Co.* (1968) 259 CA2d 219, 66 CR 357. See §2.10.

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§2.25 c. Fraud

As with other grounds for reformation, the facts constituting the defendant's fraud and the plaintiff's reliance on it should be pleaded with specificity. *California Trust Co. v Cohn* (1932) 214 C 619, 7 P2d 297; *Johnson v Sun Realty Co.* (1934) 138 CA 296, 32 P2d 393. The ultimate facts constituting the fraud should also be alleged. *Pascoe v Morrison* (1933) 219 C 54, 25 P2d 9; *California Trust Co. v Cohn, supra*. See §2.7.

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§2.26 4. Pleading Around Defenses

Facts in anticipation of the defenses of plaintiff's negligence (see §2.36), the statute of limitations (see §2.37), or laches (see §2.38) may have to be pleaded if a basis for one or more of them appears on the face of the complaint. Although the general rule is that the complaint need not anticipate defenses and that the allegations in the answer are deemed controverted (CCP §431.20(b)), defenses of negligence, statute of limitations, and laches may be raised by demurrer if a basis for them appears on the face of the complaint. See, *e.g., Goodfellow v Barritt* (1933) 130 CA 548, 20 P2d 740 (demurrer to complaint for reformation sustained because unreasonable, prejudicial delay appeared from facts alleged in complaint).

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§2.27 a. Statute of Limitations

Although defenses generally need not be anticipated (CCP §431.20(b)), a complaint is subject to demurrer if either the statute of limitations (*Miller v Lantz* (1937) 9 C2d 544, 71 P2d 585) or laches (*Barfield v Price* (1871) 40 C 535) appears as a defect on its face. In most instances, the applicable limitation period is 3 years under CCP §338(d), which covers actions for relief based on fraud or mistake and expressly provides that the period does not begin to run until discovery of the facts constituting fraud or mistake. See discussion of late discovery rule in §2.37. The allegation in the form complaint in §2.32 is intended to negate any potential application of the statute of limitations by alleging the date of discovery.

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§2.28 b. Laches

Any delay that is unreasonable or prejudicial to the defendant may give rise to a demurrer on the ground that the action is barred by laches. See §2.38. If, from the face of the complaint, laches appears to be a problem, the plaintiff should allege facts sufficient to show that the delay is reasonable, excused, and/or nonprejudicial. See *Goodfellow v Barritt* (1933) 130 CA 548, 20 P2d 740.

PRACTICE TIP: Pleading facts in a complaint that address laches at all is inherently tricky because the plaintiff does not want to suggest possible defenses. Caution dictates making the allegations, however, if it is likely that laches will be raised by the defendant in any event.

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§2.29 c. Plaintiff's Lack of Negligence

If the complaint affirmatively alleges facts suggesting that the plaintiff acted negligently (see §2.36), it may be demurrable or subject to dismissal, and facts should be added to refute the possible defense of negligence. See CC §1577; *McClure v Cerati* (1948) 86 CA2d 74, 194 P2d 46. Negligence can arise either because the plaintiff should have known of a mistake in the instrument, or because the plaintiff failed to read the written instrument (see §2.36). In either instance, the applicability of the defense depends on the facts of the particular case.

PRACTICE TIP: An allegation to anticipate a negligence defense should be used only if facts that must be alleged in the complaint raise the possibility of the plaintiff's contributory negligence; otherwise, it is best to avoid suggesting the possible availability of that defense.

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§2.30 5. Consideration

Consideration for the agreement need not be alleged in a reformation action, because the written instrument itself is presumptive evidence of consideration. CC §1614; see CC §1615; *Peasley v McFadden* (1886) 68 C 611, 10 P 179; *Belletich v Belletich* (1940) 40 CA2d 732, 105 P2d 954.

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§2.31 6. Other Causes of Action; Prayer

Other causes of action may be joined with the claim for reformation (see §2.5), and all relief sought should, of course, be set forth in the prayer.

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Source: Real Property/California Real Property Remedies and Damages/2 Reformation/§2.32 B. Form: Complaint for Reformation

§2.32 B. Form: Complaint for Reformation

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	**COMPLAINT FOR**
vs	)	**REFORMATION** _ _[*AND, E.G., FOR DAMAGES, TO QUIET TITLE, FOR SPECIFIC PERFORMANCE*]_ _
_ _[*Name(s)*]_ _,	)	
Defendant(s)	)	
_____	)	

Plaintiff alleges:

1. _ _[*State capacity and qualification to do business* _ _[*if needed*]_ _ *and residence of plaintiff*]_ _**.**

2. _ _[*State identity, capacity, and residence of defendant*]_ _**.**

3. _ _[*Fictitious name allegations*]_ _**.**

4. On or about _ _[*date*]_ _**, in** _ _[*city*]_ _**,** _ _ _ _ _ _ **County, California, plaintiff and defendant entered into** _ _[*an oral/a written*]_ _ **agreement for the** _ _[*specify, e.g., conveyance, lease*]_ _ **of real property owned by** _ _[*plaintiff/defendant*]_ _ **and located in** _ _ _ _ _ _ **County, California, commonly known as** _ _[*street address or other common designation*]_ _ **and more particularly described as** _ _[*state legal description or attach it as exhibit*]_ _**. Under the terms of the agreement, plaintiff was to** _ _[*specify plaintiff's interest, e.g., receive a grant deed to the property, convey the property to defendant*]_ _**.**

[*If appropriate, add*]

A copy of the written agreement, marked Exhibit _ _ _, is attached to and incorporated into this complaint.

[*Continue*]

[*If applicable, add one or more of the following options; see §2.21*]

[*Option 1: if written instrument is inconsistent with oral agreement*]

5. On or about _ _[*date*]_ _**, plaintiff and defendant reduced the agreement referred to in Paragraph** _ _ _ **to writing. A copy of this written instrument, marked Exhibit** _ _ _**, is attached to and incorporated into this complaint. The written instrument (Exhibit** _ _ _**) does not state the parties' true intent in that** _ _[*specify error in written instrument that plaintiff seeks to reform*]_ _**.**

[*Option 2: if deed is inconsistent with written agreement*]

5. On or about _ _[*date*]_ _**, defendant delivered to plaintiff a grant deed to the property, but the deed as delivered did not state the parties' agreement as set forth in their prior agreement (Exhibit** _ _ _**) in that** _ _[*specify error in deed plaintiff seeks to reform*]_ _**. A copy of the deed, marked Exhibit** _ _ _**, is attached to and incorporated in this complaint.**

[*Continue*]

[*Add one of the following alternatives*]

[*Alternative 1: If mutual mistake; see §§2.9, 2.23*]

[6.] The written instrument (Exhibit _ _ _) does not represent the true agreement of the parties because of a mutual mistake by plaintiff and defendant in that _ _[*allege with specificity facts showing mutual mistake*]**_ _.**

[*Alternative 2: If unilateral mistake; see §§2.10, 2.24*]

[6.] The written instrument (Exhibit _ _ _) does not represent the true agreement of the parties because of a mistake by plaintiff in that _ _[*specify facts showing plaintiff's mistake*]**_ _. Defendant knew or suspected plaintiff's mistake in that _ _**[*specify facts demonstrating defendant's knowledge or suspicion*]**_ _.**

[*Alternative 3: If fraud alleged; see §§2.7, 2.25*]

[6.] The written instrument (Exhibit _ _ _) was executed by plaintiff in reasonable reliance on defendant's representation that the written instrument embodied the parties' oral agreement of _ _[*date*]**_ _, and without knowledge that it did not represent the parties' oral agreement in that _ _**[*specify facts showing plaintiff's reasonable reliance on defendant's representations*]**_ _. Defendant knew that the written instrument (Exhibit _ _ _) did not represent the parties' oral agreement (Paragraph _ _ _) and made the representation that it did so with the intent that plaintiff rely on that representation.**

[*Continue*]

[*If applicable, add one or more of the following options to plead around potential defenses; see §§2.26-2.29*]

[*Option 1: Statute of limitations*]

[7.] On or about _ _[*date*]**_ _, Plaintiff discovered that the written instrument (Exhibit _ _ _) does not reflect the parties' agreement, promptly notified defendant of the error, and requested that the written instrument be reformed to conform to their true agreement, but defendant refused and continues to refuse to do so.** _ _[*Plaintiff could not with reasonable diligence have discovered this error earlier, because _ _*[*state facts justifying late discovery*]**_ _]_ _.**

[*Option 2: If delay occurred in bringing suit; laches*]

[8.] Any delay by plaintiff in bringing this action is reasonable and not prejudicial to defendant in that _ _[*specify facts showing reasons for delay, particularly if delay was caused by defendant, and why defendant is not prejudiced by it or should be estopped or deemed to have waived or excused the delay*]**_ _.**

[*Option 3: If allegations suggest that plaintiff was negligent*]

[9.] Plaintiff acted reasonably and was not negligent in _ _[*e.g., executing the written instrument (Exhibit _ _ _), despite its failure to reflect the true agreement of the parties*]**_ _, in that _ _**[*specify facts showing why plaintiff was not negligent*]**_ _.**

[*Continue*]

THEREFORE, plaintiff prays:

1. That the written instrument (Exhibit _ _ _) be reformed to embody the true agreement of the parties as follows: _ _[*Specify exact text of all corrections sought by plaintiff to written instrument*]**_ _;**

[*Include any other relief sought under a different cause of action*]

2. For costs of suit _ _[*if the contract or a statute provides for attorney fees to the prevailing party, include a request for attorney fees*]**_ _; and**

3. For any other relief that the Court considers proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _

Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk); copies for service (one for each defendant who is to be served); office copies.

Comment: On the formal requisites of a complaint, see California Civil Procedure Before Trial, chap 15 (4th ed Cal CEB 2004). On the format for court-filed papers, including caption requirements, see Cal Rules of Ct 2.111. Other causes of action may be joined with a reformation action (see §2.5), and the caption should specify all other relief sought in addition to reformation, and the prayer should include a demand for whatever other relief is sought.

Because the parties to the reformation action are typically the parties to the agreement or instrument sought to be reformed (see §§2.15-2.16), there might appear to be no need for fictitious name allegations (CCP §474), but they nonetheless should be included to allow mistakes to be rectified and as a simple means for amendment if a successor to any original party comes into existence or the rights of a bona fide third party are involved. On introductory allegations, see forms in chaps 3, 8, 11.

Attorney fees are not usually available in a reformation action (see CCP §1021), unless the underlying contract provides for recovery of attorney fees (see *Wong v Davidian* (1988) 206 CA3d 264, 253 CR 675); then such fees may be recoverable under CC §1717.

Verification is not required in a reformation action (see CCP §446), but verification of the complaint requires that the defendant verify the answer (CCP §446) and specifically deny the allegations of the complaint (CCP §431.30(d)). Code of Civil Procedure §128.7 (repealed by its own terms on January 1, 2006) confirms that verification of the complaint is generally not required. See §1.45 on the advantages and disadvantages of verification.

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V. DEFENSES

§2.33 A. Waiver and Ratification

An executed agreement may not be reformed when the aggrieved party had knowledge of the mistake but accepted performance under the terms of the unreformed agreement. *Vantress Farms, Inc. v Sydenstricker* (1970) 11 CA3d 943, 90 CR 251; *Burnand v Nowell* (1948) 84 CA2d 1, 189 P2d 796. These defenses of waiver and ratification are affirmative defenses and must be pleaded and proved by the defendant. *San Fernando Valley Chamber of Commerce v Thomas* (1954) 123 CA2d 348, 350, 266 P2d 891. Frequently, clients describing the facts of their dispute will omit facts relevant to these issues. Counsel should always inquire into the sorts of facts that would establish waiver or ratification.

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§2.34 B. Void or Illegal Contract

As a rule, a contract that is either void or illegal may not be reformed. *Ainsworth v Morrill* (1916) 31 CA 509, 160 P 1089. The fact, however, that the instrument as mistakenly written is void or illegal does not defeat the right to reformation if the contract as reformed will be valid. *Oatman v Niemeyer* (1929) 207 C 424, 278 P 1043. For example, a promissory note usurious on its face may be reformed if the parties intended a legal interest rate. *First Am. Title Ins. & Trust Co. v Cook* (1970) 12 CA3d 592, 90 CR 645; *Strauss v Bruce* (1934) 139 CA 62, 33 P2d 71.

A court, however, may refuse to reform an illegal contract clause on policy grounds. In *Kolani v Gluska* (1998) 64 CA4th 402, 75 CR2d 257, *e.g.,* the court declined to reform a broad noncompete covenant by narrowing its scope, despite a "savings" clause authorizing a court to revise the covenant if found to be "unfair" or "commercially unreasonable." The court ruled that the "savings" clause did not and could not by its language reform an illegality. Moreover, the policy against noncompete clauses embodied in Bus & P C §16600 would be undermined by rewriting the covenant because an employer "would have no disincentive to use the broad, illegal clauses if permitted to retreat to a narrow, lawful construction in the event of litigation." 64 CA4th at 408.

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§2.35 C. Lack of Consideration

An agreement or conveyance made without consideration is generally not reformable on behalf of the donee against the donor. *Enos v Stewart* (1902) 138 C 112, 70 P 1005. Reformation may be allowed in this situation, however, to carry out the probable intent of the donor or when equities favor the donee over anyone asserting an adverse interest. *Reina v Erassarret* (1951) 103 CA2d 258, 229 P2d 92; *Parker v Hardisty* (1921) 54 CA 628, 202 P 479.

Reformation may be an available remedy in certain circumstances even if no consideration is paid. See *Getty v Getty* (1986) 187 CA3d 1159, 1180, 232 CR 603. In *Getty*, the court reviewed the appeal of a trust beneficiary who had brought an action for fraud and declaratory relief against the other trust beneficiaries, and for reformation of the trust. The court held that, when there has been a mistake of fact, an aggrieved party seeking reformation of a contract under CCP §3399 need not have paid any consideration; rather, the governing principle is whether the party seeking reformation has superior equities.

A defendant who wishes to raise lack of consideration as a defense must plead it affirmatively because of the rule that a written instrument is presumptive evidence of consideration. See CC §§1614-1615; *Belletich v Belletich* (1940) 40 CA2d 732, 105 P2d 954.

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§2.36 D. Plaintiff's Negligence

The aggrieved party's negligence generally does not preclude reformation unless it amounts to a violation or breach of a legal duty and is thus considered inexcusable. See CC §1577; *Van Meter v Bent Constr. Co.* (1956) 46 C2d 588, 594, 297 P2d 644; *Los Angeles & Redondo R.R. v New Liverpool Salt Co.* (1906) 150 C 21, 27, 87 P 1029; *Voge, Inc. v Rose* (1962) 205 CA2d 534, 23 CR 87. See *Mills v Schulba* (1950) 95 CA2d 559, 565, 213 P2d 408. Violation of a legal duty is sometimes framed as gross negligence, which bars reformation, as distinct from ordinary negligence, which does not. Whether the negligence is sufficiently inexcusable to bar relief is a question of fact. *Hanlon v Western Loan & Bldg. Co.* (1941) 46 CA2d 580, 116 P2d 465.

Reformation based on a mistake may be denied if the plaintiff is inexcusably negligent (see *Johnson v Sun Realty Co.* (1934) 138 CA 296, 32 P2d 393), but contributory negligence is no defense to a reformation action based on fraud if the plaintiff's reliance on the defendant's misrepresentation is justified (*Security-First Nat'l Bank v Earp* (1942) 19 C2d 774, 122 P2d 900). The right to reformation of an instrument, so that it truly expresses the intention of the parties, does not depend on whether the party seeking reformation "might have discovered the mistake before signing" it. *Higgins v Parsons* (1884) 65 C 280, 281, 3 P 881.

A plaintiff's failure to read the written document or understand its contents does not necessarily constitute breach of a legal duty so as to preclude reformation. Whether reformation will be granted in this situation depends on the circumstances (*California Trust Co. v Cohn* (1932) 214 C 619, 7 P2d 297; *Tomas v Vaughn* (1944) 63 CA2d 188, 146 P2d 499) and is a question of fact (see *Sparks v Richardson* (1956) 141 CA2d 286, 296 P2d 892). Failure to read the agreement is much more likely to be excused if the aggrieved party was justified in relying on misrepresentations by the other party (*Cobbledick-Kibbe Glass Co. v Pugh* (1958) 161 CA2d 123, 326 P2d 197) or if the mistake was known to or supplied by the other party (*Ramseier v Oakley Sanitary Dist.* (1961) 197 CA2d 722, 17 CR 464; *Baines v Zuieback* (1948) 84 CA2d 483, 191 P2d 67).

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§2.37 E. Statute of Limitations

When reformation of a written instrument is essential to any relief, the action is governed by the 3-year statute of limitations applicable to actions seeking relief for fraud or mistake. CCP §338(d); see *Leeper v Beltrami* (1959) 53 C2d 195, 1 CR 12. If the action seeks only reformation, the 3-year limitation period also applies. *City of Eureka v Gates* (1902) 137 C 89, 69 P 850; *Goodfellow v Barritt* (1933) 130 CA 548, 20 P2d 740.

When reformation is merely incidental to other relief, however, the statute of limitations governing the primary relief sought controls. See, *e.g., Pierce v Freitas* (1955) 131 CA2d 65, 280 P2d 67 (ejectment and quiet title); *Wilkerson v Thomas* (1953) 121 CA2d 479, 263 P2d 678 (quiet title). In many actions involving real property, therefore, the applicable limitation period is 5 years under CCP §318, which governs actions for the recovery of real property.

The 3-year statute of limitations for actions for relief based on fraud or mistake provides that the cause of action does not accrue until the plaintiff discovers the fraud or mistake. CCP §338(d). But the late discovery statute is limited by an objective test. Accordingly, the statute begins to run when the plaintiff becomes aware of facts that would cause a reasonably prudent person to discover the fraud or mistake. *Jefferson v Pietroroia* (1936) 5 C2d 222, 54 P2d 7; *Citizens Cas. Co. v Otis Clark & Co.* (1971) 19 CA3d 294, 96 CR 838. If the failure to read an agreement is caused by a fiduciary's misrepresentation, however, the plaintiff's usual duty of diligence to discover facts does not apply. *Bennett v Hibernia Bank* (1956) 47 C2d 540, 305 P2d 20. See *Butcher v Truck Ins. Exch.* (2000) 77 CA4th 1442, 92 CR2d 521; *Cassel v Globerson (In re Kolb)* (ND Cal, May 29, 2007, No. 97-32321) 2007 Bankr. Lexis 1896 (fraudulent concealment of facts tolls statute of limitations until existence of cause of action is discovered).

PRACTICE TIP: If the fraud action is filed more than 3 years after execution of the contract, the complaint should contain allegations of the discovery date and facts justifying the late discovery to bring the action under CCP §338(d).

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§2.38 F. Laches

The defense of laches is frequently raised in reformation actions, either by demurrer or in the answer. Whether a given action is barred by laches depends on the facts, and the court may exercise broad discretion in weighing the equities. *Barfield v Price* (1871) 40 C 535. To invoke laches, the defendant must show both unreasonable delay (*Utica Mut. Ins. Co. v Monarch Ins. Co.* (1967) 250 CA2d 538, 58 CR 639) and prejudice proximately caused by that delay (*Laing v Occidental Life Ins. Co.* (1966) 244 CA2d 811, 821, 53 CR 681).

The length of time required to constitute laches depends on the circumstances of the particular case (*Voge, Inc. v Rose* (1962) 205 CA2d 534, 23 CR 87), but as a rule a reformation action brought within the applicable statute of limitations is not barred by laches (*Utica Mut. Ins. Co. v Monarch Ins. Co., supra*). The period for determining reasonable diligence does not begin to run until the plaintiff discovered, or reasonably should have discovered, the mistake. See *Good v Lindstrom* (1947) 80 CA2d 476, 181 P2d 933. If the other party's conduct lulled the plaintiff into a sense of security, the diligence requirement is relaxed. See *Caviglia v Jarvis* (1955) 135 CA2d 415, 287 P2d 525.

Because the complaint may be thrown out at the demurrer stage if, on its face, it contains facts showing unreasonable delay and prejudice (*Goodfellow v Barritt* (1933) 130 CA 548, 20 P2d 740), it may be necessary for the plaintiff to plead facts to obviate the defense of laches. See §2.28.

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VI. HEARING THE CASE; JUDGMENT

§2.39 A. Admissibility of Evidence

The scope of inquiry in a reformation action is broad, and neither the parol evidence rule nor the statute of frauds is an obstacle to introducing evidence to prove the mistake. Although the parol evidence rule bars evidence to contradict the terms of a written agreement (CCP §1856(a)), an express exception to the rule exists for reformation cases when a mistake or an imperfection in the writing itself is put in issue by the pleadings (CCP §1856(e)). See *Pierson v McCahill* (1863) 23 C 250; *Cummins v Levy* (1953) 116 CA2d 610, 253 P2d 975, corrected 255 P2d 29. Moreover, CC §3401 specifically authorizes the court in a reformation action to inquire what the instrument was intended to mean. If the plaintiff fails to establish the necessary foundation for proving fraud or mistake, however, the exception allowing parol evidence may not be invoked. *Alameda County Title Ins. Co. v Panella* (1933) 218 C 510, 24 P2d 163; *Kingston v Colburn* (1956) 139 CA2d 623, 293 P2d 805.

Under the statute of frauds (CC §1624; see §4.20), most agreements concerning real property transactions, or a note or memorandum containing the essential contract terms, must be in writing to be valid. If the parties never intended to comply with the statute of frauds, a contract that is invalid under it may not be reformed. *Kingston v Colburn, supra; McClure v Cerati* (1948) 86 CA2d 74, 194 P2d 46. The courts, however, do permit reformation when, because of mutual mistake, an agreement lacks elements required by the statute of frauds. *Calhoun v Downs* (1931) 211 C 766, 297 P 548; *Oatman v Niemeyer* (1929) 207 C 424, 278 P 1043. As confirmed by *Masin v Drain* (1984) 150 CA3d 714, 198 CR 367, a contract that does not comply with CC §1624 is voidable, not void.

Evidence of the parties' conduct after execution of the instrument may be admitted under proper circumstances to show their mutual intent. *Berendsen v McIver* (1954) 126 CA2d 347, 272 P2d 76; *Mills v Schulba* (1950) 95 CA2d 559, 213 P2d 408.

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§2.40 B. Burden of Proof: Clear and Convincing Evidence

It is presumed that an executed written instrument correctly expresses the parties' intent. *Burt v Los Angeles Olive Growers Ass'n* (1917) 175 C 668, 166 P 993; *Wilson v Sanchez* (1953) 116 CA2d 670, 254 P2d 594. Therefore, the party who seeks to reform the terms of a written instrument has the burden of establishing that the instrument does not express the parties' true intentions. *Moore v Vandermast, Inc.* (1941) 19 C2d 94, 119 P2d 129; *California Trust Co. v Cohn* (1935) 9 CA2d 33, 48 P2d 744. See *Lestrade v Barth* (1862) 19 C 660. A presumption that can favor the party seeking reformation, however, is in CC §3400, which provides that, for the purpose of revising the contract, it is presumed that the parties intended to make an equitable and conscientious agreement. See *First Am. Title Ins. & Trust Co. v Cook* (1970) 12 CA3d 592, 90 CR 645.

The party seeking reformation must establish the requisite mistake or fraud not by a mere preponderance of the evidence but by clear and convincing evidence. *Burt v Los Angeles Olive Growers Ass'n, supra; Home & Farm Co. v Freitas* (1908) 153 C 680, 96 P 308; *Lister v Sorge* (1968) 260 CA2d 333, 67 CR 63; *Perry v Bedford* (1965) 238 CA2d 6, 47 CR 461. The evidence must not leave the existence of the mistake or fraud open to substantial doubt (see *California Pac. Title Co. v Moore* (1964) 229 CA2d 114, 40 CR 61), but the existence of a mere conflict in the evidence will not preclude reformation, because the finder of fact may disbelieve the defendant's witnesses (see *Lister v Sorge, supra*). Whether the evidence is sufficiently clear and convincing is a question of fact for the trial court (*Shupe v Nelson* (1967) 254 CA2d 693, 62 CR 352; *Campbell v Republic Indem. Co.* (1957) 149 CA2d 476, 308 P2d 425).

Direct evidence of fraud or mistake is not always required; circumstantial evidence can support reformation if it is sufficient to convince a reasonable finder of fact. See *Lister v Sorge, supra; Sieger v Standard Oil Co.* (1957) 155 CA2d 649, 318 P2d 479. The fact that the parties used a printed form provision that was contradicted by a specially drafted provision may be persuasive as evidence of mistake supporting reformation. *Lissauer v Union Bank & Trust Co.* (1941) 45 CA2d 468, 114 P2d 367.

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C. Judgment

§2.41 1. Statement of Decision

The parties may obtain a statement of decision by the trial court explaining the factual and legal basis for its decision. On procedures for requesting and preparing a statement of decision, see CCP §632; Cal Rules of Ct 3.1590. See also California Trial Practice: Civil Procedure During Trial §§24.34-24.50 (3d ed Cal CEB 1995).

A judgment granting reformation must be supported by findings disposing of all the material issues and establishing the grounds on which the judgment rests. *Auerbach v Healy* (1916) 174 C 60, 161 P 1157; *Renshaw v Happy Valley Water Co.* (1952) 114 CA2d 521, 250 P2d 612. Absence of a finding on a material issue, such as the existence of mutual mistake, is not a ground for reversal if the finding would necessarily have been adverse to the party raising the issue. *Weaver v Ratcliffe* (1931) 116 CA 513, 3 P2d 20. Similarly, inconsistent findings on fraud and mutual mistake do not call for reversal when the evidence is sufficient to support the judgment under either theory. *Martinez v Martinez* (1953) 41 C2d 704, 263 P2d 617.

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§2.42 2. Scope and Effect of Judgment

The courts have broad equitable powers in reformation actions (*Cardoza v Millington* (1956) 142 CA2d 26, 297 P2d 778) and may, in order to resolve issues and terminate litigation, grant relief beyond revision of the instrument itself. See, *e.g., Reclamation Dist. No. 883 v Quigley* (1937) 8 C2d 183, 64 P2d 399; *Baines v Zuieback* (1948) 84 CA2d 483, 191 P2d 67; *Good v Lindstrom* (1947) 80 CA2d 476, 181 P2d 933. In an action based on mistake, the court may grant complete justice by correcting all subsequent mistakes that grew out of the first. *Shupe v Nelson* (1967) 254 CA2d 693, 62 CR 352.

Complete relief may also be awarded to the defendant beyond just refusing to revise the instrument. *Seegelken v Corey* (1892) 93 C 92, 28 P 849. Further, the court may condition its judgment awarding reformation on the plaintiff's performance under the instrument. *Monterey County v Seegleken* (1894) 36 P 515. (This is similar to the maxim that a plaintiff seeking equity must do equity; *i.e.*, a court can condition a plaintiff's equitable relief on the enforcement of equities favoring the defendant; see *Stein v Simpson* (1951) 37 C2d 79, 83, 230 P2d 816; *Dool v First Nat'l Bank* (1929) 207 C 347, 354, 278 P 233.)

PRACTICE TIP: When the plaintiff desires additional relief, such as damages, an injunction, a declaration of rights, or a judgment quieting title or awarding specific performance, the best course is probably to plead these as separate causes of action (see §2.5), because a prayer for relief that clearly goes beyond the purpose of a reformation action may be disregarded. *Hart v Walton* (1908) 9 CA 502, 99 P 719.

Consistent with the theory behind a cause of action for reformation, a judgment for reformation should put the parties in the positions they would have been in if the mistake or fraud had never occurred (see *Lemoge Elec. v County of San Mateo* (1956) 46 C2d 659, 297 P2d 638), and not make a new contract for the parties (*Paterson v Board of Trustees of Montecito Union Sch. Dist.* (1958) 157 CA2d 811, 321 P2d 825; see *Cardoza v Millington, supra*).

A judgment awarding reformation of an instrument gives the instrument legal operation and effect, as reformed, retroactively as of its date of execution. *Ward v Waterman* (1890) 85 C 488, 24 P 930. See *Bank of America v Craig* (1961) 193 CA2d 281, 14 CR 476.

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Source: Real Property/California Real Property Remedies and Damages/2 Reformation/§2.43 3. Form: Judgment on Complaint for Reformation of Contract

§2.43 3. Form: Judgment on Complaint for Reformation of Contract

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Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No. _ _ _ _ _ _**
Plaintiff(s)	)	**JUDGMENT ON COMPLAINT**
	)	**FOR REFORMATION OF**
vs	)	**CONTRACT**
_ _[*Name(s)*]_ _,	)	**Dep't: _ _[*number*]_ _**
Defendant(s)	)	**Trial judge: _ _ _ _**
_____	)	**Trial date: _ _ _ _**

This action for reformation was regularly tried on _ _[*date*]_ _, before the Honorable _ _[*name*]_ _, sitting without a jury. Appearing as attorneys were _ _[*name*]_ _ for plaintiff and _ _[*name*]_ _ for defendant. The court, having heard the testimony and considered the evidence, _ _[*and having already filed its statement of decision on _ _[date]_ _, enters its judgment as follows/adopts the following statement of decision: _ _ _ _ _ _/and a statement of decision not having been requested, enters its judgment as follows*]_ _**.**

IT IS ORDERED AND ADJUDGED that

1. The _ _[*specify written instrument, e.g., contract, deed*]_ _ executed by plaintiff and defendant on _ _[*date*]_ _, for the _ _[*specify purpose, e.g., conveyance, lease*]_ _ of real property owned by _ _[*plaintiff/defendant*]_ _, located in _ _ _ _ _ _ County, California, commonly known as _ _[*street address or other common designation*]_ _ and more particularly described as _ _[*legal description*]_ _, should be and hereby is reformed to embody the true agreement of the parties as follows: _ _[*Specify corrections to written instrument*]_ _.

[*If applicable, add the following option*]

[*Option: specify additional relief in succeeding paragraph(s)*]

2. Plaintiff shall recover costs _ _[*if provided for in contract or by statute and awarded by court, include award of attorney fees*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Copies: Original (presented to judge for signature, then filed with proof of service); conformed copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: The judgment must usually be custom tailored to fit the circumstances of the particular case, and, when other causes of action have been pleaded and proved, it must be specifically drafted to include the other relief. See §2.5. Relief may be made conditional on some performance by the plaintiff. See §2.42.

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§2.44 4. Recording Judgment

The plaintiff should record a certified copy of the judgment in every county in which any part of the subject real property is located. Govt C §27326. From the time it is filed with the county recorder, the certified copy is notice to all persons of its contents, and any subsequent purchaser or encumbrancer is charged with the same notice that would be given if the judgment were a duly recorded deed or other instrument of conveyance. Govt C §27326. See CC §1213.

PRACTICE TIP: There is little if any discussion of this point in the authorities, but it appears that it is virtually always in a prevailing plaintiff's interest to record a copy of the judgment, and include a legal description, if applicable, so that subsequent purchasers and encumbrancers will be put on notice of corrections made to the instrument by the judgment. The fact that the recorded judgment also creates a lien (CCP §674) is important when the judgment contains a damages award.

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§2.45 D. Reformation by Arbitration

If the parties include a provision for arbitration of disputes arising from their agreement, the arbitrator has the power to reform the agreement without exceeding his or her authority as an arbitrator. *PG&E v Superior Court* (1993) 15 CA4th 576, 19 CR2d 295. But see *Bonshire v Thompson* (1997) 52 CA4th 803, 811, 60 CR2d 716 (arbitration clause specifically excluded reformation).

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Source: Real Property/California Real Property Remedies and Damages/2 Reformation/§2.46 VII. CHECKLIST: REFORMATION

§2.46 VII. CHECKLIST: REFORMATION

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The checklist for reformation actions is similar to the checklist for rescission actions. See chap 1.

1. Facts regarding plaintiff
   - ___ a. Personal data (name, address, etc.)
   - ___ b. Plaintiff's capacity and legal status
   - ___ c. Contractual interest to be reformed
   - ___ d. Recordation of contract or documents under it
   - ___ e. Amount of money or other consideration paid under contract or still owing (see §2.30)
   - ___ f. Grounds for reformation
2. Facts regarding defendant
   - ___ a. Personal data (name, address, etc.)
   - ___ b. Defendant's capacity
   - ___ c. Amount of money or other consideration paid under contract or still owing
   - ___ d. Defenses available (see §§2.33-2.38)
3. Factors to consider and discuss with client
   - ___ a. Whether reformation is advisable under existing market conditions
   - b. Actions that may be joined with reformation action (see §2.5)
     - ___ (1) For damages for breach of contract (see chap 4)
     - ___ (2) Quiet title (CCP §§760.010-765.060; see chap 7)
     - ___ (3) Injunctive and/or declaratory relief (see California Civil Procedure Before Trial, chaps 32, 35 (4th ed Cal CEB 2004))
     - ___ (4) Specific performance (see chap 5)
   - ___ c. Facts that might support or negate defenses such as waiver or estoppel (see §§2.26-2.29)
   - ___ d. Possibility that court may award costs and attorney fees, if provided for by contract or statute (see California Attorney Fee Awards (3d ed Cal CEB 2010))
   - ___ e. Whether arbitration of the dispute is required (see §2.45)
4. Venue (see §2.14)
   - a. If main relief transitory
     - ___ (1) County of defendant's residence (CCP §395)
     - ___ (2) County in which contract entered into or to be performed (CCP §395)
     - ___ (3) For certain consumer contracts, county where buyer or lessee signed contract, resided

when contract entered into, or resides when action commenced (CCP §395)

___ b. If main relief local, county in which real property is located (CCP §392)

___ c. Whether the case is a limited or an unlimited civil case, depending on amount in issue (see §2.13). See CCP §§86(a)(3), 88

5. Essential allegations in preparation of complaint (see §§2.19-2.32)

___ a. Capacity and residence of parties

___ b. Facts concerning the agreement (see §2.20)

___ c. Incorrect representation by the written instrument (see §2.21)

d. Grounds for reformation

___ (1) Mutual mistake (see §§2.9, 2.23)

___ (2) Unilateral mistake (see §§2.10, 2.24)

___ (3) Fraud (see §§2.7, 2.25)

e. Facts In anticipation of defenses (see §2.26)

___ (1) Statute of limitations (see §2.27)

___ (2) Laches (see §2.28)

___ (3) Plaintiff's lack of negligence (see §2.29)

___ f. Prayer (see §2.31)

6. Defenses

___ a. Waiver and ratification (see §2.33)

___ b. Void or illegal contract (see §2.34)

___ c. Lack of consideration (see §2.35)

___ d. Plaintiff's negligence (see §2.36)

___ e. Statute of limitations (see §2.37)

___ f. Laches (see §2.38)

7. Statement of decision desired on request following court trial (CCP §632; see §2.41)

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3

Damages for Fraud and Nondisclosure

David B. Dimitruk

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§3.1 I. INTRODUCTION

"Courts and authors have always been cautious in attempting a definition of fraud.… It does and can assume so many shapes, it is in this regard so protean in character, that judges and text writers have cautiously abstained from the dangerous entanglements of a definition." *Brady v Bartlett* (1880) 56 C 350, 365. That wise observation is still true because deceit and manipulative motives have been and will remain propensities of the human condition.

Fraud prevention is far more desirable than the pursuit of remedies for fraud because of the costs of suit, attorney fees, and the inevitable delays in the prosecution of lawsuits and appeals. Although some fraudulent schemes are too clever or costly to uncover, other fraudulent plans *are* discoverable before a transaction is consummated if careful investigative and transactional work is done. For example, title insurance companies are a useful source of information on real property and can provide considerable assistance in pretransaction analysis. Another method is to discover—or flush out—a fraudulent plan by carefully drafting disclosure requirements in the contract that effectively force a party to divulge that which he or she wished to suppress. This process requires substantial legal skill when the many facets of real property transactions are considered in the context of the limitless stratagems of a deceitful mind. Another useful tool can be experts carefully chosen to examine various components of a property to ascertain unacceptable conditions. Whether the transaction involves residential, commercial, or industrial property—or apartment houses or raw acreage—many attorneys believe that the time needed for (and the type of) investigation should be spelled out in conditional agreements or options. See California Real Property Sales Transactions, chaps 4-8 (4th ed Cal CEB 2007).

Lawyers are often given unreasonable deadlines by clients demanding an early finish to transactional work. Lawyers should enlighten their clients on the need for sufficient time to do a proper job, or consider declining the work. Parties to proposed transactions often wish to expedite the formation of contracts and seek to impose their own time lines on counsel. These and other demands create a risk for an attorney who does not take the time to carefully draft the appropriate documents, who fails to conduct a reasonable evaluation of other pertinent documents, or who fails to investigate the condition of the property.

The plaintiff's attorney in *Feckenscher v Gamble* (1938) 12 C2d 482, 495, 85 P2d 885, refused to advise the plaintiff on the desirability of the deal in question, even refusing to advise her on the form of the contract on the ground that the deal was being put through in too big a hurry and that he could not advise her on any issue unless he had time to go over the contract. That wise decision most likely served as the reason the attorney was not named as a defendant with the real estate broker, who failed to exercise prudence on the same issues and against whom the judgment was rendered. Because some fraud is preventable, the attorney's failure to discover it may amount to neglect. See, however, *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1239, 44 CR2d 352 (plaintiff's negligence in failing to discover false statement no defense to intentional misrepresentation).

This chapter discusses the types of fraud, common fraud situations, and available causes of action in §§3.2-3.4; the contract and tort statutory definitions of fraud in §§3.5-3.10; conduct constituting fraud in §§3.11-3.35; the elements of fraud in §§3.36-3.60; and litigation considerations in §§3.61-3.90. This chapter focuses on suits between sellers and buyers in real property transactions and incidentally discusses causes of action against real estate licensees (brokers and their agents and affiliates). For complete discussion of broker duties and liability, see Real Property Sales, chap 2.

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§3.2 A. Types of Fraud

California law distinguishes between fraud in the "execution" or "inception" of a contract and fraud in the "inducement" of a contract. Most cases involving fraud relating to real property involve fraud in the inducement. In these cases, the defrauded party knows what contract is being signed, but the consent to that contract is induced by the fraud of the other party. Mutual assent is deemed present in such cases. *Rosenthal v Great W. Fin. Secs. Corp.* (1996) 14 C4th 394, 415, 58 CR2d 875. However, mutual consent is not present, as a matter of law, in fraud in the execution or inception cases because the defrauded party is deceived as to the nature of the act of forming the contract and actually does not know what contract is being signed. *Rosenthal v Great W. Fin. Secs. Corp., supra.*

Fraud in the inducement makes the contract voidable, and fraud in its execution or inception makes the contract void. *Rosenthal v Great W. Fin. Secs. Corp., supra*. Rescission is an option to the defrauded party in fraud in inducement cases and is unnecessary in fraud in execution or inception cases (*Rosenthal v Great W. Fin. Secs. Corp., supra*), although rescission or reformation has been allowed (*Security-First Nat'l Bank v Earp* (1942) 19 C2d 774, 777, 122 P2d 900). On rescission, see chap 1.

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§3.3 B. Common Fraud Situations

Fraud generally occurs in one of three forms: (1) an affirmative misrepresentation of a material fact (see §§3.11-3.14); (2) the concealment, suppression, or nondisclosure of a material fact (see §§3.15-3.17); or (3) a promise made with no intention to perform it, *i.e.,* promissory fraud (see §§3.18-3.20). Civil Code §§1572 and 1710 (all California Codes may be located on the Internet at http://www.leginfo.ca.gov/calaw.html); *Lazar v Superior Court* (1996) 12 C4th 631, 638, 49 CR2d 377. It may also occur as constructive fraud, which involves the breach of a fiduciary duty. See §§3.21-3.28.

Fraud by misrepresentation can be either intentional or negligent. See CC §§1572, 1710. The law is not settled on whether actions for nondisclosure or promissory fraud should be based only on intentional conduct. Compare *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 23 CR2d 377 (court allowed cause of action for negligent nondisclosure in pollution case; decided on demurrer) with *Tarmann v State Farm Mut. Auto. Ins. Co.* (1991) 2 CA4th 153, 158, 2 CR2d 861 (demurrer sustained to cause of action for negligent promise to perform). See also CC §1102.13 (provides for recovery of "actual damages" based on negligent nondisclosure under transfer disclosure requirements for residential sales).

PRACTICE TIP: Because the remedies for fraud ultimately depend on the type of fraud committed, it is imperative that counsel know the definitions of and the relationships among the types of fraud and the remedies available for each. See, *e.g., Loken v Century 21-Award Props.* (1995) 36 CA4th 263, 271, 42 CR2d 683.

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Source: Real Property/California Real Property Remedies and Damages/3 Damages for Fraud and Nondisclosure/§3.4 C. Remedies; Liability Insurance

§3.4 C. Remedies; Liability Insurance

Fraudulent conduct can serve as a basis for the following remedies:

- Damages for a statutory violation (CC §§1102-1102.17, 2079; *Assilzadeh v California Fed. Bank* (2000) 82 CA4th 399, 409, 98 CR2d 176; see also §3.30-3.35);
- Damages for breach of contract (*Lazar v Superior Court* (1996) 12 C4th 631, 638, 49 CR2d 377 (plaintiff has cause of action for promissory fraud in tort as alternative or in addition to cause of action on contract); *Crogan v Metz* (1956) 47 C2d 398, 303 P2d 1029; *Walker v Signal Cos.* (1978) 84 CA3d 982, 995, 149 CR 119; on damages for breach of contract, see chap 4);
- Rescission (*Earl v Saks & Co.* (1951) 36 C2d 602, 609, 226 P2d 340; on rescission, see chap 1);
- Reformation (*Security-First Nat'l Bank v Earp* (1942) 19 C2d 774, 777, 122 P2d 900; on reformation, see chap 2);
- Quasi-contractual theories of unjust enrichment and constructive trust (*Ward v Taggart* (1959) 51 C2d 736, 741, 336 P2d 534; *Gonzales v State* (1977) 68 CA3d 621, 628, 137 CR 681; on constructive trusts, see chap 15);
- Damages for breach of an express warranty (*Hauter v Zogarts* (1975) 14 C3d 104, 111, 120 CR 681 (personal property case); *Pollard v Saxe & Yolles Dev. Co.* (1974) 12 C3d 374, 380, 115 CR 648 (sellers of new construction should be held to what is impliedly represented); but see *Shapiro v Hu* (1986) 188 CA3d 324, 332, 233 CR 470 (no warranties of quality or condition implied in sale of real property); Com C §2721);
- Damages for breach of fiduciary duty (*Crogan v Metz* (1956) 47 C2d 398, 404, 303 P2d 1029; *Strebel v Brenlar Invs., Inc.* (2006) 135 CA4th 740, 747, 37 CR3d 699; *City of Atascadero v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 CA4th 445, 483, 80 CR2d 329); and
- Tort damages for fraud (*Stout v Turney* (1978) 22 C3d 718, 723 n6, 725, 730, 150 CR 637 (intentional misrepresentation); *Gagne v Bertran* (1954) 43 C2d 481, 487, 275 P2d 15 (negligent misrepresentation)).

It can be fatal to the outcome of a case if the fraud allegations are not aligned with the statutory definitions and the remedies associated with each. See *Crogan v Metz, supra*. But see *Eatwell v Beck* (1953) 41 C2d 128, 130, 257 P2d 643 (motion to reopen to present further evidence on proper measure of damages should have been granted).

PRACTICE TIP: The issue of whether insurance is available to defend or indemnify in a third party lawsuit is crucial for both plaintiff's and defense counsel to consider as early as possible. When appropriate, plaintiff's counsel should plead causes of action that give rise to potential insurance coverage with an eye on alleging facts to show damage or injury to property. Defense counsel should immediately tender the lawsuit for both defense and indemnification to the commercial general liability (CGL) insurers as well as to professional liability insurers. A standard CGL policy that covers bodily injury and tangible property damage, however, does not cover economic losses causing emotional distress. *Waller v Truck Ins. Exch.* (1995) 11 C4th 1, 44 CR2d 370. But see *Karsant Family Ltd. Partnership v Allstate Ins. Co.* (ND Cal, Jan. 27, 2009, No. C08-01490 SI) 2009 US Dist Lexis 7558 (emotional distress award arising from invasion of tenants' right of private occupancy constitutes an award for "personal injury" within meaning of insurance policy). For further discussion, see California Liability Insurance Practice: Claims & Litigation (Cal CEB 1991).

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II. CONTRACT AND TORT STATUTORY DEFINITIONS

§3.5 A. Fraud Separated Into Contract and Tort Statutory Framework

The legislature has separated fraud types into a contract and a tort statutory framework. Fraud that serves as a ground for contract-based remedies is generally set forth in CC §§1571-1574 (see also Com C §2721 for an expanded fraud remedy for a breach of the Commercial Code). Fraud that serves as a ground for tort-based remedies is in CC §§1709-1710. The search for an explanation as to why two statutes describe fraud, one in the context of contract law and the other in the context of tort law, does not yield a clear or single explanation. Instead, a vast array of case law must be searched for the answer. See *Mirkin v Wasserman* (1993) 5 C4th 1082, 1091, 23 CR2d 101.

The similarity between these statutes raises the question of why they both exist in the Civil Code. Although there are some slight variations, they do not warrant the legislature's duplicating definitions of fraud in different words. It is the placement of the statutes in their respective chapters—one in the contract sequence of statutes, the other in the tort sequence—that reveal their different purposes. Thus, the statutes are not duplicates but reflect the legislature's effort to separately regulate contract and tort law.

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§3.6 1. Fraud Under Contract Statutes

Fraud under the contract statutes is either actual or constructive. CC §1571. Actual fraud consists of any of the following acts, committed either by a party to the contract or with his or her connivance, with the intent to deceive another party to the contract or to induce him or her to enter into the contract (CC §1572):

- The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though the person believes it to be true;
- The suppression of that which is true, by one having knowledge or belief of the fact;
- A promise made with no intention of performance; or
- Any other act fitted to deceive.

Constructive fraud is broadly described in CC §1573 and is discussed in §§3.21-3.28.

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§3.7 2. Fraud Under Tort Statutes

Under the tort statutes, fraud under CC §1710 is defined as a deceit, within the meaning of CC §1709, and is:

- The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
- The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
- The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts, which are likely to mislead for want of communication of that fact; or
- A promise made with no intention of performance.

Civil Code §1709 states that one who willfully deceives another with intent to induce him or her to alter his or her position to his or her injury or risk, is liable for any damages that he or she thereby suffers.

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§3.7A 3. Fraud Under Statutes Regulating Real Estate Licensees

Real estate brokers and salespersons (real estate licensees) may be liable (in a damages claim or a disciplinary action or both) for specific fraudulent acts that violate the statutes regulating their professional activities. See Bus & P C §§10026, 10085.6, 10087, 10147.6, 10176, 10176.1, 10177, 10177.1, 10177.2, 10177.5, and authorities in §§3.27, 3.32-3.33, 3.35. For expanded discussion of real estate licensees' statutory duties and related litigation, see California Real Estate Brokers: Law and Litigation, chaps 8-9, 11 (Cal CEB 2009).

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B. Implications of Statutory Framework

§3.8 1. Reconciling Fraud Under Contract and Tort Law

The California Supreme Court is increasingly beset by the quandary of how to reconcile "the nebulous and troublesome margin between tort and contract law." See *Aas v Superior Court* (2000) 24 C4th 627, 635, 101 CR2d 718 (negligence arising from contract); *Robinson Helicopter Co. v Dana Corp.* (2004) 34 C4th 979, 22 CR3d 352, cited in §12.36 (declining to apply economic loss rule to fraud claims based on duty existing independent of contract and arising from principles of tort law). See also *Intelligraphics, Inc. v Marvell Semiconductor, Inc.* (ND Cal, Feb. 10, 2009, C07-02499) 2009 US Dist Lexis 9875; Imre, *Is* Seaman's *Rising from the Ashes? The Ever-Changing Line Between Contract and Tort Remedies*, 27 CEB Civ LR 96 (June 2005). Although the purposes behind contract and tort law are distinct, the boundary between them is not, and the distinction between the remedies for each is not easily made. See *Erlich v Menezes* (1999) 21 C4th 543, 551, 87 CR2d 886. This uncertainty requires the attorney to be cautious in deciding the appropriate theories for relief and factually specific in drafting the complaint. See, *e.g., Community Cause v Boatwright* (1981) 124 CA3d 888, 901, 177 CR 657.

In large part, the manner in which fraud types are described is essentially the same in each set of statutes, but there are textual differences that can affect the outcome of a case. A leading example is that CC §1572 applies only to fraud committed by a party to the *contract* with intent to deceive another contracting party or to induce him to enter into the contract. *Wilkins v National Broadcasting Co.* (1999) 71 CA4th 1066, 1084, 84 CR2d 329. The existence of a contractual relationship is, therefore, a requirement in a §1572-based case but not in an action based on CC §1710; instead, the person deceived must have been induced to "alter his position." See CC §1709.

This requirement makes sense because a plaintiff in a tort action is not to be placed in a better position than he or she would have been had the wrong not been done. *Valdez v Taylor Auto. Co.* (1954) 129 CA2d 810, 821, 278 P2d 91, cited with approval in *Christiansen v Roddy* (1986) 186 CA3d 780, 790, 231 CR 72. The "economics" of tort compensation is to make the plaintiff whole, not economically better. Contract compensation, however, allows the economics of the parties' negotiated transaction to dictate how compensation should be measured. *Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co.* (1977) 66 CA3d 101, 123, 125, 135 CR 802. The choice of how to treat the wrong—in this case, the fraud—should be the plaintiff's choice. See *Robinson Helicopter Co. v Dana Corp.* (2004) 34 C4th 979, 22 CR3d 352 (economic loss rule did not bar claim for punitive damages, because fraud claim existed independently of contract claim).

Because almost all real property disputes involving a fraud claim also involve a contract, CC §§1571-1573 will apply to most disputes, at least insofar as rescission is concerned. The tort-based statutes (CC §§1709-1710) form an independent basis for imposing liability and provide the plaintiff with alternative causes of action. The possibility still exists, however, that in a real property action a fraud claim might not depend on the existence of a contract between the plaintiff and the defendant; in that event, §§1709-1710 may be the only statutes that apply. See, *e.g.*, *Ward v Taggart* (1959) 51 C2d 736, 336 P2d 534 (no contract with real estate broker); *LiMandri v Judkins* (1997) 52 CA4th 326, 337, 60 CR2d 539. See also *Geernaert v Mitchell* (1995) 31 CA4th 601, 37 CR2d 483 (buyer sued immediate seller's predecessor in interest under Restatement (Second) of Torts §533 (1977)).

As another example, CC §§1572 and 1710 refer to the negligent misrepresentation of facts as a type of fraud, but §1572 does not contain the phrase, "by one who has no reasonable ground for believing it to be true," as §1710 does, although the distinctions may not be different in principle. A cause of action based on this type of fraud therefore may be easier to establish under §1572 because of the absence of the "reasonable ground" component in §1710. At least one decision, however, without any explanation, applied the "reasonable ground" standard to negligent misrepresentation under both statutes. See *Anderson v Deloitte & Touche* (1997) 56 CA4th 1468, 66 CR2d 512, 1476.

Civil Code §1571 further classifies fraud as actual or constructive. Sections 1709-1710 make no such distinction, although the courts seem to draw one. Actual fraud is defined in CC §1572 as several different types of conduct as set forth in CC §1572(1)-(4) (see §3.7) and "any other act fitted to deceive." The last type of fraud seems to expand the

reach of the law to all instances in which deceit is practiced. The fact that CC §1710 does not list this category may not be significant, because CC §1709 also refers to one who "willfully deceives another" and seems to be sufficiently broad to encompass any act fitted to deceive. It is unclear whether the willfulness aspect of §1709 is a more stringent standard than the "any act" aspect of §1571. Causes of action and affirmative defenses should emphasize, therefore, the facts that support allegations of *deception* as a means of strengthening fraud allegations.

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§3.9 2. Conduct as Breach of Contract or Tort

The same act may constitute both a breach of contract and a tort. *Vandenberg v Superior Court* (1999) 21 C4th 815, 840, 88 CR2d 366; *Acadia, Cal., Ltd. v Herbert* (1960) 54 C2d 328, 336, 5 CR 686; *Eads v Marks* (1952) 39 C2d 807, 810, 249 P2d 257. The California Supreme Court held that the tort in *Eads v Marks*, the negligent performance of a contractual obligation, is essentially ex delicto rather than ex contractu and, therefore, can serve as an independent ground for that tort action. 39 C2d at 811. The kind of fraud generally described in CC §1572 arguably does not "grow out of" the contract within the meaning of the *Eads* formulation. The type of §1572 fraud that bears on free consent to the formation of a contract is a part of the nucleus of its formation and has more of an ex contractu nature to it, suggesting that a contract remedy is appropriate to this type of fraud. Although the ex contractu/ex delicto distinction has recently fallen out of favor (*Vandenberg v Superior Court* (1999) 21 C4th 815, 839, 88 CR2d 366), it may be a suitable explanation for the presence of §1572 in the context of contract formation. See also *Weaver v Bank of America* (1963) 59 C2d 428, 432 n6, 30 CR 4.

WARNING: Deciding whether to focus on a contract or a tort theory in litigation requires (a) a careful assessment of the merits of each theory against each defendant, (b) an estimate of potential damages under each theory against each defendant (see, *e.g.,* §§3.43-3.44, 4.13-4.17, 4.39-4.45), (c) the strategic use of alternative pleading in the complaint (see §§3.91-3.92), and (d) a proper and complete trial record for appeal. See, *e.g*., *Brown v Boren* (1999) 74 CA4th 1303, 88 CR2d 758.

In the analogous area of governmental immunity, a governmental agency is generally immune from allegations of misrepresentation. Govt C §818.8; *Warner Constr. Corp. v City of Los Angeles* (1970) 2 C3d 285, 293, 85 CR 444; *Arthur L. Sachs, Inc. v City of Oceanside* (1984) 151 CA3d 315, 320, 198 CR 483. Such agencies, however, are liable under contract law pursuant to Govt C §814. *Warner Constr. Corp. v City of Los Angeles* (1970) 2 C3d 285, 294, 85 CR 444; *Arthur L. Sachs, Inc. v City of Oceanside*, *supra*. Faced with the question of whether an agency employee's misrepresentation also defeats contract-based claims, the courts have typically answered in favor of the contract-based causes of action. *Warner Constr. Corp. v City of Los Angeles* (1970) 2 C3d 285, 293, 85 CR 444 (tort actions for misrepresentation against public agencies are barred, but plaintiff retains cause of action in contract); *Arthur L. Sachs, Inc. v City of Oceanside* (1984) 151 CA3d 315, 322, 198 CR 483 (action for rescission of contract although based on mistake/fraud is still an action based on a contract). Therefore, if a public agency may be held liable in contract for fraudulent conduct, there is no apparent reason that the same rule should not apply to private parties to a contract.

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§3.10 3. Election of Remedies Rule

The election of remedies rule is akin to the one allowing a plaintiff to plead alternative causes of action, but its principal effect is at the end of the trial rather than the beginning of the lawsuit. If the plaintiff has not acted in any way that could prejudice the defendant (such as obtaining a pretrial attachment of the defendant's property), the plaintiff need not elect its remedy during trial and it may submit the case to the trier of fact on one or more theories. See *Weaver v Bank of America* (1963) 59 C2d 428, 432, 30 CR 4; *Acadia, Cal., Ltd. v Herbert* (1960) 54 C2d 328, 336, 5 CR 686. After the jury renders a verdict or, in the case of a bench trial, after the court's decision, the plaintiff must choose between two inconsistent remedies before judgment is entered. *Kirkpatrick v Westamerica Bank* (1998) 65 CA4th 982, 990, 76 CR2d 876. See *Roam v Koop* (1974) 41 CA3d 1035, 116 CR 539 (although plaintiff presumably elected contract remedy by obtaining prejudgment attachment of property, election of remedies defense was waived because defendant raised it for first time only on appeal).

PRACTICE TIP: A plaintiff relying on the rule that an election of remedies can be made after a jury verdict (but before entry of judgment) must be prepared with special verdict forms. Otherwise, the trial judge may be reluctant to send the case to the jury with confusing or inconsistent instructions.

For additional discussion of election of remedies issues, see California Civil Procedure Before Trial §15.30 (4th ed Cal CEB 2004); California Trial Practice: Civil Procedure During Trial §26.86 (3d ed Cal CEB 1995).

There is a related rule that precludes a plaintiff from obtaining a double or duplicative recovery for the same items of damage. *Tavaglione v Billings* (1993) 4 C4th 1150, 1158, 17 CR2d 608. When separate items of compensable damage are shown by distinct and independent evidence, the plaintiff is entitled to recover the entire amount of his or her damages, whether that amount is expressed by the jury in a single verdict or multiple verdicts referring to different claims or legal theories. 4 C4th at 1159.

The implications of the election of remedies rule also affects a plaintiff's federal rights. Anyone suing on a cause of action is bound to anticipate that bankruptcy may intervene and should draw the pleadings, on which his or her cause of action is based, so that it will appear not dischargeable if he or she wishes any judgment entered in the particular case to be free from a stay of the bankruptcy court while the discharge matter is pending. *Bohn v Watson* (1954) 130 CA2d 24, 35, 278 P2d 454.

WARNING: When drafting a multitheory complaint, counsel must bear in mind that a jury trial on a damages claim may be completely obviated if the court adjudicates equitable issues in favor of the defendant that disposes of the legal issues. See, *e.g., Nwosu v Uba* (2004) 122 CA4th 1229, 19 CR3d 416. For further discussion, see §§1.29, 7.11, 7.29.

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III. CONDUCT CONSTITUTING FRAUD

§3.11 A. Misrepresentation of Past or Present Fact

It takes only one false representation of a material fact to create a case for fraud. *Feckenscher v Gamble* (1938) 12 C2d 482, 492, 85 P2d 885; *Cory v Villa Props.* (1986) 180 CA3d 592, 597, 225 CR 628. A misrepresentation of fact is material if it induced the plaintiff to alter his or her position to his or her detriment. *Okun v Morton* (1988) 203 CA3d 805, 828, 250 CR 220. If a seller intends that a misrepresentation or concealment be repeated or concealed by an intermediary, the principle of indirect deception applies to impose fraud liability. *Shapiro v Sutherland* (1998) 64 CA4th 1534, 1548, 76 CR2d 101. See also *Geernaert v Mitchell* (1995) 31 CA4th 601, 605, 37 CR2d 483. But unless reliance is alleged, liability will not attach for indirect communications. *Mirkin v Wasserman* (1993) 5 C4th 1082, 1095, 23 CR2d 101. See §§3.38-3.40.

Misrepresentations of law are ordinarily not actionable unless a fiduciary or confidential relationship exists. See §§3.21-3.28. Likewise, predictions or representations about future events are also not actionable. *Cicone v URS Corp.* (1986) 183 CA3d 194, 202, 227 CR 887. However, if the predictions or representations about future events carry with them the implication of a special knowledge of facts that make them probable, such statements may be actionable. *Cicone v URS Corp., supra*.

Occasionally, a defendant helps establish the falsity of his or her own representations, as in one case in which the defendant admitted to the plaintiff after the transaction was concluded that "we handed you a lemon." That admission helped the plaintiff's case, but it did not establish that the representations about the value of the property were false. Instead, expert testimony was introduced to prove that the defendant misrepresented the value of the property. *Feckenscher v Gamble* (1938) 12 C2d 482, 491, 85 P2d 885.

Advertising that misleads or misrepresents the safety of a product installed in real property may give rise to a fraud cause of action. See *County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 40 CR3d 313 (reversing summary adjudication of plaintiffs' fraud claim against manufacturer that advertised safety, and misrepresented dangers, of lead-based products used in plaintiffs' buildings).

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§3.12 1. Expressions of Opinion

In certain circumstances, expressions of professional opinion are treated as representations of fact. When a statement, although in the form of an opinion, is not a casual expression of belief but a deliberate affirmation of the matters stated, it may be regarded as a positive assertion of fact. Moreover, when a party possesses or holds him- or herself out as possessing superior knowledge or special information or expertise, that representation may be treated as one of material fact. *Bily v Arthur Young & Co.* (1992) 3 C4th 370, 408, 11 CR2d 51. See also *Gagne v Bertran* (1954) 43 C2d 481, 489, 275 P2d 15. Whether representations are of fact or matters of opinion largely depends on the surrounding circumstances. *Anderson v Thacher* (1946) 76 CA2d 50, 71, 172 P2d 533. See also *Friedberg v Weissbuch* (1955) 135 CA2d 750, 754, 287 P2d 785.

Sales "puffing" can also constitute actionable fraud. *Hauter v Zogarts* (1975) 14 C3d 104, 111 n5, 120 CR 681. The broader the statement, the more inclined the courts are to find misrepresentation. 14 C3d at 111. For example, the supreme court rejected the defendant's argument that "sound condition," "perfectly intact," and "perfect … in all respects" should be treated as "mere sales talk." *Herzog v Capital Co.* (1945) 27 C2d 349, 352, 164 P2d 8.

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§3.13 2. Fraud After Contract Formation

When a misrepresentation is made *after* the formation of a contract, it is not actionable unless there is independent reliance on that representation resulting in compensable damage. *Roland v Hubenka* (1970) 12 CA3d 215, 223, 90 CR 490. The reason is that reliance usually occurs in fraud causes of action by entering into the contract. *Jue v Smiser* (1994) 23 CA4th 312, 317 n5, 28 CR2d 242. Similarly, an action for rescission cannot be maintained based on misrepresentations after a contract is formed. *Crow v Kenworthy* (1939) 30 CA2d 313, 315, 86 P2d 154. See chap 1.

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§3.14 3. Negligent Misrepresentation

Negligent misrepresentation is a separate and distinct tort, a species of the tort of deceit. *Bily v Arthur Young & Co.* (1992) 3 C4th 370, 407, 11 CR2d 51. To be actionable, a negligent misrepresentation must ordinarily be applied to past or existing material facts. *Tarmann v State Farm Mut. Auto. Ins. Co.* (1991) 2 CA4th 153, 158, 2 CR2d 861. To be actionable deceit, the representation need not be made with knowledge of actual falsity, but only as an assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true. *Gagne v Bertran* (1954) 43 C2d 481, 487, 275 P2d 15. Although it is unnecessary to plead and prove *intent to deceive* in a cause of action for negligent misrepresentation, it is still necessary to plead and prove *intent to induce action* as an element of a negligent misrepresentation cause of action. 43 C2d at 488 n5.

It is a general rule that the negligence of a plaintiff is no defense when the defendant with intent to deceive has falsely represented as a fact something which he or she does not believe to be true. *Van Meter v Bent Constr. Co.* (1956) 46 C2d 588, 593, 297 P2d 644.

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Source: Real Property/California Real Property Remedies and Damages/3 Damages for Fraud and Nondisclosure/§3.15 B. Nondisclosure, Suppression, and Concealment

§3.15 B. Nondisclosure, Suppression, and Concealment

Civil Code §§1102-1102.17 impose statutory disclosure duties on sellers of residential property and their agents. See *Shapiro v Sutherland* (1998) 64 CA4th 1534, 1544, 76 CR2d 101; §3.30. Real estate brokers and salespersons also have statutory duties to conduct a reasonably competent and diligent visual inspection of residential property and to disclose all facts materially affecting the value or desirability of the property. CC §2079(a). See CC §§2079-2079.11. See §3.32. The remedies under these statutory schemes are not exclusive. CC §§1102.8, 2079.24. For full discussion of these and other disclosure statutes, see §§3.29-3.35.

Failure to make these disclosures in good faith may result in liability. For example, if a seller gives a negative answer to the question set forth by statute that asks about neighborhood noise problems or other nuisances, the seller could be liable for express misrepresentation and failure to disclose material facts. See *Shapiro v Sutherland* (1998) 64 CA4th 1534, 76 CR2d 101. Whether information is sufficiently material to affect the value or desirability of residential property is a fact-specific determination; the trier of fact is capable of deciding it on the basis of expert testimony or on his or her personal knowledge and experience. *Alexander v McKnight* (1992) 7 CA4th 973, 9 CR2d 453.

In addition to the statutory duty, there is also a common law duty to disclose. *Assilzadeh v California Fed. Bank* (2000) 82 CA4th 399, 98 CR2d 176; *Karoutas v HomeFed Bank* (1991) 232 CA3d 767, 774, 283 CR 809. This duty becomes particularly important if the statutory disclosure duties do not apply if, *e.g.,* the property was acquired by the sellers through a foreclosure sale. See CC §1102.2(c); *Assilzadeh v California Fed. Bank, supra*.

When a broker's knowledge of undisclosed material facts is coextensive with the seller's, the broker becomes jointly and severally liable with the seller for the full amount of damages. See *Lingsch v Savage* (1963) 213 CA2d 729, 736, 29 CR 201. See also *Reed v King* (1983) 145 CA3d 261, 193 CR 130; *Joanaco Projects, Inc. v Nixon & Tierney Constr. Co.* (1967) 248 CA2d 821, 833, 57 CR 48. The broker's conduct in the transaction amounts to a representation of the nonexistence of the facts that he or she has failed to disclose. *Lingsch v Savage, supra*.

Although many of the following cases were decided before the enactment of the statutory duties (CC §§1102, 2079), they continue to be relevant to causes of action based on the common law, which retain their vitality despite the statutory remedies (see CC §§1102.8, 2079.24). The cases found fraudulent nondisclosure was shown or adequately pleaded in situations involving:

- Known defects in improvements on the property. See *Herzog v Capital Co.* (1945) 27 C2d 349, 351, 164 P2d 8 (painting over rain leaks); *Koyer v McComber* (1938) 12 C2d 175, 177, 82 P2d 941 (misrepresentations about structural beams); *Geernaert v Mitchell* (1995) 31 CA4th 601, 604, 37 CR2d 483 (soil subsidence and structural defects); *Lingsch v Savage* (1963) 213 CA2d 729, 29 CR 201 (illegal rental units and condemned by city); *County of Mariposa v Yosemite W. Assocs.* (1988) 202 CA3d 791, 248 CR 778 (misrepresentations about water and sewer services).
- Separately recorded deed restriction in CC&Rs not disclosed in grant deed for residential sale. See *Alfaro v Community Hous. Improvement Sys. & Planning Ass'n, Inc.* (2009) 171 CA4th 1356, 89 CR3d 659 (plaintiff allowed to proceed to trial on claim for damages but not to invalidate deed restriction limiting equity).
- Physical hazards on the property, even though the seller believes that the condition was adequately repaired. *Barnhouse v City of Pinole* (1982) 133 CA3d 171, 183 CR 881 (developer did not disclose preexisting springs and slides on land because he thought they had been adequately repaired). See also *Felburg v Don Wilson Builders* (1983) 142 CA3d 383, 191 CR 92 (builder/seller fraudulently concealed from purchasers fact that house was built over oil sump).
- Hazardous material. See CC §851(a). See also the Environmental Responsibility Acceptance Act (CC §§850-855).
- The number of units on the property and the legality of any work done on the property. See *Gulke v Brock* (1963) 222 CA2d 459, 35 CR 200 (illegal conversion); *Birch v Ciria* (1962) 205 CA2d 1, 22 CR 798 (basement apartment); *Unger v Campau* (1956) 142 CA2d 722, 298 P2d 891 (illegal work done on premises); *Curran v Heslop* (1953) 115 CA2d 476, 481, 252 P2d 378 (building code violations); *Barder v McClung* (1949) 93 CA2d

692, 697, 209 P2d 808 (improvements added with no permit and in violation of zoning regulations).

- The presence of fill. *Gagne v Bertran* (1954) 43 C2d 481, 275 P2d 15; *Geernaert v Mitchell* (1995) 31 CA4th 601, 604, 37 CR2d 483; *Central Mut. Ins. Co. v Schmidt* (1957) 152 CA2d 671, 313 P2d 132; *Barnhouse v City of Pinole* (1982) 133 CA3d 171, 187, 183 CR 881.
- Termite infestation. *Orlando v Berkeley* (1963) 220 CA2d 224, 33 CR 860; *Piazzini v Jessup* (1957) 153 CA2d 58, 60, 314 P2d 196.
- Area and boundaries. *Williams v Marshall* (1951) 37 C2d 445, 235 P2d 372 (number of acres of citrus trees); *Cory v Villa Props.* (1986) 180 CA3d 592, 631, 225 CR 628 (size and length of lot); *Piazzini v Jessup, supra* (same); *Wilbur v Wilson* (1960) 179 CA2d 314, 3 CR 770 (acreage); *Soderling v Tomlin* (1959) 170 CA2d 169, 338 P2d 946 (location of boundaries); *Mills v Hellinger* (1950) 100 CA2d 482, 224 P2d 34 (number of acres); *Edwards v Sergi* (1934) 137 CA 369, 30 P2d 541 (boundary lines).
- The property's value, if based on a statement of facts known to be false. *Feckenscher v Gamble* (1938) 12 C2d 482, 85 P2d 885 (stated value of belief not honestly held); *Strebel v Brenlar Invs., Inc.* (2006) 135 CA4th 740, 747, 37 CR3d 699 (undisclosed liens exceeded value of property); *Jue v Smiser* (1994) 23 CA4th 312, 28 CR2d 242 (house represented as designed by famous architect when it was not); *Friedberg v Weissbuch* (1955) 135 CA2d 750, 287 P2d 785 ("value" of property was over $35,000); *Schoenberg v Romike Props.* (1967) 251 CA2d 154, 59 CR 359 (negligent misrepresentation of value in context of confidential relationship). But see *Craig v Wade* (1911) 159 C 172, 112 P 891; *Finch v McKee* (1936) 18 CA2d 90, 93, 62 P2d 1380 (statements about property value are generally held to be expressions of opinion and are not actionable as fraud, even if exaggerated).
- Income that the property produces even though the buyer could have discovered the truth by a more careful investigation. *Bagdasarian v Gragnon* (1948) 31 C2d 744, 748, 192 P2d 935 (misrepresentations on crop yield); *Koyer v McComber* (1938) 12 C2d 175, 177, 82 P2d 941 (misrepresentations about income); *Pearson v Norton* (1964) 230 CA2d 1, 40 CR 634 (Misrepresented hotel income); *Daniels v Oldenburg* (1950) 100 CA2d 724, 224 P2d 472 (rental income). But see *Pacesetter Homes, Inc. v Brodkin* (1970) 5 CA3d 206, 85 CR 39 (statements of opinion on probable potential income are merely expressions of opinion and do not constitute fraud).
- Social facts. *Shapiro v Sutherland* (1998) 64 CA4th 1534, 1545, 76 CR2d 101 (difficult neighbors); *Alexander v McKnight* (1992) 7 CA4th 973, 977, 9 CR2d 453 (reputation and history); *Reed v King* (1983) 145 CA3d 261, 193 CR 130 (murder on premises affecting property value). For discussion that an occupant died on the property or was afflicted with, or died from, the AIDS virus, see §3.33.

For further discussion of the seller's and broker's duties to disclose, see §§3.30-3.33; California Real Estate Brokers: Law and Litigation, chap 3 (Cal CEB 2009); California Real Property Sales Transactions §§6.36-6.70 (4th ed Cal CEB 2007); Handling Real Property Sales Transactions, steps 4-8 (Cal CEB Action Guide March 2009).

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§3.16 1. Partial Disclosure

If a seller makes an affirmative statement or answers the other party's questions, not only must the statement or response be truthful, the seller must then make full disclosure of all other known facts that are material to the subject matter of the statement or answer. *Hale v Wolfsen* (1969) 276 CA2d 285, 81 CR 23. Even if any representation actually made is itself true, failure to disclose other pertinent facts that condition or modify the representation constitutes fraud. *Strebel v Brenlar Invs., Inc.* (2006) 135 CA4th 740, 747, 37 CR3d 699 (agent representing both buyer and seller misrepresented seriousness of liens on property); *Welch v State* (1983) 139 CA3d 546, 558, 188 CR 726 (half-truths are inclusive of erroneous representations and vice versa when assessing liability for nondisclosure); *Hale v Wolfsen*, *supra* (furnishing two-year-old appraisal required disclosure of decrease in value and fact that property was now vacant); *McCue v Bruce Enters., Inc.* (1964) 228 CA2d 21, 25, 39 CR 125 (statement that property "on city utilities" required disclosure that property had septic tank and city did not supply sewage disposal services); *Brady v Carman* (1960) 179 CA2d 63, 3 CR 612 (undertaking to answer buyer's questions about easement creates duty to explain effect of easement on property); *Gilbert v Corlett* (1959) 171 CA2d 116, 339 P2d 960 (seller who furnished buyer with favorable engineer's report had duty to disclose earlier unfavorable report).

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2. Negligent Nondisclosure

§3.17 a. Seller and Broker Liability

An unsettled area of law is whether a common law action lies for negligent failure to disclose material facts that may affect the value or desirability of property. See *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 349, 23 CR2d 377 (decided on appeal from demurrer; action might have ultimately proceeded on violation of statutory duty). The sellers in *Newhall* did not disclose to the buyer that the property was contaminated (the contamination was not visible at the time of sale). 19 CA4th at 340. The buyer alleged that the sellers were negligent in failing to disclose the contamination and based their allegations on the duties stated in Health & S C §5411 and various sections of the Water Code. They asserted that violation of those statutes constituted negligence under Evid C §669, which creates a presumption of negligence for violating a statute or regulation. 19 CA4th at 347. See §3.35. See also *Karoutas v HomeFed Bank* (1991) 232 CA3d 767, 771, 283 CR 809.

In residential transactions, a statutory disclosure violation is actionable if the real estate broker is negligent, and the standard of care is that of a reasonably prudent real estate licensee. CC §2079.2. But the broker does not breach the disclosure duty under CC §2079 if he or she has made a reasonably competent and diligent visual inspection. See CC §2079.3; *Wilson v Century 21 Great W. Realty* (1993) 15 CA4th 298, 308, 18 CR2d 779 (alleged defect, absence of steel reinforcement and J bolts in foundation, was detectable only by radiographing foundation and uncovering wood with steel bar).

In the face of an ever-increasing body of statutory disclosure law, *Newhall Land & Farming Co. v Superior Court*, *supra,* possibly serves as a cornerstone to negligent nondisclosure-based causes of action. A negligent nondisclosure cause of action against a real estate agent may be brought independently of a statutory disclosure action under CC §2079 if the agent is a fiduciary. For example, in *Michel v Moore & Assocs., Inc.* (2007) 156 CA4th 756, 67 CR3d 797, an agent who was an associate of the buyers' agent gave the buyers a tour of the residence but did not disclose property defects that he had previously observed during an inspection before the seller listed the property with another broker. The court of appeal ruled the associate agent had a fiduciary duty to disclose to the buyers all material information regardless of how obtained and concluded that the jury's rejection of the cause of action for violation of CC §2079 did not preclude liability under common law fiduciary negligence. Arguably, CC §3333 applies to the measurement of damages in such a case.

But disclosure duties vary according to the type of property conditions. See *Wilson v Century 21 Great W. Realty*, *supra* (cautioning that *specific* disclosure duties must be scrutinized for their application to *specific facts in issue* and that it is hasty to assume that statutory or common law disclosure requirements apply to all property conditions). See also *Assilzadeh v California Fed. Bank* (2000) 82 CA4th 399, 410, 98 CR2d 176 (seller or his or her agent must have actual knowledge in order to be liable for failing to disclose material fact); *Padgett v Phariss* (1997) 54 CA4th 1270, 1282, 63 CR2d 373 (failure to disclose homeowner association's involvement in construction defect litigation not actionable under statutory and common law duties without evidence that brokers knew of defects or lawsuit). For further discussion, see California Real Estate Brokers: Law and Litigation, chaps 3-4, 11 (Cal CEB 2009).

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§3.17A b. Third Party Liability

There are situations when third parties, who are hired by the seller to provide reports or perform work relative to a real estate transaction, may be held liable when the seller fails to disclose relevant information, even though they do not have a direct duty to the buyer. For example, contractors, real estate brokers, property inspectors, termite inspectors, and similar consultants who help the seller conceal or obscure the importance of material conditions may have liability for aiding and abetting a fraudulent act. In addition, third parties may be liable for failing to inform the buyer of the seller's fraud under an aiding and abetting theory, even though they are not found to be co-conspirators in the fraud. See, *e.g., Saunders v Superior Court* (1994) 27 CA4th 832, 846, 33 CR2d 438 (court reporter stated cause of action for conspiracy and aiding and abetting by defendant reporters and insurers to commit an unfair business practice).

A related theory is negligent misrepresentation by a third party. See *Gagne v Bertran* (1954) 43 C2d 481, 487, 275 P2d 15, and other authorities cited in §§3.67, 3.73.

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§3.18 C. Promissory Fraud

Generally speaking, promissory fraud is a type of fraud that pertains to *executory* promises by one party to another. See, *e.g., Price v Wells Fargo Bank* (1989) 213 CA3d 465, 483, 261 CR 735; *Walker v Signal Cos.* (1978) 84 CA3d 982, 994, 149 CR 119. "Promissory fraud" is a subspecies of the action for fraud and deceit. A promise to do something implies the intention to perform; hence, when a promise is made without that intention, there is an implied misrepresentation of fact that may be actionable fraud. *Lazar v Superior Court* (1996) 12 C4th 631, 638, 49 CR2d 377; *Brockway v Heilman* (1967) 250 CA2d 807, 811, 58 CR 772; *Vogelsang v Wolpert* (1964) 227 CA2d 102, 115, 38 CR 440 ("we got to talking about the Vogelsangs, so he came out and flatly told me he didn't aim to pay the sons-of-bitches anything"). But something more than the mere failure of performance is required to establish a cause of action for promissory fraud. *Tenzer v Superscope, Inc.* (1985) 39 C3d 18, 30, 216 CR 130 (if plaintiff adduces no further evidence of fraudulent intent than proof of nonperformance of an oral promise, summary judgment may be proper).

A real estate broker was found liable for actual fraud when the broker used a client's funds to purchase a home in another's name and refused to convey title to the client as promised. The court ruled that the absence of a written contract was not a defense to fiduciary fraud. *Warren v Merrill* (2006) 143 CA4th 96, 49 CR3d 122. See 3.27, 3.53, 3.58, 7.21, 15.7, 15.37. For a case in which the supreme court reversed the jury award of $1.7 million (ratio of 340:1 punitive to compensatory damages) and remanded to the lower court to reduce the award to $50,000 for a plaintiff (who succeeded on the theory of promissory fraud in a real property sale), see *Simon v San Paolo U.S. Holding Co.* (2005) 35 C4th 1159, 29 CR3d 379.

Another case provides a good example of how contract language, in describing contractual obligations, can form the basis of a promissory fraud action. A breach of those obligations can thus constitute a breach of contract or the alternative cause of action for promissory fraud. In *Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co.* (1977) 66 CA3d 101, 135 CR 802, the defendants entered into a loan contract in which some of the funds were earmarked to pay for certain offsite improvements. The contract obligated the borrowers to complete those improvements within 18 months. The court construed the contract language as equivalent to the borrowers' promise to use the segregated loan funds for that purpose and their diversion of the funds for other uses was evidence of their intent not to fulfill their promise. 66 CA3d at 133.

In an action for breach of contract, a plaintiff must allege and prove that a breach occurred. *Reichert v General Ins. Co.* (1968) 68 C2d 822, 830, 69 CR 321. A breach of contract often occurs in the form of a failure to perform a promise. The California Supreme Court seems to have concluded that, in some circumstances, promissory fraud and misrepresentation may be equated with a breach of contract. A promise to do something implies the intention to perform; hence, if a promise is made with no such intention, there is an *implied misrepresentation of fact* that may be actionable fraud. *Lazar v Superior Court, supra* (emphasis added). See also *Tarmann v State Farm Mut. Auto. Ins. Co.* (1991) 2 CA4th 153, 158, 2 CR2d 861.

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§3.19 1. Parol Evidence Rule

Under the current formulation of the parol evidence rule, evidence of prior or contemporaneous negotiations between the parties is not admitted to alter or vary the terms of a written instrument if that instrument appears to be the final or the complete, exclusive expression of the agreement between the parties. See CCP §1856(a)-(b). For comprehensive discussion of the parol evidence rule, see California Law of Contracts §§5.33-5.43 (Cal CEB 2007).

Although application of the rule results in the exclusion of evidence, it is not a rule of evidence but is one of substantive law. *Casa Herrera, Inc. v Beydoun* (2004) 32 C4th 336, 343, 9 CR3d 97. It states that the terms in an integrated written agreement may not be contradicted by prior or contemporaneous agreements. In doing so, the rule necessarily bars consideration of extrinsic evidence of prior or contemporaneous negotiations or agreements that do not coincide with the written agreement. 32 C4th at 344.

The parol evidence rule allows the terms of a written agreement to be explained or supplemented by:

- Evidence of consistent additional terms, if the instrument is not intended as a complete and exclusive statement of the parties' agreement (CCP §1856(b)); or
- Course of dealing, usage of trade, or course of performance (CCP §1856(c)).

Whether a prior agreement is admissible and enforceable depends on whether it is collateral to the written agreement, *i.e.,* whether it is a term that the parties might reasonably have left unwritten.

EXAMPLE: In *Kett v Graeser* (1966) 241 CA2d 571, 50 CR 727, a residential sales agreement contained a clause stating that the written contract was the entire agreement between the parties. Later, the purchaser claimed that the seller fraudulently promised to make certain repairs, although the sales agreement was silent on this point. The court held that the promise to make repairs was collateral to the sales agreement and therefore the parol evidence rule would not prevent the court from enforcing the oral agreement.

An exception to the parol evidence rule allows the use of extrinsic evidence to clarify the parties' intent in a written agreement if its language is ambiguous. See *Pacific State Bank v Greene* (2003) 110 CA4th 375, 1 CR3d 739.

The parol evidence rule allows extrinsic evidence to be admitted when it is relevant to issues concerning underlying illegality or fraud. CCP §1856(g). Specifically, the rule does not preclude evidence of fraudulent misrepresentations. *Price v Wells Fargo Bank* (1989) 213 CA3d 465, 483, 261 CR 735; *Hartman v Shell Oil Co.* (1977) 68 CA3d 240, 251, 137 CR 244 (parol evidence admissible to prove fraud even when fraudulently induced contract contains integration clause). Evidence of a promise that contradicts the contract, however, is inadmissible under the parol evidence rule to establish promissory fraud. *Bank of America Nat'l Trust & Sav. Ass'n v Pendergrass* (1935) 4 C2d 258, 263, 48 P2d 659; *Banco Do Brasil, S.A. v Latian, Inc.* (1991) 234 CA3d 973, 1009, 285 CR 870; *Price v Wells Fargo Bank, supra*.

NOTE: An issue that the courts have not yet decided is the apparent anomaly created by the "implied misrepresentation of fact" feature of promissory fraud that the supreme court described in *Lazar v Superior Court* (1996) 12 C4th 631, 638, 49 CR2d 377. If promissory fraud constitutes an implied misrepresentation of a fact—the intent of the promisor to not perform the promise—why should that fact be treated any differently from any other misrepresented fact that induced justifiable reliance? One explanation may be a policy preferring that such cases be brought as breach of contract and not tort actions.

A solution may exist in the election of remedies rules. *Walters v Marler* (1978) 83 CA3d 1, 16, 147 CR 655, disapproved on other grounds in *Gray v Don Miller & Assocs., Inc.* (1984) 35 C3d 498, 507, 198 CR 551. If a buyer seeks to rescind a contract for fraud, the parol evidence rule should not bar any evidence of any fraud. However, if a buyer seeks to affirm the contract, the full range of contract interpretation rules, including the parol evidence rule, should be applied to that contract. If a buyer pursues both remedies through trial, a jury instruction and carefully drafted special verdict form preventing the use of fraud evidence for purposes that the parol evidence rule precludes should be used to control the misuse of fraud evidence. *Acadia, Cal., Ltd. v Herbert* (1960) 54 C2d 328, 336, 5 CR 686 (jury was properly instructed that it could not award damages under both contract and tort theories, but must select which theory,

if either, was substantiated by evidence). Until some solution is adopted, the inconsistencies and flaws described by the commentators will remain in the application of the parol evidence rule to questions of fraud.

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§3.20 2. No Negligent Promissory Fraud

Simply put, making a promise with an honest but unreasonable intent to perform is wholly different from making one with no intent to perform. Therefore the former does not constitute a false promise. Moreover, the courts have declined to establish a new type of actionable deceit: the negligent false promise. *Tarmann v State Farm Mut. Auto. Ins. Co.* (1991) 2 CA4th 153, 159, 2 CR2d 861.

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§3.21 D. Constructive Fraud and Fiduciary Duties

Among the various types of fraud, constructive fraud is the most abstruse. Civil Code §1573 "defines" constructive fraud in the following disjunctive, unclear manner. Constructive fraud exists:

1. In any breach of duty which, without an actually fraudulent intent, gains an advantage to the person in fault, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him; *or*
2. In any such act or omission as the law specially declares to be fraudulent, without respect to actual fraud.

Constructive fraud appears on its face to be very similar to concealment law. The impression that the words "breach of any duty" in CC §1573 might initially create in a lawyer's mind is that constructive fraud can be linked to any breach of a statute, regulation, or common law rule that imposes a duty that prejudicially misleads another. That viewpoint, however, is not taken by most of the courts that have evaluated constructive fraud. The great bulk of cases in which constructive fraud claims were raised tethered constructive fraud to a violation of either a fiduciary duty or a confidential relation, even though §1573 mentions neither. Thus, actions for constructive fraud are usually against real estate brokers and sales agents. See, *e.g., Michel v Moore & Assocs., Inc.* (2007) 156 CA4th 756, 67 CR3d 797; *Warren v Merrill* (2006) 143 CA4th 96, 49 CR3d 122. See also California Real Estate Brokers: Law and Litigation, chaps 4, 11 (Cal CEB 2009); California Real Property Sales Transactions §§2.124-2.151 (4th ed Cal CEB 2007). For example, a broker may be held guilty of constructive fraud for informing clients that a property fulfills their express requirements without properly examining whether that is true. See *Salahutdin v Valley of Cal., Inc.* (1994) 24 CA4th 555, 29 CR2d 463.

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§3.22 1. The "Any Breach of Duty" Component

The words "any breach of duty" imply a broad application to common law and statutory duties. *Krawitz v Rusch* (1989) 209 CA3d 957, 963, 257 CR 610 (duty may be contractual, statutory, or common law). (Compare CC §1573 with CC §1575, which expressly applies to confidential relationships.) Section 1573, however, has not received a judicial construction in the manner that its composition suggests. Some courts assert that the statute applies *only* to persons who have a fiduciary or confidential relationship even though nothing in the statute states that it is tied only to a fiduciary or confidential relationship. *Mary Pickford Co. v Bayly Bros.* (1939) 12 C2d 501, 525, 86 P2d 102 (§1573 states rule applicable in confidential relations; it has never been applied to fix liability for breach of statutory duty except that of a fiduciary); *Feeney v Howard* (1889) 79 C 525, 529, 21 P 984 (essential to operation of this principle that fiduciary relationship exist).

The principle alluded to in *Feeney* was a narrow one, involving a parol promise by a fiduciary to reconvey property. The "essential" language in *Feeney* and the observation in *Mary Pickford Co. v Bayly Bros.*, *supra,* that §1573 had never been applied to fasten liability on another except a fiduciary, have been used by some courts to conclude that constructive fraud arises only in the context of a fiduciary duty or a confidential relationship. See, *e.g., Salahutdin v Valley of Cal., Inc.* (1994) 24 CA4th 555, 563, 29 CR2d 463; *Peterson Dev. Co. v Torrey Pines Bank* (1991) 233 CA3d 103, 116, 284 CR 367; *Byrum v Brand* (1990) 219 CA3d 926, 937, 268 CR 609.

Other courts assert that constructive fraud usually applies to fiduciaries and others having a confidential relationship. *Michel v Moore & Assocs., Inc.* (2007) 156 CA4th 756, 67 CR3d 797; *Barrett v Bank of America* (1986) 183 CA3d 1362, 1368, 229 CR 16; *Boyd v Bevilacqua* (1966) 247 CA2d 272, 290, 55 CR 610; *Sixta v Ochsner* (1960) 187 CA2d 485, 490, 9 CR 617. These cases, however, suggest circumstances under which constructive fraud could arise outside of such a relationship, as the statute itself implies. Whether CC §1573 is restricted to fiduciary or confidential relationships has yet to be definitively determined.

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§3.23 2. The Intent Component

The chief significance of CC §1573 lies in the statutory fact ("without an actually fraudulent intent") that the plaintiff is relieved from the duty to plead or prove intent to deceive as an element to this cause of action. The word "omission" in CC §1573(2) implies that neglect will trigger its applicability as would intentional conduct. This misleading terminology may thus take the form of neglect or the failure to adhere to a standard the law imposes on the particular defendant. *Sixta v Ochsner* (1960) 187 CA2d 485, 490, 9 CR 617 (constructive fraud can be based on negligent misrepresentations); *Hayter v Fulmor* (1949) 92 CA2d 392, 398, 206 P2d 1101 (constructive fraud, also known as negligent or careless misrepresentation, may be actionable even if material misstatements are made without fraudulent intent to deceive).

Commentators do not agree on whether intent to deceive must be specifically alleged in causes of action for constructive fraud. Although it was not necessary to resolve the issue in the case before it, one court sided with the view that intent was not a necessary element of the cause of action. *Byrum v Brand* (1990) 219 CA3d 926, 938 n7, 268 CR 609. See also *Michel v Moore & Assocs., Inc.* (2007) 156 CA4th 756, 762, 67 CR3d 797.

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§3.24 3. The "Gains an Advantage" Component

The courts have not interpreted the scope of the "gains an advantage" component under CC §1573. However, the definition of advantage developed by the courts for fiduciaries also seems appropriate to it. See *Rader v Thrasher* (1962) 57 C2d 244, 250, 18 CR 736 (defendant acquired advantage by mere formation of contingency-fee contract).

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§3.25 4. The "Specially Declares to Be Fraudulent" Alternative

Civil Code §1573 is framed in the disjunctive and CC §1573(2) provides an independent basis for finding constructive fraud to exist in any "act or omission as the law specially declares to be fraudulent, without respect to actual fraud." See §3.21. This subdivision has received little attention in reported cases; its criteria seem to be satisfied by the adoption of any case law or statutory requirement.

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§3.26 5. Plaintiff's Reliance in Constructive Fraud Cases

Some courts have said that the requirement of reliance is relaxed in constructive fraud to the extent that the court may presume reasonable reliance on the misrepresentation or nondisclosure of the fiduciary, absent direct evidence of a lack of reliance. See *Estate of Gump* (1991) 1 CA4th 582, 601, 2 CR2d 269. Similarly, the plaintiff's obligation to inquire does not always apply in fiduciary fraud cases. If the plaintiff's reliance either was appropriate given the context of the relationship or, in light of the plaintiff's own intelligence and information, was not otherwise manifestly unreasonable, no inquiry duty applies. *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1247, 44 CR2d 352.

Note that the *Gump* court did not eliminate the element of reliance. *Estate of Gump* (1991) 1 CA4th 582, 602, 2 CR2d 269. The statutory fraud alluded to by the court is a CC §1573-based fraud, *i.e.*, constructive fraud. The court found no proof in the record of reliance evidence and concluded that without it the trial court's finding of "actual, constructive or statutory fraud" could not be upheld. 1 CA4th at 603.

PRACTICE TIP: In view of the ruling in *Gump* and the dictum in *Alliance Mortgage*, the plaintiff should always plead and be prepared to prove the element of reliance and be prepared to argue that reliance can be presumed under the circumstances of the transaction, with the consequent shifting of the burden of proof. Many of the same facts that would prove the nature of the fiduciary or confidential relationship would be highly relevant to establish justifiable reliance in any event.

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§3.27 6. Elements of Fiduciary or Confidential Relationship

There are *two kinds* of fiduciary duties—those imposed by law and those undertaken by agreement. *GAB Bus. Servs. v Lindsey & Newsom Claim Servs.* (2000) 83 CA4th 409, 99 CR2d 665, disapproved on other grounds in *Reeves v Hanlon* (2004) 33 C4th 1140, 17 CR3d 289. For a fiduciary duty to arise, a person must either knowingly undertake to act on behalf and for the benefit of another, or must enter into a relationship that imposes the obligation as a matter of law. *Committee on Children's Television, Inc. v General Foods Corp.* (1983) 35 C3d 197, 197 CR 783, superseded by statute on other grounds as stated in *Gartin v S&M NuTec LLC* (CD CA 2007) 245 FRD 429, 437 n6 (refused to impose fiduciary duty on businesses selling breakfast cereal to retail purchasers). See also *City of Hope Nat'l Med. Ctr. v Genentech, Inc.* (2008) 43 C4th 375, 75 CR3d 333 (fiduciary duty did not arise from contract between hospital and biotechnology company under which hospital, in exchange for royalties, entrusted secret invention to company to develop, patent, and market product; both parties had substantial bargaining power).

Determining the existence of a fiduciary relationship is crucial because a fiduciary is liable to its principal for constructive fraud even if his or her conduct is not actually fraudulent. *Salahutdin v Valley of Cal., Inc.* (1994) 24 CA4th 555, 562, 29 CR2d 463 (real estate agent breached fiduciary duty owed to buyers he represented in real property purchase by making affirmative statements about size, boundaries, and subdividability—knowing that they materially affected buyers' decision to purchase—and by not disclosing his failure to investigate accuracy of statements). Constructive fraud comprises *any* act, omission, or concealment involving a breach of legal or equitable duty, trust, or confidence that results in damage to another even if the conduct is not otherwise fraudulent. *Salahutdin v Valley of Cal., Inc., supra*. However, a confidential relationship does not exist between a buyer and a seller of real property simply because they know each other. *Kudokas v Balkus* (1972) 26 CA3d 744, 750, 103 CR 318.

The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. *Roberts v Lomanto* (2003) 112 CA4th 1553, 5 CR3d 866. To plead a cause of action for breach of fiduciary duty, an adequate showing must be made of each element. A fiduciary or confidential relationship does not arise solely because one person reposes confidence in the integrity and good faith of another. *City of Hope Nat'l Med. Ctr. v Genentech, Inc., supra*. But if the latter voluntarily accepts or assumes that confidence, he or she may not act so as to take advantage of the others' interest without their knowledge or consent. *City of Atascadero v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 CA4th 445, 483, 80 CR2d 329 (beneficiary action against securities brokers who assisted trustee in speculating with trust funds; allegations of volatile securities investments, risky transactions in highly leveraged interest-bearing instruments, deceit, and excessive commissions were sufficient to state claims for breach of fiduciary duty and aiding and abetting breach of fiduciary duty).

Fiduciary duties are also established by statutory and case law regulating real property transactions. For example, Bus & P C §10176(g) requires real estate brokers and agents (licensees) to disclose to their principals any anticipated compensation, commission, or profit resulting from the agency relationship. A licensee who violates this statute also violates the fiduciary duty owed to the principal and will be liable in the amount of the undisclosed benefit. *Roberts v Lomanto, supra*.

Similarly, Bus & P C §10176(a)-(b) prohibits real estate brokers and agents (licensees) from making misrepresentations and false promises "to influence, persuade or induce" their principals. *Warren v Merrill* (2006) 143 CA4th 96, 109, 49 CR3d 122.

The cases have distinguished, made synonymous, and equated fiduciary and confidential relationships. A confidential relationship exists between two persons when one has gained the confidence of the other and purports to act or advise with the other's interest in mind. A confidential relationship may exist even if no fiduciary relationship exists. *Davies v Krasna* (1975) 14 C3d 502, 510, 121 CR 705; *Vai v Bank of America* (1961) 56 C2d 329, 337, 15 CR 71. But see *GAB Bus. Servs. v Lindsey & Newsom Claim Servs., supra* (fiduciary duty is undertaken by implied agreement when one person enters into confidential relationship with another); *Michelson v Hamada* (1994) 29 CA4th 1566, 1581, 36 CR2d 343 (confidential relationships and fiduciary relationships are synonymous in law).

Real estate brokers and agents are retained for their specialized and professional skill and knowledge. They take

required courses to acquire and maintain licensure and pass examinations in order to work as brokers and agents. They are generally familiar with a wide array of buyers' and sellers' disclosure and contract obligations, lending practices, escrow and title operations, and local requirements. Hence, the law imposes on real estate brokers and agents the following fiduciary duties (see *Batson v Strehlow* (1968) 68 C2d 662, 675, 68 CR 589; *Roberts v Lomanto, supra; Assilzadeh v California Fed. Bank* (2000) 82 CA4th 399, 414, 98 CR2d 176; *Field v Century 21 Klowden-Forness Realty* (1998) 63 CA4th 18, 21, 25, 73 CR2d 784):

- To act in the highest good faith and undivided service and loyalty;
- To avoid taking or obtaining any advantage over the principal in any transaction;
- To perform the research and investigation that is necessary to learn which matters are important enough that they might affect the value or desirability of property, and, therefore, the principal's decision to buy or sell the property;
- To counsel and advise the principal about the suitability and consequences of the principal's decision;
- To fully disclose the nature and full amount of any compensation, commission, or profit the agent receives or will receive from the transaction and to obtain the approval of the principal;
- To make the fullest disclosure of all material facts concerning the transaction that might affect the principal's decision that are reasonably available to the broker; and
- To investigate facts not known by the agent and to disclose all material facts that might reasonably be discovered.

Fiduciary duties are thus much broader than the statutory duties required of brokers. *Michel v Moore & Assocs., Inc.* (2007) 156 CA4th 756, 763, 67 CR3d 797; *Assilzadeh v California Fed. Bank* (2000) 82 CA4th 399, 415, 98 CR2d 176; see §3.32. Also, the breach of any one of these duties may constitute mere negligence rather than fraud. *Assilzadeh v California Fed. Bank*, *supra*.

When an owner engages a broker to market the property, the broker has a fiduciary duty to the owner to disclose all material facts. Once the agency relationship has been created, the fiduciary duty continues even if the broker, or a relative or associate of the broker, becomes a principal in the transaction. *Roberts v Lomanto, supra*.

For a sample complaint, see §3.92. For more on the fiduciary duties of real estate brokers, see California Real Estate Brokers: Law and Litigation, chap 3 (Cal CEB 2009).

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§3.28 7. Burden of Proof and Presumptions

In an action for an alleged breach of a fiduciary duty, a presumption of undue influence arises when a fiduciary gains an advantage in a transaction. The advantage does not have to be unfair. When a fiduciary enters into a transaction with a client by which the fiduciary's position is improved, the fiduciary obtains a favorable opportunity, or the fiduciary otherwise gains, benefits, or profits, a rebuttable presumption arises that an advantage was obtained. Unless the presumption is dispelled, it remains as evidence of undue influence and as a breach of fiduciary duty. *Bradner v Vasquez* (1954) 43 C2d 147, 151, 272 P2d 11.

The supreme court elaborated further on this presumption in *Rader v Thrasher* (1962) 57 C2d 244, 250, 18 CR 736, an attorney-client case. The requirement of showing that the agent acquired an advantage is satisfied by establishing that the agent was to get paid. In *Rader*, the mere formation of a contingency-fee contract with the attorney was held to constitute sufficient evidence of the advantage component to the presumption. These cases, and others like them, were based on former CC §2235, which set forth the presumption. But see *Delos v Farmers Ins. Group* (1979) 93 CA3d 642, 656, 155 CR 843 (burden shifts only as to constructive fraud; burden of preponderance of evidence remains with plaintiff as to actual fraud).

In 1986, former §2235 was repealed together with several related statutes, raising the prospect that this line of cases can no longer be relied on for the duties or, more important, the presumption they advance. The repeal of the statutes does not seem to have undermined the common law foundations for another line of cases enumerating the same various fiduciary duties or the presumption that operates against a fiduciary. The basic concept of characterizing an agent as a fiduciary for its principal seems too well rooted in common law to have been affected by the repeal of those statutes. See, *e.g., Burke v Bours* (1893) 98 C 171, 177, 32 P 980; *Butler v Agnew* (1908) 9 CA 327, 331, 99 P 395. Similarly, the presumption of undue influence or gaining unfair advantage also seem to be too well rooted in common law to have been affected by their repeal. See *Solon v Lichtenstein* (1952) 39 C2d 75, 82, 244 P2d 907; *Davis v Kahn* (1970) 7 CA3d 868, 877, 86 CR 872; *Chung v Johnston* (1954) 128 CA2d 157, 164, 274 P2d 922. But see *McCann v Lucky Money, Inc.* (2005) 129 CA4th 1382, 1398, 29 CR3d 437 (narrowly construing fiduciary duty in "purely commercial situations").

PRACTICE TIP: The courts have not considered the effect of the repeal of former CC §2235 on the cases that applied the presumption stated in that section. Because the presumption may change the course of a trial, it will surely arise. For plaintiffs, it is prudent to allege a constructive fraud cause of action when appropriate (see CC §§1573, 1575) and assert that under common law the burden of dispelling the presumption shifts to the appropriate defendant. For defendants, it is at least necessary to assert that the CC §2235 basis to the evidentiary presumptions cited in certain reported decisions was removed by its repeal.

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§3.29 E. Breach of Statutory and Regulatory Disclosure Requirements

The violation of a statute may constitute a tort. A tort in essence is the breach of a nonconsensual duty owed another. Violation of a statutory duty to another may therefore be a tort, and violation of a statute embodying a public policy is generally actionable even if no specific civil remedy is provided in the statute itself. *Laczko v Jules Meyers, Inc.* (1969) 276 CA2d 293, 295, 80 CR 798. Although the scope of liability created by the adoption of the statutory obligations has not been explored, violation of the statutes discussed in §§3.30-3.35 may provide bases for several causes of action, including negligence as well as intentional torts.

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Source: Real Property/California Real Property Remedies and Damages/3 Damages for Fraud and Nondisclosure/ 1. Duties Associated With Residential Sellers/§3.30 a. Real Estate Transfer Disclosure Statement

1. Duties Associated With Residential Sellers

§3.30 a. Real Estate Transfer Disclosure Statement

In addition to the common law duties imposed on sellers of residential real property (*Assilzadeh v California Fed. Bank* (2000) 82 CA4th 399, 98 CR2d 176; *Karoutas v HomeFed Bank* (1991) 232 CA3d 767, 773, 283 CR 809), the legislature enacted CC §§1102-1102.17, which added disclosure duties for sellers of residential property (see *Shapiro v Sutherland* (1998) 64 CA4th 1534, 1544, 76 CR2d 101). Civil Code §1102(a) applies to residential property transactions, including any transfer by sale, exchange, installment land sale contract, lease with an option to purchase, any other option to purchase, or ground lease coupled with improvements "of real property or residential stock cooperative, improved with or consisting of not less than one nor more than four dwelling units." Civil Code §1102(b) extends the provisions to manufactured homes and mobilehomes. Waivers of the law are void as against public policy under CC §1102(c). See *Realmuto v Gagnard* (2003) 110 CA4th 193, 1 CR3d 569. Also, the statutory duty may be limited in certain situations, such as when sellers acquire property through foreclosure. CC §1102.2(c).

Sellers must complete and deliver to the buyer a comprehensive real estate disclosure statement. Civil Code §§1102.1, 1102.3-1102.3a, 1102.6 (statutory disclosure form), §1102.6a (additional disclosures required by city or county), §1102.6b (Mello-Roos and contractual assessment disclosures), §1102.6d (manufactured home and mobilehome disclosures), §1102.6e (transfer fee disclosures), §1102.10 (delivery requirements), §1102.15 (ordnance location disclosures), §1102.16 (window security bar disclosure), and §1102.17 (industrial use zoning disclosure). See disclosure form in California Real Property Sales Transactions §6.37 (4th ed Cal CEB 2007).

NOTE: Sellers of residential property must disclose whether the property is in compliance with requirements for smoke detectors and hot water heaters (effective January 1, 2011) and for carbon monoxide detectors (effective July 1, 2011). CC §§1102.6, 1102.6d; Health & S C §§13113.8, 17926. Sellers of single-family residential property (effective January 1, 2017) and sellers of multifamily residential and commercial property (effective January 1, 2019) must disclose whether the property has plumbing fixtures that do not meet water conservation standards. CC §§1101.4(c), 1101.5(e), 1102.155.

The statutory disclosure form in CC §1102.6 contains an exhaustive list of items normally found in residential properties about which the seller is required to provide some disclosure. See *Alexander v McKnight* (1992) 7 CA4th 973, 9 CR2d 453. Errors, inaccuracies, and omissions of information will not result in liability if (CC §1102.4(a); see *Shapiro v Sutherland* (1998) 64 CA4th 1534, 1547, 76 CR2d 101):

- They are not within the personal knowledge of the transferor or that listing or selling agent,
- They are based on information timely provided by public agencies or by others providing information specified in CC §1102.4(c) (certain expert reports), and
- Ordinary care was exercised in obtaining and transmitting the information.

The seller's duty to deliver the disclosure form to a prospective buyer is a nonwaivable condition precedent to the buyer's duty to perform. *Realmuto v Gagnard* (2003) 110 CA4th 193, 1 CR3d 569. Consequently, if the seller fails to deliver the disclosures, the buyer may either refuse to complete the sale (see CC §1102.3) or close the sale and afterward sue for damages (see CC §1102.13). If the buyer does not complete the sale, the seller may not obtain either specific performance or damages from the buyer. *Realmuto v Gagnard, supra*. The remedies available under the disclosure statutes are not exclusive. CC §§1102.8, 2079.24.

An action for negligent misrepresentation against a broker for violation of CC §§1102-1102.17 must be brought within 2 years after the date of the violation. CC §2079.4; *Loken v Century 21-Award Props.* (1995) 36 CA4th 263, 272, 42 CR2d 683.

For further discussion of the broker's and seller's duties to disclose, see California Real Estate Brokers: Law and Litigation, chaps 3-5 (Cal CEB 2009); California Real Property Sales Transactions §§2.127-2.141, 6.35-6.70 (4th ed Cal CEB 2007); Handling Real Property Sales Transactions, steps 4-8, 16 (Cal CEB Action Guide March 2009).

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§3.31 b. Other Disclosure Duties

In addition to the statutory disclosure duties set forth in §3.30, sellers of residential property are obligated to disclose the following:

- The presence of toxic substances such as, but not limited to, asbestos, formaldehyde, radon, gas, lead-based paint, fuel or chemical storage tanks, and contaminated soil or water on the property. CC §1102.6.
- Whether the property is subject to a lien under the Mello-Roos Community Facilities Act of 1982 (Govt C §§53311-53368.3), a contractual assessment program (Str & H C §§5898.12-5898.32), or the Improvement Bond Act of 1915 (Str & H C §§8500-8887). CC §1102.6b.
- That the sale of the property will result in a property tax revaluation and potential supplemental property tax assessment billings. CC §1102.6c.
- The existence of any window security bars and safety release mechanism on the bars. CC §1102.16.
- Any federal or state ordnance locations, *i.e.,* areas once used by the military for training that might contain explosive munitions. CC §1102.15.
- Natural hazards, including floods, fires, earthquakes, and proximity to airports, farms, or ranches. CC §§1103-1103.14. See *Johnson v Siegel* (2000) 84 CA4th 1087, 101 CR2d 412 (drainage and flooding problems).
- Any conversion from existing dwelling to condominium project, community apartment project, or stock cooperative. CC §1134.
- Homeowner association disclosures as required by the Davis-Stirling Common Interest Development Act (CC §§1350-1378) for common interest developments. CC §1368.
- Whether the residence complies with smoke detector requirements and whether the water heater is properly braced, strapped, or anchored. Health & S C §13113.8.
- Type, thickness, and R-value of insulation in newly built homes. 16 CFR §460.16.
- The existence of toxic mold. Health & S C §§26100-26156. Although these statutory disclosure obligations are deferred until the California Department of Health Services establishes standards and guidelines on exposure limits, they expressly do not limit other statutory and common law obligations of the seller to disclose the presence of mold materially affecting the value and desirability of the property. Health & S C §§26149-26150. Therefore, the existence of any type of mold should be disclosed even during the deferral period, especially because mold can cause property damage or affect the health of occupants. See, *e.g.,* Handling Mold Litigation in California (Cal CEB Action Guide September 2009).
- The fact that a prospective buyer may access information about registered sex offenders from the appropriate state or local government agencies. CC §2079.10a.
- Whether the property is subject to a deed of trust, a mortgage, or other lien known as a "blanket encumbrance." CC §1133.
- Any known lead-based paint hazards with respect to residential properties built before 1978, plus a lead hazard information pamphlet. 42 USC §4852d; 24 CFR §§35.80-35.98; 40 CFR §§745.100-745.119. See Real Property Sales §6.51. The failure of a seller or real estate agent to provide a copy of a known lead paint report is not excused by an oral disclosure that lead paint was present and a mention of the existence of a lead paint report. The scienter standard for imposing civil liability for knowingly violating the report requirement does not require a showing of bad faith or willfulness. "Knowingly," as commonly used and interpreted, means that the defendant was aware of his or her conduct and that defendant did not disclose. This is true even if the failure to perform was the result of ignorance, mistake, or accident. Note: Plaintiffs in these actions are entitled to treble damages. *Smith v Coldwell Banker Real Estate Servs.* (D Conn 2000) 122 F Supp 2d 267.
- Whether the residence complies with carbon monoxide detector requirements (effective July 1, 2011). CC §§1102.6, 1102.6d; Health & S C §17926.
- Whether the property includes plumbing fixtures that do not meet water conservation standards for single-family residential property (effective January 1, 2017) and multifamily residential and commercial property (effective

January 1, 2019). CC §§1101.4(c), 1101.5(e), 1102.155.

WARNING: The above list is not exhaustive. For further discussion of sellers' duties to disclose, see Real Property Sales §§6.34-6.70; Handling Real Property Sales Transactions, steps 5-8 (Cal CEB Action Guide March 2009). On litigating actions for property damage or personal injury resulting from the undisclosed presence of mold, see Mold Litigation.

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Source: Real Property/California Real Property Remedies and Damages/3 Damages for Fraud and Nondisclosure/ 2. Duties Associated With Brokers/§3.32 a. Duty to Visually Inspect and Disclose

2. Duties Associated With Brokers

§3.32 a. Duty to Visually Inspect and Disclose

A real estate broker or salesperson has a duty to a prospective purchaser of residential real property comprising one to four dwelling units, or a manufactured home, to conduct a reasonably competent and diligent visual inspection of the property offered for sale and to disclose to the prospective purchaser all facts materially affecting the value or desirability of the property. CC §2079; *Furla v Jon Douglas Co.* (1998) 65 CA4th 1069, 76 CR2d 911. The broker typically satisfies these duties by conducting a visual inspection, completing a portion of the disclosure form prescribed by CC §1102.6 (see §3.30), and making sure it is delivered to the buyer or the buyer's broker. These duties apply exclusively to prospective purchasers. Only the ultimate purchaser can recover from a broker or agent for a breach of these duties. *Coldwell Banker Residential Brokerage Co. v Superior Court* (2004) 117 CA4th 158, 165, 11 CR3d 564. The inspection and disclosure duties do not apply to brokers selling properties with a principally commercial use. *Smith v Rickard* (1988) 205 CA3d 1354, 254 CR 633.

The provisions in CC §2079 codify the common law and are intended to clarify the scope of the broker's duty and the standard of care recognized in *Easton v Strassburger* (1984) 152 CA3d 90, 199 CR 383. CC §2079.12. However, they do not preempt common law causes of action that may be asserted against brokers for nondisclosure or other torts committed in their agency or fiduciary capacities. See CC §2079.24. A licensee's disclosure duties as a fiduciary may require disclosure of all known information, regardless of how it is obtained. See *Michel v Moore & Assocs., Inc.* (2007) 156 CA4th 756, 763, 67 CR3d 797 (fiduciary duty owed by brokers to their own client is substantially more extensive than nonfiduciary duty in CC §2079). See also §§3.21-3.28.

The disclosure duty places brokers and agents (real estate licensees) at risk of fraud-based claims for damages and disciplinary action for a violation of the statute. Bus & P C §§10176-10177. A licensee fulfills that duty by visually inspecting the property and disclosing any material facts about it learned during the inspection. *Assilzadeh v California Fed. Bank* (2000) 82 CA4th 399, 412, 98 CR2d 176 (no breach of duty in failing to disclose load-bearing defects in high-rise condominium after disclosure to buyers of settled litigation; statutory duty to disclose limited because property acquired through foreclosure); *Padgett v Phariss* (1997) 54 CA4th 1270, 1283, 63 CR2d 373 (no breach of duty in failing to find common area defects or pending litigation); *Wilson v Century 21 Great W. Realty* (1993) 15 CA4th 298, 308, 18 CR2d 779 (no breach of duty in failing to discover defects not apparent from visual inspection). The measure of damages for a violation of the broker's disclosure duties is not specified in CC §§2079-2079.24.

Although the residential disclosure law requires a visual inspection of the property (CC §2079(a)), the inspection need not include (CC §2079.3):

- Reasonably and normally inaccessible areas,
- An affirmative inspection of off-site areas,
- Public records or permits regarding title or use of the property, or
- More than the unit offered for sale (if it is part of a planned unit development, condominium, or stock cooperative), as long as the seller or broker complies with CC §1368 on unit alterations and modifications.

PRACTICE TIP: Although CC §§2079-2079.12 appear to absolve the real estate professional of any duty to check public records on zoning, building permits, or code violations, a broker or agent with knowledge of a material fact in these areas (that may affect the value or desirability of the property) would be well advised to suggest that the client, whether buyer or seller, conduct a reasonable investigation—particularly in light of the fact that CC §2079.5 provides that a buyer with knowledge of material facts is not relieved of the duty of self-protection.

Civil Code §2079.5 provides that the inspection and disclosure duties do not neutralize a buyer's duty to also exercise reasonable care. After the sellers and their agent make the required disclosures, the potential purchasers must investigate and then make an informed decision. *Assilzadeh v California Fed. Bank* (2000) 82 CA4th 399, 413, 98 CR2d 176. See *Robinson v Grossman* (1997) 57 CA4th 634, 644, 67 CR2d 380.

PRACTICE TIP: The duties in CC §§2079 and 2079.5 are not countervailing, they are corresponding duties with the same objective in mind: to encourage both brokers and buyers to conduct a visual inspection of property in order to discover conditions that may affect the value or desirability of the property. If both duties are fulfilled and the property proves to have something wrong with it, it is the buyer's problem. If either duty is breached, the consequences fall on the party who breached its duties. If both duties are breached, an issue of fact is created as to which breach was the greater cause of the problem.

Real estate professionals may be able to seek equitable indemnity in nondisclosure actions from home inspection companies under certain circumstances. *Leko v Cornerstone Bldg. Inspection Serv.* (2001) 86 CA4th 1109, 103 CR2d 858; see §3.15.

For further discussion of a broker's statutory duties to disclose, see California Real Estate Brokers: Law and Litigation, chaps 3-4 (Cal CEB 2009); California Real Property Sales Transactions §§2.127-2.141, 6.34-6.70 (4th ed Cal CEB 2007); Handling Real Property Sales Transactions, steps 4-8 (Cal CEB Action Guide March 2009).

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b. Duties to Disclose and Confirm Agency Relationship

§3.32A 1. Nature of Agency Relationship

The seller/broker relationship is almost always created by a written listing or commission agreement; a written contract for a commission is legally required under CC §1624(a)(4). The buyer/broker relationship can also be created by a written agreement, but it is less common in practice because the seller pays the commission in most situations. Absent a written agreement, an agency relationship can be created by the following, all of which are factually complex:

- Express or implied agreement of the parties;
- Ratification of previously unauthorized acts of the agent; or
- Estoppel (or ostensible agency).

California has codified these common law agency principles. CC §§2295-2400. For further discussion, including the interplay of agency and contract law, see California Real Estate Brokers: Law and Litigation, chaps 2-3 (Cal CEB 2009); California Real Property Sales Transactions §§2.26-2.30 (4th ed Cal CEB 2007).

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§3.32B 2. Agency Roles and Terminology

Although in some transactions, one broker (listing broker) represents only the seller, and another broker represents only the buyer, other permutations exist. Complicated arrangements may be established in writing by the buyer's and seller's acceptance of the brokers' agency elections. A common practice is for a listing brokerage office to disclose and operate as a dual agent, representing both seller and buyer, but two different salespersons in that broker's office will each interact with the seller or buyer, potentially creating an illusion of separate agency.

The listing agent may elect to be the seller's agent exclusively or a dual agent. If an agent is both the listing and the selling agent and elects to be the seller's agent only, and furnishes services to the buyer on behalf of the seller, the buyer is effectively unrepresented in the transaction.

The agent who procures the buyer (selling agent) may elect to be (a) a dual agent, (b) the seller's agent exclusively, or (c) the buyer's agent exclusively (unless also acting as the listing agent). A selling agent who does not also represent the seller may be known as the cooperating agent, or sometimes simply as the buyer's agent.

An agent who both lists and sells the property is prohibited from representing the buyer only. CC §2079.18. As a consequence, no salesperson in the listing broker's office can purport to represent the buyer exclusively. An agency relationship exists between the seller and the broker (not the salesperson) from the time the listing is signed, and that relationship cannot later be abrogated.

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§3.32C 3. Dual Agency

Dual agency, in which the same broker represents both buyer and seller, is fairly common in residential sales because listing agents frequently sell their own listings. Dual agency also arises when two different sales agents working under the same broker represent the parties, whether or not the two agents are in the same office of their common broker (because the agency relationship is deemed to exist at the broker level). CC §2079.13(d). Other situations can create the unintended dual agency. See California Real Estate Brokers: Law and Litigation §§3.26-3.28 (Cal CEB 2009); California Real Property Sales Transactions §2.38 (4th ed Cal CEB 2007). The Commissioner of the Department of Real Estate may discipline agents who fail to disclose their dual agency to the parties in a transaction. Bus & P C §10176(d). See RE Brokers, chap 9. Even though general agency principles require the disclosure of dual agency in both commercial and residential transactions, no statute requires a written disclosure in a commercial transaction. See §3.32E.

PRACTICE TIP: Although it has some advantages, a dual agency arrangement is risky because it means the agent has a fiduciary duty to both buyer and seller and could become embroiled in a conflict of interest. See, *e.g., Strebel v Brenlar Invs., Inc.* (2006) 135 CA4th 740, 37 CR3d 699; RE Brokers §§3.22-3.25 (Cal CEB 2009); Real Property Sales §§2.35, 2.38, 2.130, 2.155-2.158.

For general discussion of broker liability, see California Real Estate Brokers: Law and Litigation, chaps 3-4, 11 (Cal CEB 2009); Real Property Sales §§2.124-2.183.

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§3.32D 4. Changing Agency Relationships

Agency elections can be changed if they are made before the agency services are performed. For example, an agent may elect to act as the buyer's exclusive agent when making an offer on property listed with another agent. If the offer is rejected and the buyer chooses to make an offer on one of the agent's own listings, the agency election must be changed to dual agency and disclosed to both principals, because an agent cannot be the buyer's agent exclusively when the broker is also the listing agent. CC §2079.18.

If the agent fails to properly confirm that the agency election has changed, the seller and buyer may each assume the agent is still acting on his or her behalf alone when, in fact, the agent has become a dual agent. The subtleties of the agency change may be totally lost if the principals are focused on the monetary terms of the transaction. For further discussion, including the effect on agency relationships of using the Multiple Listing Service, see California Real Property Sales Transactions §§2.33-2.41, 2.130, 2.156 (4th ed Cal CEB 2007).

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§3.32E 5. Residential Agency Disclosure and Confirmation Requirements

Real estate agents participating in sales transactions (including leases for more than 1 year) involving residential property containing one to four dwelling units or mobile homes must provide written disclosures to both the buyer and the seller on the available agency relationships. CC §§2079.13-2079.24. Delivery of the completed form required by CC §2079.16 must be made by:

- The listing agent to the seller before (or when) entering into the listing agreement (CC §2079.14(a));
- The selling agent to the seller as soon as practicable before (or when) presenting an offer, unless the selling agent is a dual agent and already has delivered the form under subdivision (a) (thus, sellers generally receive a copy of this form twice, even when the listing agent and selling agent are with the same brokerage) (CC §2079.14(b)); and
- The selling agent to the buyer as soon as practicable before (or at the time of) execution of the buyer's offer (CC §2079.14(d)).

The disclosure form merely describes the possible types of agency relationships that may be chosen. It does not disclose the particular type of agency relationship that, in fact, will exist. Disclosure of the actual type of agency relationship (*i.e.,* confirmation of that agency relationship) is made in a separate form prescribed by CC §2079.17. This confirmation form must be given to the buyer and the seller as soon as practicable, although the statute suggests that the confirmation is normally not made until an offer is presented to the seller (and often is contained in the offer itself). CC §2079.17(a)-(b). Thus, the disclosure form describing the various types of agency relationships may be given to buyers and sellers before the forms confirming the actual relationship; but they are usually delivered simultaneously.

NOTE: If the agent fails to properly confirm that the agency election has changed (see §3.32D), the seller and buyer may each assume the agent is still acting on his or her behalf alone when, in fact, the agent has become a dual agent or has otherwise changed the relationship.

For full discussion and sample forms, see California Real Property Sales Transactions §§2.31-2.37 (4th ed Cal CEB 2007). See also California Real Estate Brokers: Law and Litigation §§3.8-3.23 (Cal CEB 2009).

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§3.32F 6. Failure to Disclose or Confirm Agency Relationship

When a real estate agent does not properly disclose or confirm agency status, the disclosure statutes provide no relief. But common law actions for breach of fiduciary duty or other torts may apply, depending on the effect on the transaction. In *Huijers v DeMarrais* (1992) 11 CA4th 676, 14 CR2d 232, *e.g.,* a dual agent (who represented the buyer before approaching the sellers) failed to give the required disclosure when the listing was obtained. This omission enabled the sellers to declare the listing agreement void, thus relieving them from their obligation to pay the commission. The broker did make proper agency disclosures when the purchase contract was executed, and so the sellers were not relieved of their obligations to the buyers under that agreement. A party also may submit a written verified complaint to the Commissioner of the Department of Real Estate, who may discipline an agent who acted as an undisclosed dual agent. Bus & P C §10176(d). See California Real Estate Brokers: Law and Litigation, chap 9 (Cal CEB 2009).

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§3.33 c. Additional Disclosure Duties

Apart from the physical inspection and agency disclosure duties (see §§3.32-3.32F), other statutory duties require brokers to disclose the following:

- Seismic and geologic hazards, in general, unless the Seismic Safety Commission's Homeowner's Guide to Earthquake Safety is made available to prospective purchasers. CC §§2079.8-2079.9, 2079.11.
- Common environmental hazards that can affect real property, as described in a specified consumer information booklet. CC §2079.7.
- Availability of public access to data banks for the location and identification of persons who are required to register as sex offenders. CC §2079.10a (applicable to written agreements and contracts entered into after July 1, 1999).
- Any anticipated compensation, commission, or profit under an agreement authorizing or employing the broker to do any acts for which a license is required. Bus & P C §10176(g). A broker who violates this statute is liable to the principal in the amount of the undisclosed benefit. *Roberts v Lomanto* (2003) 112 CA4th 1553, 5 CR3d 866.
- That the sales agent undertakes to arrange financing or the arranger of financing will act as an agent. Bus & P C §10177.6.

Disclosure of an occupant's death occurring on the property, or the manner of that death, is not required if the death was more than 3 years before the offer to purchase, lease, or rent the real property. CC §1710.2(a). An owner, or his or her agent, who is asked directly about deaths, however, may not intentionally misrepresent whether deaths occurred. CC §1710.2(d). Civil Code §1710.2(a) also provides that it is unnecessary to disclose that an occupant was afflicted with or died from the HTLV-III (AIDS) virus, regardless of the date of death. The occurrence of a murder must be disclosed if it affects the value of the property. *Reed v King* (1983) 145 CA3d 261, 193 CR 130.

For further discussion of a broker's duties and liabilities, see California Real Property Sales Transactions §§2.127-2.141 (4th ed Cal CEB 2007); California Real Estate Brokers: Law and Litigation, chaps 3-4, 11 (Cal CEB 2009).

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§3.33A 3. Duties Associated With Nonresidential Sellers

Although sellers of nonresidential property are not required to prepare and sign the statutory transfer disclosure statements that apply to residential sales (see §3.30), they have numerous disclosure obligations that are mandated by statutes and the common law. See California Real Property Sales Transactions §§4.49, 4.77-4.82 (4th ed Cal CEB 2007); Handling Real Property Sales Transactions, steps 5-7 (Cal CEB Action Guide March 2009). Some nonresidential disclosure obligations are contractual; *i.e.*, they arise directly from the negotiated purchase and sale agreement. See Real Property Sales, chap 4.

NOTE: Effective January 1, 2019, sellers of nonresidential property must disclose whether the property includes plumbing fixtures that do not meet water conservation standards. CC §1101.5(e). Excluded properties are listed in CC §1101.7.

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§3.33B 4. Duties Associated With Lenders

Lenders in real property purchases are governed by many state and federal statutes and regulations. Among them are disclosure obligations and "equal credit opportunity" protections associated with secured lending (see, *e.g.,* 15 USC §§1601-1693r; 12 CFR pt 226) and prohibitions against predatory lending (see, *e.g.,* Fin C §4970-4979.8). Mortgage Loan Originators have their own licensing, regulatory, and disclosure duties. See Bus & P C §§10140.6(b)(1), 10151(e), 10166.01-10166.17. Brokers and agents may be subject to discipline if they violate state mortgage statutes. Bus & P C §10177(q). A full discussion of such laws is beyond the scope of this chapter. For comprehensive discussion of lender and broker liability, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 7 (borrower strategies before and during foreclosure), 10 (lender liability in context of loan workout), 12 (lender liability in making and administering loan and in foreclosure process) (4th ed Cal CEB 2009).

For discussion of lender liability for statutory and common-law fraud, see §3.74.

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§3.34 5. Duties Regarding "Arrangers of Credit"

Civil Code §§2956-2967 require that specified written disclosures be made to both the buyer and the seller regarding financing provided through an "arranger of credit" by the seller of a one-to-four-unit dwelling. The required disclosures, which are listed in CC §2963(a)-(p), must be given to the buyer by both the arranger of credit and the seller (regarding information within the seller's knowledge), and to the seller by both the arranger of credit and the buyer (regarding information within the buyer's knowledge). CC §2956.

For a form containing the required disclosures, see California Real Property Sales Transactions §9.13 (4th ed Cal CEB 2007).

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§3.35 6. Violation of Other Statutes and Regulations

In addition to the statutory duties discussed in §§3.32-3.34, Evid C §669(a) provides that a defendant's failure to exercise due care is presumed when the plaintiff proves that the defendant violated a statute, ordinance, or regulation. For further discussion, see California Tort Guide, chap 1 (3d ed Cal CEB 1996). The statutes and regulations pertaining to brokers (Bus & P C §§10000-10580) and Title 10 of the California Code of Regulations, Chapter 6 (10 Cal Code Regs §§2705-2781, 2830.1-2972) provide numerous grounds to seek an award of damages based on a violation of those laws. A violation may also subject the broker to disciplinary action. See, *e.g.,* Bus & P C §§10026, 10085.6, 10087, 10147.6, 10176-10177.4. For expanded discussion, see California Real Estate Brokers: Law and Litigation, chaps 9, 11 (Cal CEB 2009); California Real Property Sales Transactions, chap 2 (4th ed Cal CEB 2007). The statutes and regulations regulating brokers can be found on the Internet at http://www.leginfo.ca.gov/calaw.html and http://www.calregs.com.

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§3.36 IV. ELEMENTS OF FRAUD

The elements of fraud that support a tort action for deceit are the following (*Lazar v Superior Court* (1996) 12 C4th 631, 638, 49 CR2d 377; *County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 329, 40 CR3d 313; *City of Atascadero v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 CA4th 445, 481, 80 CR2d 329):

- Misrepresentation (*e.g.*, false representation, concealment, or nondisclosure) (see §§3.11-3.20);
- Knowledge of falsity (or "scienter") (see §§3.11-3.20);
- Intent to defraud, *i.e.*, to induce reliance (see §3.37);
- Justifiable reliance (see §§3.38-3.39); and
- Resulting damage (see §3.44).

To establish liability for fraud it is not essential that the person charged have received any advantage from the fraud. 68 CA4th at 482.

In many instances, the facts establishing fraud qualify as two or more types of fraud. For example, if a party affirmatively represents that fact A is true, but it is not, and conceals fact B, which may be either the opposite of fact A or a fact that is different from fact A, the seller is guilty of misrepresentation and concealment. Thus, if a seller represents that Blackacre was once contaminated but that the contamination was removed, and knows instead that the contamination was either not removed or not completely removed, the representation is a misrepresentation and the withheld information—the "opposite" of the misrepresentation—is a concealment.

PRACTICE TIP: Because of the requirements of pleading and proving specific facts in fraud cases, it is prudent to either (1) allege each instance of fraud involved in a real property dispute as a separate cause of action or (2) group all affirmative misrepresentations in one cause of action, all concealed facts in a second cause of action, and all false promises in a third cause of action. See California Civil Procedure Before Trial §15.23 (4th ed Cal CEB 2004).

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§3.37 A. Intent

Fraud is an intentional tort; it is the element of fraudulent intent, or intent to deceive, that distinguishes it from negligent misrepresentation and from nonactionable innocent misrepresentation. *City of Atascadero v Merrill Lynch, Pierce, Fenner & Smith, Inc.* (1998) 68 CA4th 445, 482, 80 CR2d 329. The statutes use terminology that is generally easy to satisfy from the standpoint of pleading the misrepresentation. A "suggestion, as a fact" that information is true when it is in fact untrue (CC §§1572(1), 1710(1)) or the "positive assertion" (CC §1572(2)) or the "assertion" of facts as being true that are untrue (CC §1710(2)), therefore constitute actionable fraud.

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§3.38 B. Reliance

Reliance is not mentioned in CC §§1572-1573 or §§1709-1710. Yet it is essential that it be alleged and proved in a fraud cause of action. *Mirkin v Wasserman* (1993) 5 C4th 1082, 1089 n2, 23 CR2d 101; see *Gawara v U.S. Brass Corp.* (1998) 63 CA4th 1341, 74 CR2d 663. Reliance is a required element in actions for intentional misrepresentation, negligent misrepresentation, nondisclosure, and constructive fraud, and it must be clearly alleged in the complaint. *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1239 n4, 44 CR2d 352 (court also indicated rebuttable presumption of reliance exists in constructive, *i.e.*, fiduciary, fraud; see §3.26).

The supreme court clarified the allegations and proof required for the element of reliance in *Engalla v Permanente Med. Group, Inc.* (1997) 15 C4th 951, 64 CR2d 843. Actual reliance occurs when a fraudulent misrepresentation is an immediate cause of a plaintiff's conduct, which then alters his legal relationships, and when, absent such representation, the plaintiff would not, in all reasonable probability, have entered into the contract or other transaction. It is not necessary that reliance on the truth of the misrepresentation be the sole or even the predominant or decisive factor in plaintiff's decision. It is enough that the representation played a substantial part and thus was a substantial factor in influencing the decision. 15 C4th at 976.

Reliance is often established in rescission cases by testimony from the plaintiff that it would not have entered into the contract had it known the true facts underlying the fraud. See, *e.g., Feckenscher v Gamble* (1938) 12 C2d 482, 492, 85 P2d 885; *Wood v Kalbaugh* (1974) 39 CA3d 926, 930, 114 CR 673. These cases express the underlying idea that consent (*i.e.*, the reliance on the fraud) was neither free nor real, thus warranting cancellation of the contract. The same (*i.e.*, that the contract would not have been entered into) is not usually said of actions for fraud damages, because a plaintiff affirms the contract in such an action, suggesting that it is inconsistent that the plaintiff would not have entered into a contract. Some cases have blurred the distinction, suggesting that the same evidence is present in fraud damage actions. *Manson v Reed* (1986) 186 CA3d 1493, 1505, 231 CR 446; *Williams v Meyers* (1930) 110 CA 265, 283, 294 P 61; *Craig v Shea* (1919) 45 CA 351, 355, 188 P 73 (no testimony of reliance).

The supreme court hinted at the difference in *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1239, 44 CR2d 352, when it stated that reliance exists when the misrepresentation or nondisclosure was an immediate cause of the plaintiff's conduct, which altered his or her legal relations, and when without such misrepresentation or nondisclosure he or she would not, in all reasonable probability, have entered into the contract or transaction.

PRACTICE TIP: It is unhelpful in fraud damage cases to link reliance exclusively to the expression of whether that party would have entered into the transaction, because some parties would still have wanted to consummate a transaction even had they known the truth, albeit at a different price. Thus, plaintiffs should cautiously link their reliance allegations to the fraud in question and illustrate why, for instance, the plaintiff would not have paid the price agreed on or consented to another part of the transaction. Defendants should examine the plaintiff's allegations for inconsistent allegations about suing for fraud damages and making statements that they would not have entered into the contract.

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§3.39 1. Justifiable Reliance

"No rogue should enjoy his ill-gotten plunder for the simple reason that his victim is by chance a fool." *Seeger v Odell* (1941) 18 C2d 409, 415, 115 P2d 977. If the plaintiff's conduct in the light of his or her own intelligence and information is manifestly unreasonable, however, he or she will be denied a recovery. *Seeger v Odell, supra*. Thus, reliance must be justified. The plaintiff may not put faith in representations that are preposterous or that are shown by facts within his or her observation to be so patently and obviously false that he or she must have deliberately avoided discovering the truth. *Seeger v Odell, supra*. On defrauded party's duty to investigate after being put on inquiry notice, see §3.40.

In real property fraud cases, the justifiability of the defrauded party's reliance might arguably be better explained by the law's contempt for fraud rather than the justifiability of one's reliance. This argument implies that justifiability is not a bright line but rather a flexible concept. The range of education, experience, resources, and intellect contemplated by such rules suggests that where one fits within that spectrum may affect the outcome of a fraud claim. Persons at both ends of that spectrum are more susceptible to losing a fraud claim. The test of the representation is its actual effect on the particular mind, whether it is a strong and circumspect mind, or one weak and too relying. *Feckenscher v Gamble* (1938) 12 C2d 482, 496, 85 P2d 885. See also *Elkind v Woodward* (1957) 152 CA2d 170, 176, 313 P2d 66 (unlikely that experienced businessman relied on representations).

Whether reliance is justified is a question for the ultimate trier of fact; the issue is whether the person who claims reliance was justified in believing the representation in the light of his or her own knowledge and experience, except for fiduciary fraud. *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1247, 44 CR2d 352; *Gray v Don Miller & Assocs., Inc.* (1984) 35 C3d 498, 503, 198 CR 551. As a corollary, justifiable reliance is not measured by the standard of precaution or of minimum knowledge of a hypothetical, reasonable man. *Seeger v Odell*, *supra*. If the fraud is intentional, the plaintiff's negligence is no defense, whereas the plaintiff's negligence is a factor under comparative fault rules if the fraud is a negligent misrepresentation. See *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1239, 44 CR2d 352; *Manderville v PCG&S Group, Inc.* (2007) 146 CA4th 1486, 55 CR3d 59 (buyers' failure to investigate zoning and other laws restricting property's development or use did not preclude their claim of justifiable reliance on broker's intentional misrepresentation that lot could be split). With fraud in the execution or inception cases, however, the fraud does not automatically void the contract if the defrauded party neglects to read the contract. *Rosenthal v Great W. Fin. Secs. Corp.* (1996) 14 C4th 394, 423, 58 CR2d 875.

Similarly, the plaintiff must plead and prove reasonable or justifiable reliance in nondisclosure actions. *Lingsch v Savage* (1963) 213 CA2d 729, 29 CR 201. Although constructive notice of the true facts contained in public records is no defense to fraud, the existence of information in public records may be relevant to whether the plaintiff's reliance was justifiable. See authorities cited and analyzed in *Alfaro v Community Hous. Improvement Sys. & Planning Ass'n, Inc.* (2009) 171 CA4th 1356, 89 CR3d 659 (claim for damages for nondisclosure of recorded deed restriction limiting homebuyers' equity).

On the standard in fiduciary fraud actions, which allow a presumption of reasonable reliance, see §3.26.

In some circumstances, plaintiff may also be able to assert a cause of action under Bus & P C §17200, informally referred to as the "unfair competition law" (UCL). This law prohibits wrongful business conduct in whatever context such activity might occur and imposes strict liability for violations. A claim under the UCL has a number of potential advantages. For example, to state a claim under this statute, it is not necessary to plead or prove all elements of a tort: A plaintiff need only show that members of the public are likely to be deceived. Allegation of actual deception is not necessary. *Committee on Children's Television, Inc. v General Foods Corp.* (1983) 35 C3d 197, 211, 197 CR 783, superseded by statute on other grounds as stated in *Gartin v S&M NuTec LLC* (CD CA 2007) 245 FRD 429, 437 n6.

However, the supreme court held that an amendment to the UCL by voter initiative requires a consumer suing a business under the fraud prong of the UCL to plead and prove actual reliance on the alleged misrepresentation, rather than a mere factual nexus between the business's conduct and the consumer's injury. See *In re Tobacco II Cases* (2009) 46 C4th 298, 326, 93 CR3d 559. Similarly, a court of appeal concluded that to have standing to bring a claim

under the unlawful prong of the UCL, in which the unlawful conduct is based on misrepresentations, the reasoning of *Tobacco II* applies, and actual reliance is an essential element of the claim. *Durrell v Sharp Healthcare* (2010) 183 CA4th 1350, 1363, ___ CR3d ___. Finally, under the UCL, damages must be alleged and proved; the plaintiff must have suffered injury in fact and lost money or property. See *Californians for Disability Rights v Mervyn's LLC* (2006) 39 C4th 223, 227, 46 CR3d 57.

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§3.40 2. Investigation

A plaintiff's inspection of the property or subsequent acquisition of information about a misrepresentation does not automatically defeat its fraud claims. *Bagdasarian v Gragnon* (1948) 31 C2d 744, 748, 192 P2d 935; *Feckenscher v Gamble* (1938) 12 C2d 482, 495, 85 P2d 885. An independent investigation or examination of property does not preclude reliance on representations if the falsity of the statement is not apparent from an inspection, if the person making the representations has superior knowledge, or if the party relying on them is not competent to judge the facts without expert assistance. *Bagdasarian v Gragnon, supra.* See also *Manderville v PCG&S Group, Inc.* (2007) 146 CA4th 1486, 55 CR3d 59; *County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 331, 40 CR3d 313; *Hartong v Partake, Inc.* (1968) 266 CA2d 942, 966, 72 CR 722.

In nondisclosure cases, however, a seller's failure to disclose the condition of the property's title in a grant deed or a purchase contract, unaccompanied by affirmative misrepresentations about title, does not excuse a reasonably prudent buyer from reading available documents that describe the title's condition. For example, a buyer who receives and reads a preliminary report of title that refers to a deed restriction has actual notice of its existence and is on inquiry notice of the nature of that restriction. See *Alfaro v Community Hous. Improvement Sys. & Planning Ass'n, Inc.* (2009) 171 CA4th 1356, 89 CR3d 659. In *Alfaro*, the purchased properties were all in essentially limited equity developments. The preliminary reports given to plaintiffs at the time of purchase referred to CC&Rs and deed restrictions of record but did not describe any limits on the sale prices of the properties or the ability of plaintiffs to encumber the properties for financing. Although the reports could not have satisfied the sellers' duty to disclose the deed restriction, the court stated they were relevant to whether plaintiffs justifiably relied on the sellers' nondisclosure of the deed restriction, a factual question. The court of appeal, after reviewing trial court orders on demurrers, allowed the plaintiffs to proceed to trial on their claims for damages but not to invalidate the deed restrictions, and stated the plaintiffs would be required to show that they were induced to perform by the sellers' nondisclosure.

Negative information received before the close of an escrow does not automatically preclude reliance on fraudulent representations. In one case, a bank appraiser told the purchaser that "it wasn't a very good ranch" and that he estimated the grape crop "to be around 275 tons" rather than the 600 tons represented by the seller. The court concluded that it could not say as a matter of law that such information precluded justifiable reliance on other representations. *Bagdasarian v Gragnon* (1948) 31 C2d 744, 749, 192 P2d 935. In another case, the buyer made some inquiries from persons living nearby and reported to the defendant what he had heard, some of which was unfavorable to the property. Despite such inquiries, the fact that a buyer makes an independent investigation does not preclude him or her from relying on the representations made by the seller if the seller has a superior knowledge. *Garrett v Perry* (1959) 53 C2d 178, 180, 346 P2d 758. See *Piazzini v Jessup* (1957) 153 CA2d 58, 60, 314 P2d 196 (fact that plaintiff visited property does not necessarily determine that they depended on their own observation in determining lot area). See also *Jue v Smiser* (1994) 23 CA4th 312, 317, 28 CR2d 242.

Despite these plaintiff-favorable expressions, if the quantity or quality of the investigation passes some point, a waiver of the fraud may occur. *Hartong v Partake, Inc.* (1968) 266 CA2d 942, 965, 72 CR 722 (plaintiff will be denied recovery only if his or her conduct is manifestly unreasonable in the light of his or her own intelligence or information); *Elkind v Woodward* (1957) 152 CA2d 170, 176, 313 P2d 66. Personal inspection is no defense if the conditions are not visible and are known only to the seller, and if material facts are accessible to the seller only and he or she knows them not to be in the reach of the diligent attention and observation of the buyer, the seller is obliged to disclose such facts to the buyer. *Rothstein v Janss Inv. Corp.* (1941) 45 CA2d 64, 68, 113 P2d 465.

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§3.41 C. Causation

The plaintiff's reliance on the fraud must result in compensable damage. If there is no causal link between the fraud, the reliance, and the damage, the action must fail. *Service by Medallion, Inc. v Clorox Co.* (1996) 44 CA4th 1807, 1818, 52 CR2d 650 (deception without resulting loss is not actionable fraud). Even though the plaintiff must show that the fraud was a substantial factor in causing the damage, it need not be the sole cause of damage. *Continental Airlines, Inc. v McDonnell Douglas Corp.* (1989) 216 CA3d 388, 425, 264 CR 779.

PRACTICE TIP: It weakens a plaintiff's action to allege damages that flow more directly from causes other than the alleged fraud. Defense attorneys should carefully examine and investigate the alleged damages to ascertain whether they are caused by factors other than the fraud. See *Gagne v Bertran* (1954) 43 C2d 481, 275 P2d 15, holding that additional damages in the form of construction costs for the foundation were not caused by defendant's misrepresentation but by the physical condition of the land. The court, however, stated that if on retrial the plaintiffs could prove that the property was worth less than what they paid for it because of its condition, the defendant would be liable for the difference because his misrepresentation had induced the purchase. 43 C2d at 490 n6.

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§3.42 D. Changed Circumstances

If previously accurate statements become false because of a change in circumstances, the seller or broker must disclose the new circumstances. *Southern Cal. Dist. Council, Assemblies of God v Shepherd of the Hills Evangelical Lutheran Church* (1978) 77 CA3d 951, 144 CR 46 (failure to advise buyer of termination of access easement after representing that access would be available). One who learns that his or her statements, even if thought to be true when made, have become false through a change in circumstances has the duty before his or her statements are acted on to disclose the new conditions to the party relying on the original representations. *Koch v Williams* (1961) 193 CA2d 537, 14 CR 429. The aggrieved party must plead and prove that the party making the prior representation concealed the changed circumstance to induce action or inaction on the part of the aggrieved party. *Blickman Turkus, LP v MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 76 CR3d 325 (ruled on demurrer that plaintiff could not plead or prove element of reliance because lease had already been signed when circumstances changed; distinguished *Koch* because effect of nondisclosure in *Koch* was to deprive buyer of opportunity to reject sale under changed conditions before execution of contract). The aggrieved party must show that its knowledge of the changed circumstance would have made a difference in the transaction. 162 CA4th at 881.

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E. Damages When Buyer Is Victim

§3.43 1. The Three Rules

Unfortunately, the names given to the two primary measures of damages in fraud-based cases are, in a sense, themselves misleading. The prevailing rule today is known as the "out-of-pocket" measure of damages (see §3.44) and another rule is known as the "benefit-of-the-bargain" measure of damages (see §3.57). *Bagdasarian v Gragnon* (1948) 31 C2d 744, 759, 192 P2d 935; *Channell v Anthony* (1976) 58 CA3d 290, 129 CR 704. The labels for these rules and the rules themselves suggest a wide range of applications. In some cases, the outcome from the measure for breach of contract damages and for fraud damages is the same. See, *e.g., Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co.* (1977) 66 CA3d 101, 141, 135 CR 802.

Until 1935, California followed the benefit-of-the-bargain rule. *Jacobs v Levin* (1943) 58 CA2d Supp 913, 915, 137 P2d 500. It was viewed as the "extreme rule" and was only to be applied in clear cases and on just terms. In 1935, however, the legislature changed the landscape by enacting CC §3343, which adopted the out-of-pocket measure of damages followed in England and by the federal courts. 58 CA2d Supp at 916. The rationale underlying the formula was repeated by the *Jacobs* court, citing a prior federal case as follows: "A person is not cheated when that which he gets is worth all that he pays for it, which is also common sense." 58 CA2d Supp at 916. (Note that the benefit-of-the-bargain rule applies in personal property cases because of the effect of Com C §2721. *Continental Airlines, Inc. v McDonnell Douglas Corp.* (1989) 216 CA3d 388, 430, 264 CR 779.)

Finally, a third rule, CC §1709, provides that a defendant who willfully deceives the plaintiff, with an intent to induce the plaintiff to alter his position to his injury or risk, is liable for any damages the plaintiff suffers. Although §1709 looks like a measure of damages statute, in real property fraud cases not involving fiduciary or confidential relations, CC §3343 generally applies. See authorities discussed in *Strebel v Brenlar Invs., Inc.* (2006) 135 CA4th 740, 747, 37 CR3d 699; *Overgaard v Johnson* (1977) 68 CA3d 821, 137 CR 412; §3.44.

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§3.44 2. Measure of Damages Compared

Civil Code §3343 applies to real property fraud claims that do not concern the fraud of a fiduciary or its agent. *Stout v Turney* (1978) 22 C3d 718, 725, 150 CR 637; *Bagdasarian v Gragnon* (1948) 31 C2d 744, 759, 192 P2d 935. It also applies to actions for breach of statutory disclosure duties under CC §§1102-1102.17. *Saunders v Taylor* (1996) 42 CA4th 1538, 50 CR2d 395. The basic measure of damages, referred to as an "out-of-pocket" standard, is described in CC §3343(a) as follows: One defrauded in the purchase, sale, or exchange of property is entitled to recover the difference between the actual value of that with which the defrauded person parted and the actual value of that which was received.

EXAMPLE: If the value of the property at the time of the transaction was $100,000 because of the effect of the fraud on its value, but the buyer paid $125,000, the buyer's damages are $25,000 because the buyer paid that much more than the property's value. *Cory v Villa Props.* (1986) 180 CA3d 592, 600, 225 CR 628. If the value of property (measured on the sale date) was greater than or equal to the price paid by the buyer, the buyer suffered no general damages under CC §3343(a), although there may be other damages the buyer may recover. See 180 CA3d at 601.

The plaintiff may recover damages even if the property is foreclosed on. *Ford v Cournale* (1973) 36 CA3d 172, 183, 111 CR 334; *Burkhouse v Phillips* (1971) 18 CA3d 661, 665, 96 CR 197. In that event, the plaintiff is entitled to recover its down payment and the installment payments made before the foreclosure. *Burkhouse v Phillips*, *supra*. The property's actual value should not be reduced by a collateral source receipt, such as raising the rent to cover the cost of repairing the misrepresented condition. *Philip Chang & Sons Assocs. v La Casa Novato* (1986) 177 CA3d 159, 165, 222 CR 800.

NOTE: The supreme court held that CC §3343 does not require the plaintiff to show "out-of-pocket" loss to recover consequential or additional damages. See *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1241 n5, 44 CR2d 352; §3.48.

In contrast, under the benefit-of-the-bargain measure of damages, a plaintiff is entitled to recover the difference between the actual value of what the defrauded plaintiff received and the value that it would have been received if the property had been as represented. *Bagdasarian v Gragnon* (1948) 31 C2d 744, 760, 192 P2d 935. The words "as represented" are problematic.

EXAMPLE: If the actual value of the property was $100 and its value as represented was $4000, the plaintiff's damages would be $3900, regardless of the selling price. To that measure, a plaintiff may likewise show and recover the depreciation in the value of the improvements that the plaintiff may have placed on the property—a depreciation resulting from the fact that the actual value was not the represented value. The plaintiff may also recover for any other legitimate expenditures. *Hines v Brode* (1914) 168 C 507, 510, 143 P 729. This approach to measuring damages enabled plaintiffs in *Hines* to prove fraud claims through expert testimony and essentially recover the benefit of the bargain.

Despite the passage of CC §3343 (see §3.43), the California Supreme Court held that, when the party guilty of a misrepresentation provides a service, such as a property soils test for the buyer (ancillary to a purchase), the measure of damages, whether for deceit or negligence, must be measured under CC §§1709 and 3333 by the actual losses resulting from the misrepresentation. *Gagne v Bertran* (1954) 43 C2d 481, 490, 275 P2d 15 (despite statutory language, construed §§1709 and 3333 as out-of-pocket standard similar to §3343 and allowed additional consequential damages if proved on remand). The supreme court later suggested in dictum that §§1709 and 3333 read together are the equivalent of benefit-of-the-bargain damages when applied in fiduciary fraud actions. *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1241, 1250, 44 CR2d 352. See §3.57. See also Caron, *Measure of Damages for Liability in Real Estate Sales*, 23 Cal Real Prop J 13 (Summer 2005).

Real property transactions often involve equipment that may not constitute fixtures. With respect to items that are

properly classified as personal property rather than as a fixture, a different measure of damages may apply. It is appropriate to make a deduction for some kinds of personal property. See Com C §2721; *Unger v Campau* (1956) 142 CA2d 722, 728, 298 P2d 891.

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3. Actual Value Means Market Value

§3.45 a. Proving Market Value

Actual value, as used in CC §3343, generally means the market value of the property. *Bagdasarian v Gragnon* (1948) 31 C2d 744, 752, 192 P2d 935; *Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co.* (1977) 66 CA3d 101, 141, 135 CR 802. The market value is usually calculated as of the date of sale, and if the appraisal is made later, an adjustment should be made for repairs and improvements subsequently made by the buyer. *Graf v Sumpter* (1962) 207 CA2d 391, 393, 24 CR 590; *Unger v Campau* (1956) 142 CA2d 722, 727, 298 P2d 891. But see *Housley v City of Poway* (1993) 20 CA4th 801, 812, 24 CR2d 554. The *measurement* of damages and the *methods* used to arrive at the measurement are related but distinct matters. As a rule, §3343 prescribes the measure of damages while the Evidence Code and related case law prescribe the methods to use in arriving at that measurement.

The actual value the defrauded party received and parted with is determined as of the date the fraud occurred, which is usually the date of sale. *McCue v Bruce Enters., Inc.* (1964) 228 CA2d 21, 39 CR 125. Under this rule, a defrauded party may not be entitled to any recovery if the property was worth the price paid at the time of sale. In one case, buyers of property alleged that they were defrauded when the sellers misrepresented the property's acreage. However, because the value of the property exceeded the purchase price, the trial court granted summary judgment in the sellers' favor. The appellate court reversed, holding that, even though there was no out-of-pocket loss, §3343 allows the buyers to prove "additional damages." It therefore remanded the case for a trial on that issue. *Cory v Villa Props.* (1986) 180 CA3d 592, 225 CR 628.

Despite the rule that damages are to be calculated as of the date of the fraud, the statute contains nothing to show that the difference must be calculated solely on the basis of facts existing at the time the contract was made or performed. *Garrett v Perry* (1959) 53 C2d 178, 184, 346 P2d 758. Thus, subsequent circumstances, like payments on notes to the seller and foreclosure, have evidentiary value toward determining actual value. *Garrett v Perry, supra*.

A plaintiff's recovery is not reduced if the defrauded buyer later resells the property at a profit. *Burkett v J. A. Thompson & Son* (1957) 150 CA2d 523, 310 P2d 56.

The cost of repairs caused by misrepresentations about the condition of the property is not an element of recoverable damages but may be introduced to show the actual value of the property. *Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co.* (1977) 66 CA3d 101, 148, 135 CR 802; *McNeill v Bredberg* (1961) 192 CA2d 458, 469, 13 CR 580; *Central Mut. Ins. Co. v Schmidt* (1957) 152 CA2d 671, 313 P2d 132. If evidence is introduced on the cost of repairs, the court's failure to give a jury instruction on the limits of fraud damages under CC §3343 is prejudicial error. *Housley v City of Poway* (1993) 20 CA4th 801, 812, 24 CR2d 554.

Some courts have permitted defrauded buyers to recover the entire purchase price paid, despite the out-of-pocket measure, because the misrepresented or undisclosed conditions effectively denied the buyers use of the property. *Garrett v Perry* (1959) 53 C2d 178, 184, 346 P2d 758 (foreclosure as result of misrepresented rental income from the property); *Buist v C. Dudley DeVelbiss Corp.* (1960) 182 CA2d 325, 6 CR 259 (property had no value because of landslide problem).

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§3.46 b. Use of Opinion Testimony

The market value of real property is normally established by the testimony of either the owner of the property or an expert witness. Evid C §813; *Southern Pac. Transp. Co. v Santa Fe Pac. Pipelines, Inc.* (1999) 74 CA4th 1232, 1246, 88 CR2d 777 (easement valuation); *Buist v C. Dudley DeVelbiss Corp.* (1960) 182 CA2d 325, 334, 6 CR 259) (appraisers); *Brady v Carman* (1960) 179 CA2d 63, 3 CR 612 (same). In addition to professional real estate appraisers, the courts have allowed the opinion testimony of various experts on the value of fraudulently sold property. *McCue v Bruce Enters., Inc.* (1964) 228 CA2d 21, 39 CR 125 (brokers); *Hardy v Carmichael* (1962) 207 CA2d 218, 24 CR 475 (building contractors); *Ashburn v Miller* (1958) 161 CA2d 71, 326 P2d 229 (brokers). On the potential effect of testimony about value that is not precisely calculated as of the sale date, see *Cory v Villa Props.* (1986) 180 CA3d 592, 601, 225 CR 628.

If an expert's opinion is based on inadmissible material, the opinion becomes unreliable. *People ex rel Dep't of Pub. Works v Dunn* (1956) 46 C2d 639, 641, 297 P2d 964 (when witness testimony on market value is based on improper considerations, it may be stricken); *Korsak v Atlas Hotels, Inc.* (1992) 2 CA4th 1516, 1526, 3 CR2d 833 (expert's failure to show any connection between his opinion and alleged data resulted in erroneous admission of expert's opinion, requiring reversal for new trial); *Redevelopment Agency v First Christian Church* (1983) 140 CA3d 690, 703, 189 CR 749 (lack of knowledge about an essential matter by otherwise highly qualified real estate appraiser rendered his opinion inadmissible). See also Evid C §822 (prescribing standards for inadmissibility based on improper bases for opinion).

PRACTICE TIP: Counsel who believe that the expert's opinion is based on improper considerations should file a motion in limine to exclude the testimony. Relevant portions of the expert's deposition and exhibits should be attached to counsel's declaration supporting the motion.

The buyer may testify regarding value, although not as an expert. *Buist v C. Dudley DeVelbiss Corp.* (1960) 182 CA2d 325, 6 CR 259. The buyer's opinion need not be as solidly grounded as that of an expert (*Sanders v Park Beverly Corp.* (1952) 109 CA2d 698, 241 P2d 597) and may be based on information about neighboring property values (*Koch v Williams* (1961) 193 CA2d 537, 14 CR 429). If the buyer fails to provide competent testimony on value, the action will fail. *Nece v Bennett* (1963) 212 CA2d 494, 497, 28 CR 117.

The general rule applicable to nonexperts is that their opinions are limited to such opinions as are permitted by law, including but not limited to an opinion that is (1) rationally based on the perception of the witness and (2) helpful to a clear understanding of his or her testimony. Evid C §800. The general rules on expert testimony are set forth in Evid C §801.

Special rules, however, apply to the valuation of real property. Under Evid C §813(a), The value of real property may be shown *only by* the opinions of (1) witnesses qualified to express such opinions, (2) the owner or the spouse of the owner, or (3) an officer, regular employee, or partner designated by the owner as long as that person is knowledgeable about the value of the property.

An owner as defined in Evid C §813(c) also means:

- A person entitled to possession of the property; and
- Either party in an action to decide ownership of the property when the court rules that it would not be in the interest of efficient administration of justice to decide the issue of ownership prior to the admission of the opinion of the party.

Thus, in an ordinary lawsuit for fraud damages unaccompanied by causes of action for rescission, specific performance or other causes of action that have ownership or possession as an issue to be resolved within the meaning of that section, the seller, as a former owner, appears to be disqualified as a person who can render an opinion about value, because the collective import of Evid C §813(a)(2) and (c) is that a former owner is not an owner. It is arguable, however, that if the seller is giving an opinion on the property's value during a time when the seller

owned it, such testimony should be permitted under Evid C §813, if it is relevant to the action. See *Marriage of Stoll* (1998) 63 CA4th 837, 74 CR2d 506.

Similarly, an unsuccessful buyer also seems to be disqualified as a person who can render an opinion about value because such a person never acquired the status of an owner. This is, of course, unless the seller as a former owner and an unsuccessful buyer do not otherwise qualify as experts and perhaps, if the circumstances warrant, the court allows the person to testify under Evid C §800 *or* Evid C §813(a)(1).

PRACTICE TIP: Even if a witness qualifies to testify about the value because of his or her status as an owner, it may be unwise to rely on his or her abilities to testify. The inability to explain the factors that a witness uses in forming an opinion and standing up to cross-examination may be as damaging as having no witness testify about value. Thus, the witness must be able to articulate in a manner that can be understood. See Evid C §701. The witness should also be able to state the reasons and the bases for the opinion. See Evid C §802.

Moreover, an opinion on the property's value must be based on matters perceived by or personally known to the witness or made known to the witness at or before the hearing, whether or not those matters are admissible, as long as they are the type that an expert may reasonably rely on in forming a value opinion. Evid C §814. Many cases are won and lost, or at least decided, on the disparity between the convincing quality of the reasons as articulated by the witnesses of why the property has one value instead of another. The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning used. *PG&E v Zuckerman* (1987) 189 CA3d 1113, 1135, 234 CR 630. Trial courts have a duty to independently examine the experts' reasoning. *Marriage of Micalizio* (1988) 199 CA3d 662, 673, 245 CR 673. Against the opinion of an experienced appraiser accustomed to testifying in court, the opinion of a party to the lawsuit may be overpowered solely by the convincing quality of the expert's reasoning.

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§3.47 c. Methods of Establishing Value

There are three recognized methods of establishing value for real property. *People ex rel Dep't of Water Resources v Andresen* (1987) 193 CA3d 1144, 1163, 238 CR 826 (rock quarry); *Redevelopment Agency v First Christian Church* (1983) 140 CA3d 690, 705, 189 CR 749 (church). The one used most often is the comparable sales approach. See Evid C §816. The other methods are the cost of reproduction and capitalization. *People ex rel Dep't of Water Resources v Andresen, supra*. See Evid C §819. Generally, the nature of the property in question governs the method that should be used to value it. 193 CA3d at 1164. See also *Barnes v Dobbins* (1958) 159 CA2d 737, 324 P2d 696; *Bice v Stevens* (1955) 136 CA2d 368, 289 P2d 95; *Oliver v Benton* (1949) 92 CA2d 853, 208 P2d 375. Finally, if no relevant, comparable market exists, the value of property may be established by any just and equitable method. Evid C §823.

Because any tract of land is considered unique, the question of admissibility of evidence of prices paid on other sales is most often considered in cases requiring valuation. The view of the majority of courts that admit this evidence, with safeguarding limits, seems preferable. These safeguards are that the sales of the other tracts must have occurred sufficiently near in time, must be located sufficiently near the land to be valued, and must be sufficiently alike in character, situation, usability, and improvements to make it clear that the two tracts are comparable in value and that the price of the other land may be considered. *County of Los Angeles v Faus* (1957) 48 C2d 672, 678, 312 P2d 680.

When the comparable sales method is used, the comparable sales should be close to the subject property in time of sale, location, and characteristics. *PG&E v Zuckerman* (1987) 189 CA3d 1113, 1129 n6, 234 CR 630 (the closer a property is in physical characteristics and time of sale, the more comparable it is to the subject transaction); *Oldenburg v Brody* (1956) 139 CA2d 543, 557, 293 P2d 844 (valuation should be determined at time of transaction). In one case, an expert was allowed to use a sale of a property that was to be sold 10 days *after* the witness testified at trial. *People ex rel Dep't of Pub. Works v Jarvis* (1969) 274 CA2d 217, 223, 79 CR 175. Another allowed an expert to use a sale of property in the same neighborhood 7 months after the sale date for valuation. See *County of Los Angeles v Hoe* (1955) 138 CA2d 74, 79, 291 P2d 98, disapproved on other grounds in *Merced Irrig. Dist. v Woolstenhulme* (1971) 4 C3d 478, 495, 93 CR 833.

No general rules exist regarding the degree of similarity required between the properties, or the nearness in respect of time and distance, because these are matters resting largely in the trial judge's discretion. The time element goes merely to the weight of the opinion. *PG&E v Zuckerman* (1987) 189 CA3d 1113, 1128, 1130, 234 CR 630 (court reversed valuation when expert compared single transaction occurring 24 years before). In some cases, there is insufficient data on which to draw appropriate comparisons. In other cases, data may exist but may require some adjustment. This common sense approach reflects the fact that things tend to cost more as time goes by. *City of Los Angeles v Retlaw Enters., Inc.* (1976) 16 C3d 473, 486, 128 CR 436 (rates of appreciation tend to show in logic and common sense that such rates affect similar properties). See also *Merced Irrig. Dist. v Woolstenhulme* (1971) 4 C3d 478, 495, 93 CR 833 (courts have accepted adjustment process as integral element of comparable sales approach).

It is axiomatic that appraisals cannot be based on the success of a tenant's business. It is settled that evidence of profits derived from a business conducted on the land is too speculative, uncertain, and remote to be considered as a basis for ascertaining market value. *PG&E v Zuckerman* (1987) 189 CA3d 1113, 1133, 234 CR 630. See *People ex rel Dep't of Pub. Works v Dunn* (1956) 46 C2d 639, 641, 297 P2d 964. It follows that the use of or reliance on such speculative evidence renders an opinion based on it unreliable itself. But see *Nece v Bennett* (1963) 212 CA2d 494, 497, 28 CR 117.

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§3.48 4. Additional Damages

Civil Code §3343 allows a plaintiff to recover any additional damage arising from the transaction, including the following:

- Amounts actually and reasonably expended in reliance on the fraud.
- An amount that would compensate the plaintiff for loss of use and enjoyment of the property to the extent that the fraud proximately caused that loss.
- When the plaintiff was induced through fraud to sell or part with the property in question, an amount that will compensate the plaintiff for profits or other gains that might reasonably have been earned by use of the property had he or she retained it.
- When the plaintiff was induced through fraud to acquire the property in question, an amount that will compensate the plaintiff for any loss of profits or other gains that were reasonably anticipated and would have been earned from the use or sale of the property had it possessed the characteristics fraudulently represented by the defendant. Lost profits, however, are recoverable only to the extent that all of the following apply:
- The plaintiff acquired the property for the purpose of using or reselling it for a profit.
- The plaintiff reasonably relied on the fraud in entering into the transaction and in anticipating profits from the subsequent use or sale of the property.
- Any loss of profits was proximately caused by the fraud and the plaintiff's reliance on it.

Nothing in CC §3343 shall either:

- Permit the plaintiff to recover any amount measured by the difference between the value of property as represented and its actual value; or
- Deny to anyone having a cause of action for fraud or deceit any legal or equitable remedies to which such person may be entitled.

The plaintiff need not show "out-of-pocket" losses to recover consequential or additional damages. See *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1241 n5, 44 CR2d 352, quoting *Stout v Turney* (1978) 22 C3d 718, 729, 150 CR 637. Civil Code §3343(a)(1) codifies previous decisions allowing expenditures in reliance on the fraud. *Stout v Turney* (1978) 22 C3d 718, 726, 150 CR 637 (actual expenditures of time and money in reliance on misrepresentation, including rental of suitable premises, and damage to other property); *Sixta v Ochsner* (1960) 187 CA2d 485, 490, 9 CR 617 (legal fees incurred in defense of plaintiff's action); *Lawson v Town & Country Shops, Inc.* (1958) 159 CA2d 196, 198, 205, 323 P2d 843 (shopping center operating losses, loss of personal services, and unpaid rents). Reliance damages are those incurred in reliance on the fraud and are recoverable only if the damages have a causal connection with the fraudulent misrepresentation or nondisclosure. *Gagne v Bertran* (1954) 43 C2d 481, 275 P2d 15; *Walters v Marler* (1978) 83 CA3d 1, 147 CR 655, disapproved on other grounds in *Gray v Don Miller & Assocs., Inc.* (1984) 35 C3d 498, 507, 198 CR 551.

Civil Code §3343(a)(2) codifies previous decisional law on loss of use and enjoyment of property. *Channell v Anthony* (1976) 58 CA3d 290, 315, 129 CR 704 (contract entitled seller to damages); *Williams v Graham* (1948) 83 CA2d 649, 653, 189 P2d 324 (recovery of deposit and amount required to rent other property). But see *Gray v Don Miller & Assocs., Inc.* (1984) 35 C3d 498, 504, 198 CR 551 (delay damages not recoverable if not caused by misrepresentation); *Eatwell v Beck* (1953) 41 C2d 128, 134, 257 P2d 643 (anticipated revenues not recoverable under §3343, but are "an element to be considered in determining the actual value of the property").

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§3.49 a. Labor

Actual expenditures of time and money are recoverable as additional damages if they were incurred in reliance on the fraud. *Stout v Turney* (1978) 22 C3d 718, 726, 150 CR 637; *Hartong v Partake, Inc.* (1968) 266 CA2d 942, 969, 72 CR 722 (plaintiff's reasonable hourly wages were representative of loss of time). But see *Earle v Lambert* (1962) 205 CA2d 452, 459, 23 CR 79 (not error to disallow loss of wages resulting from being made ill and mentally and physically upset). In one case, however, the court disapproved damages for material and labor to put a well into the condition as represented by the seller. The basis for the ruling was that there was no evidence of CC §3343 out-of-pocket damages. *Crawford v Nastos* (1960) 182 CA2d 659, 669, 6 CR 425.

PRACTICE TIP: If *Crawford* is understood as an improvements case, it was correctly decided. If it is understood as a labor case, it is doubtful that it can stand in the face of the 1971 amendments to §3343 and *Stout v Turney, supra,* because *Stout* made it clear that such out-of-pocket "actual expenditures of time and money" damages are not required to recover such additional damages.

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§3.50 b. Repairs and Improvements

When, as a result of the fraud, the defrauded person made expenditures that were reasonable under the circumstances, the expenditures may ordinarily be recovered insofar as they were lost or rendered fruitless because of the deceit. *Garrett v Perry* (1959) 53 C2d 178, 186, 346 P2d 758. Therefore, a buyer who makes improvements that are worthless because of fraud may recover the cost of these improvements as additional damages. *Buist v C. Dudley DeVelbiss Corp.* (1960) 182 CA2d 325, 333, 6 CR 259 (cost of improvements damaged by undisclosed ancient slide in area of underground water).

When improvements (*i.e.*, repairs and construction) are not lost or rendered fruitless by the fraud, the buyer cannot recover for them. *McNeill v Bredberg* (1961) 192 CA2d 458, 469, 13 CR 580. See also *Roberts v Karr* (1960) 178 CA2d 535, 547, 3 CR 98 (leveling work not caused by erroneous survey); *County of Mariposa v Yosemite W. Assocs.* (1988) 202 CA3d 791, 813, 248 CR 778 (developer that failed to provide adequate water and sewer services could be liable to homeowners' association for maintenance district annexation fees).

Repair costs that a seller is obligated to make under the terms of a contract without charge are unrecoverable as damages. *Gonsalves v Hodgson* (1951) 38 C2d 91, 101, 237 P2d 656. See also *Housley v City of Poway* (1993) 20 CA4th 801, 812, 24 CR2d 554; *McNeill v Bredberg* (1961) 192 CA2d 458, 469, 13 CR 580. It may nevertheless be possible to use the cost of repairs as evidence to show the actual value of property. *Philip Chang & Sons Assocs. v La Casa Novato* (1986) 177 CA3d 159, 163, 222 CR 800; *Sanfran Co. v Rees Blow Pipe Mfg. Co.* (1959) 168 CA2d 191, 205, 335 P2d 995.

In an action based on rescission, because the improvements made by the buyer must be returned to the seller with the property, the rescinding buyer can recover for the improvements. *Lobdell v Miller* (1952) 114 CA2d 328, 343, 250 P2d 357. The recovery appears to be measured by the increase in the property's market value caused by the improvements rather than by their cost. *Tarrant v Butler* (1960) 180 CA2d 235, 243, 4 CR 230. See chap 1.

PRACTICE TIP: If the buyer were awarded only the increase on the market value, theoretically there would be no recovery for an improvement rendered totally worthless by the land conditions about which the buyer was defrauded. For example, for a house built on fill that collapses, it is doubtful whether the rule would be applied. Nevertheless, this prospect might be sufficient to induce a buyer to pursue an action for damages rather than one for rescission.

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§3.51 c. Expenses

Expenditures that would have been incurred regardless of the fraud are not recoverable, because they were not spent in reliance on the fraud. See CC §3343(a)(1). Hence, closing costs are not recoverable in an action for damages because they do not result from the fraud. *Isaacs v Frank Meline Co.* (1934) 2 CA2d 341, 347, 37 P2d 1045. They may, however, be awarded to the buyer in a rescission action. *Curran v Heslop* (1953) 115 CA2d 476, 483, 252 P2d 378. See chap 1.

Expenditures made in reliance on the fraud are recoverable. CC §3343(a)(1). But if the buyer does not produce admissible evidence of the costs, the action must fail. *Gulke v Brock* (1963) 222 CA2d 459, 460, 35 CR 200. For example, recoverable expenditures in attempting to obtain a duly recorded subdivision map are escrow fees, moving expenses, building permits, telephone connections and charges, mileage expenses, fences, yard cleaning, garage materials, door locks, shrubbery, taxes, rent, and labor. *Cory v Villa Props.* (1986) 180 CA3d 592, 603, 225 CR 628; *Hartong v Partake, Inc.* (1968) 266 CA2d 942, 969, 72 CR 722; *Younis v Hart* (1943) 59 CA2d 99, 107, 138 P2d 323 (rescission action).

PRACTICE TIP: Some of these decisions are either unclear or questionable because of the negligible analysis given to the small damage components in the cases. For instance, the court approved a variety of such expenses in *Hardy v Carmichael* (1962) 207 CA2d 218, 24 CR 475, but gave no reasons why each such expense qualified as an expenditure in reliance on the fraud. Uncritical reliance on cases like *Hardy*, as legal support for similar expenses in another case when they would have been incurred whether or not fraud was present, may be unwarranted.

On attorney fee expenses as an element of damages, based on the third party tort doctrine, see §3.56.

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§3.52 d. Lost Profits

Under CC §3343(a)(3), a defrauded *seller* can recover for profits or other gains that might have been earned if the property had been retained. See §3.60. Also, CC §3343(a)(4) provides for recovery by a defrauded *buyer* of the loss of profits and other gains that could have been earned if the property had been as represented, as long as (*Stout v Turney* (1978) 22 C3d 718, 727, 150 CR 637; *Cory v Villa Props.* (1986) 180 CA3d 592, 603, 225 CR 628):

- The property was acquired in order to generate profits or to resell at a profit (CC §3343(a)(4)(i));
- The buyer reasonably relied on the fraud in buying the property and anticipating such profits (CC §3343(a)(4)(ii)); and
- The lost profits were proximately caused by the fraud and the buyer's reliance on it (CC §3343(a)(4)(iii)).

With respect to a buyer's action for fraud, the buyer must actually acquire the property before recovering lost profits. *Kenly v Ukegawa* (1993) 16 CA4th 49, 55, 19 CR2d 771 (action by prospective buyer against seller); *Nguyen v Scott* (1988) 206 CA3d 725, 740, 253 CR 800 (action by prospective buyer against broker).

These loss-of-profits provisions give CC §3343 some aspects of a benefit-of-the-bargain measure of damages, but the section itself declares that it does not authorize recovery of the difference between the value of the property as represented and its actual value. CC §3343(b)(1); see *Stout v Turney* (1978) 22 C3d 718, 726, 150 CR 637.

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§3.53 e. Personal Injuries and Emotional Distress

Some cases have asserted that personal injuries are recoverable in fraud actions. See, *e.g.*, *Sixta v Ochsner* (1960) 187 CA2d 485, 491, 9 CR 617; *Oliver v Benton* (1949) 92 CA2d 853, 855, 208 P2d 375. Neither case, however, actually involved a claim for personal injuries. Apparently, no case has considered the question of whether a victim of fraud also suffered personal injuries in connection with the fraud. Personal injuries may result, for example, from an undisclosed defective condition in a building that causes personal injuries. Because of the rule that precludes the imposition of negligence liability for preexisting defects caused by a former owner (see *Preston v Goldman* (1986) 42 C3d 108, 227 CR 817), liability for nondisclosure might serve as a separate ground for imposing liability (see *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 349, 23 CR2d 377, discussed extensively in chap 11). (Note that the *Preston* rule does not preclude fraud liability.)

If deceit is a substantial factor in causing personal physical injuries, the injured party should be able to recover damages. Landlords are liable for personal injuries to tenants caused by defects concealed from tenants. *Merrill v Buck* (1962) 58 C2d 552, 25 CR 456; *Burks v Blackman* (1959) 52 C2d 715, 344 P2d 301. Because both the landlord and the seller have similar duties to disclose the existence of defective or dangerous conditions as an incident to conveying the property, there should be no reason a tenant should be entitled to recover for physical injuries and a buyer should not.

Some courts allow pain and suffering damages in constructive (fiduciary) fraud actions under CC §1573. See, *e.g.*, *Warren v Merrill* (2006) 143 CA4th 96, 116, 49 CR3d 122. But emotional distress resulting from ordinary fraud is not an allowable element of damages under CC §3343. See *Gravillis v Coldwell Banker Residential Brokerage Co.* (2006) 143 CA4th 761, 776, 49 CR3d 531 (dicta); *Devin v United Servs. Auto. Ass'n* (1992) 6 CA4th 1149, 1162, 8 CR2d 263. The source of this rule is *Newman v Smith* (1888) 77 C 22, 27, 18 P 791, in which the supreme court held that the plaintiff could not recover for anxiety, worry, and harassment and that the allegations on the subject should be treated as surplusage. From that statement sprang the rule (that emotional distress damages are not recoverable in real property fraud actions under §3343), which has stood the test of time.

PRACTICE TIP: If physical injury/emotional distress is a large component of the plaintiff's damages, counsel should consider the pros and cons of pursuing the action under different or additional theories, such as fiduciary fraud (see §3.57), nuisance (see chap 11) or infliction of emotional distress (see California Tort Damages, chap 6 (2d ed Cal CEB 2002)).

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§3.54 f. Interest

Negotiated contractual interest is not recoverable under CC §3343, because the purpose of tort-based damage measurement does not include a contract-based method of calculating that interest. Instead, statutory interest under CC §3287 is appropriate. *Christiansen v Roddy* (1986) 186 CA3d 780, 790, 231 CR 72. Under CC §3288, a defrauded party may recover prejudgment interest in an action for damages, within the trial court's discretion. *Pepitone v Russo* (1976) 64 CA3d 685, 690, 134 CR 709; *Conger v White* (1945) 69 CA2d 28, 40, 158 P2d 415.

Interest runs from the date of sale (*Pavlovich v Neidhardt* (1954) 128 CA2d 559, 562, 275 P2d 836; *Williams v Graham* (1948) 83 CA2d 649, 653, 189 P2d 324), except that, for additional items of damages, interest runs from the date payments were made in reliance on the fraud (*Sixta v Ochsner* (1960) 187 CA2d 485, 9 CR 617). Civil Code §3288 commits recovery of interest to the discretion of the trier of fact, and a trial court's award or denial is unlikely to be overturned on appeal. See *Nathanson v Murphy* (1955) 132 CA2d 363, 373, 282 P2d 174; *Conger v White*, *supra*.

If a seller breaches a sales agreement, prejudgment interest can be awarded on the amount of the buyer's escrow deposit. *Al-Husry v Nilsen Farms Mini-Market, Inc.* (1994) 25 CA4th 641, 647, 31 CR2d 28 (parties were in escrow for purchase of a mini-market business when defendant sellers refused to execute amended escrow instructions). See also *Rifkin v Achermann* (1996) 43 CA4th 391, 50 CR2d 661 (prejudgment interest to potential buyer in breach of contract case calculated from date action filed).

A rescinding buyer may also recover interest on the award in the court's discretion. *Smith v Rickards* (1957) 149 CA2d 648, 654, 308 P2d 758; *Younis v Hart* (1943) 59 CA2d 99, 107, 138 P2d 323. In an action based on rescission, however, interest runs from the date notice of rescission was given. *Younis v Hart*, *supra; Wilson v Rigali & Veselich* (1934) 138 CA 760, 768, 33 P2d 455.

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§3.55 g. Punitive Damages and Statutory Penalties

A fraud cause of action seeking punitive damages need not include an allegation that the fraud was motivated by a malicious desire to injure the victim. Pleading fraud is sufficient. *Stevens v Superior Court* (1986) 180 CA3d 605, 610, 225 CR 624 (distinguishing *Ebaugh v Rabkin* (1972) 22 CA3d 891, 99 CR 706, which relied on CC §3294 requiring "oppression, fraud, or malice" as a basis for awarding exemplary damages).

The court may award punitive damages in an action for breach of an obligation not arising from a contract if the plaintiff proves by clear and convincing evidence that the defendant's conduct was fraudulent. CC §3294(a); *Pat Rose Assocs. v Coombe* (1990) 225 CA3d 9, 21, 275 CR 1, disapproved on other grounds in *Adams v Murakami* (1991) 54 C3d 105, 116, 284 CR 318; *Storage Servs. v Oosterbaan* (1989) 214 CA3d 498, 514, 262 CR 689. The duty not to commit fraud does not arise from a contract but instead is imposed by law. *Ward v Taggart* (1959) 51 C2d 736, 336 P2d 534. If the underlying facts show both fraud and breach of contract, punitive damages are not precluded. *Walker v Signal Cos.* (1978) 84 CA3d 982, 996, 149 CR 119; *Glendale Fed. Sav. & Loan Ass'n v Marina View Heights Dev. Co.* (1977) 66 CA3d 101, 135, 135 CR 802.

Punitive damages may be awarded in addition to the damages authorized by CC §3343 (see, *e.g., Simon v San Paolo U.S. Holding Co.* (2005) 35 C4th 1159, 29 CR3d 379; *Hartman v Shell Oil Co.* (1977) 68 CA3d 240, 248, 137 CR 244; *Channell v Anthony* (1976) 58 CA3d 290, 320, 129 CR 704), in addition to equitable relief requiring defendant to disgorge secret profits (*Ward v Taggart, supra*), or in addition to restitution after rescission of the purchase agreement (*Mahon v Berg* (1968) 267 CA2d 588, 73 CR 356; *Millar v James* (1967) 254 CA2d 530, 62 CR 335).

Although fraud as defined in CC §§1572 and 1710 includes negligent misrepresentation, nondisclosure, and constructive fraud as types of fraud, punitive damages under CC §3294 requires proof of willful or intentional misconduct. Thus, punitive damages may not be awarded for negligent misrepresentation (*Branch v Homefed Bank* (1992) 6 CA4th 793, 799, 8 CR2d 182; *Reid v Moskovitz* (1989) 208 CA3d 29, 32, 255 CR 910; *Delos v Farmers Ins. Group* (1979) 93 CA3d 642, 656, 155 CR 843) or constructive fraud (*Palmer v Ted Stevens Honda, Inc.* (1987) 193 CA3d 530, 536, 238 CR 363; *Flyer*'s *Body Shop Profit Sharing Plan v Ticor Title Ins. Co.* (1986) 185 CA3d 1149, 1154, 230 CR 276).

Punitive damages may not be awarded ordinarily unless actual damages have been suffered. *Simon v San Paolo U.S. Holding Co., supra; Warren v Merrill* (2006) 143 CA4th 96, 116, 49 CR3d 122 (upheld award to buyer against real estate broker). But the supreme court in *Ward v Taggart, supra,* allowed buyers to obtain punitive damages in a case for equitable relief for disgorgement of secret profits obtained by a broker. After purchasing the property, the buyers discovered the broker had misrepresented that he was the seller's agent, actually presented the buyers' offer to the seller as his own, closed escrow using the buyers' money, and then resold the property to the buyers at a profit of $1000 per acre, representing his selling price to the buyers as the seller's counteroffer. All the explanations he gave to the buyers for the unusual handling of the sale were false. Although no opinion from the California Supreme Court has rejected the ruling in *Ward*, the Ninth Circuit declined to follow *Ward* in *State of California v Altus Finance S.A.* (9th Cir 2008) 540 F3d 992, a case involving fraudulent conspiracy during insurance insolvency proceedings. Even though the restitutionary award was substantial, the Ninth Circuit reversed the punitive damage award, reasoning that California law requires an award of actual damages to support punitive damages.

The economic loss rule does not bar a claim for punitive damages in a fraud action if the claim for fraud exists independently of the claim for breach of contract. See *Robinson Helicopter Co. v Dana Corp.* (2004) 34 C4th 979, 22 CR3d 352. See also Imre, *Is* Seaman's *Rising from the Ashes? The Ever-Changing Line Between Contract and Tort Remedies*, 27 CEB Civ LR 96 (June 2005); Comment, 28 CEB Real Prop L Rep 24 (Jan. 2005). A broker's deliberate concealment of an unfavorable termite report justified an award of punitive damages and damages for emotional distress in *Godfrey v Steinpress* (1982) 128 CA3d 154, 181, 180 CR 95, 109.

On appealing excessive punitive damages awards, see §12.87.

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§3.56 h. Attorney Fees

It is sometimes possible to obtain attorney fees in fraud and nondisclosure actions. The general rule in California is that attorney fees are not recoverable unless provided for by law, statute, or contract. CCP §1021; *Trope v Katz* (1995) 11 C4th 274, 278, 45 CR2d 241. The general fraud statutes (CC §§1571-1573, 1709-1710; see §§3.5-3.10) do not provide for attorney fees to the prevailing party. Thus, if the transaction documents lack an appropriate fee clause, a party's entitlement to attorney fees may depend on a special statute (*e.g.,* CC §§1133(d), 1368(d)) or the tort-of-another rule (see *Gray v Don Miller & Assocs., Inc.* (1984) 35 C3d 498, 508, 198 CR 551).

If the purchase and sale agreement (or any other contract) provides that one party may recover attorney fees incurred in enforcing the agreement, the provision is treated as reciprocal and any party who prevails in an action to enforce the agreement can recover such fees. CC §1717; *Reynolds Metals Co. v Alperson* (1979) 25 C3d 124, 158 CR 1. If the litigation results in an unqualified winner on a single contract claim on a contract with an attorney fee clause, then the court must award fees under §1717. *Hsu v Abbarra* (1995) 9 C4th 863, 877, 39 CR2d 824. A third party beneficiary may also recover fees if the contract was made for the third party beneficiary's benefit. *Loduca v Polyzos* (2007) 153 CA4th 334, 62 CR3d 780.

A party may not recover attorney fees solely because an opposing party claims to be entitled to such fees. In *Hasler v Howard* (2005) 130 CA4th 1168, 30 CR3d 714, the court held that §1717 would not permit a broker's client who prevailed on appeal to recover fees if the underlying contract did not entitle either party to fees. The fact that the broker had claimed the right to attorney fees at trial was irrelevant. A party is entitled to fees under §1717 even when the party prevails on grounds such as "the contract is inapplicable, invalid, unenforceable or nonexistent," if the other party would have been entitled to attorney fees had it prevailed. *Hsu v Abbara, supra,* at 870. See *Blickman Turkus, LP v MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 76 CR3d 325 (declined to award attorney fees to landlord who defeated procuring broker's action for commission on lease because procuring broker was not party to listing agreement containing attorney fee clause). See also *Musaelian v Adams* (2009) 45 C4th 512, 87 CR3d 475 (self-represented attorney not entitled to attorney fees under CCP §128.7).

If a contractual fee provision is phrased broadly enough (*e.g.,* allows award of fees in actions "arising out of or related to" the contract), it may support an award of attorney fees to the prevailing party in either contract or tort causes of action, or both. See, *e.g., Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830 (decided question of whether defendant residential sellers were entitled to fees in defending against dismissed contract claims and dismissed tort claims, including fraud claims; see California Attorney Fee Awards §6.21 (2d ed Cal CEB 1994)). Under Cal Rules of Ct 3.1702(b) the court, on a noticed motion, may determine who is the prevailing party and whether fees should be awarded on a particular cause of action. See *Santisas v Goodin, supra;* Attorney Fee Awards, chap 11.

If a broker's misrepresentation leads the client/buyer to mistakenly sue for specific performance against the seller, the broker may be held liable for the client's legal fees (incurred in the specific performance action) as an element of damages in the fraud action against the broker. The client is not entitled to the fees on the theory that the broker was a fiduciary who committed fraud. Rather, the fees are recoverable by the person who incurs them to prosecute or defend a separate action against a third party because of the defendant's tort. See *Gray v Don Miller & Assocs., Inc.* (1984) 35 C3d 498, 507, 198 CR 551 (broker misrepresented to buyers that sellers had accepted buyers' offer; subsequent suit for specific performance by buyers against sellers failed). In *Pacific Preferred Props. v Moss* (1999) 71 CA4th 1456, 1463, 84 CR2d 500, "a tripartite contract concerning the award of attorney's fees" was formed that obligated the broker for the legal fees the seller incurred in defending an action. Compare *Gray* and *Moss* with *Super 7 Motel Assocs. v Wang* (1993) 16 CA4th 541, 20 CR2d 193 (fraud and rescission claims against broker are not premised on purchase contract so as to entitle broker to fees under CC §1717).

On pleading and proving attorney fees as damages based on the third party tort doctrine, see Attorney Fee Awards, chap 7.

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5. Fraud by Fiduciaries

§3.57 a. Intentional Torts

If an intentional misrepresentation or nondisclosure is committed by one who stands in a fiduciary relationship to the defrauded party (see §§3.21-3.28), recovery is governed not by CC §3343 (see §§3.43-3.44) but by the "broader" measure of damages in CC §§1709 and 3333. *Strebel v Brenlar Invs., Inc.* (2006) 135 CA4th 740, 747, 37 CR3d 699. See also *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1241, 44 CR2d 352 (dictum); *Stout v Turney* (1978) 22 C3d 718, 150 CR 637. But see *Hensley v McSweeney* (2001) 90 CA4th 1081, 109 CR2d 489.

NOTE: In real property transactions, a fiduciary relationship exists between a seller or buyer and its respective real estate agent, but a dual agent owes fiduciary duties to both principals. See, *e.g., Strebel v Brenlar Invs., Inc., supra*.

The precise measure of damages in fiduciary fraud cases remains unsettled. The courts of appeal were divided on the applicable recovery formula before the ruling in *Stout,* which did not resolve the split; and *Strebel* highlights the differences, but its discussion of the two standards were not ultimately used to decide that case. Some courts hold that the measure of damages for intentional breach of fiduciary duty is the "benefit-of-the-bargain" standard applicable to breach of contract actions under CC §§3300-3321. See *Pepitone v Russo* (1976) 64 CA3d 685, 134 CR 709; *Walsh v Hooker & Fay* (1963) 212 CA2d 450, 28 CR 16; *Simone v McKee* (1956) 142 CA2d 307, 298 P2d 667. Others hold that CC §3333 limits recovery to the extent of the financial injury actually sustained and does not authorize the plaintiff to recover the benefit of his or her bargain, the "out-of-pocket" standard. See *Walters v Marler* (1978) 83 CA3d 1, 147 CR 655, disapproved on other grounds in *Gray v Don Miller & Assocs., Inc.* (1984) 35 C3d 498, 507, 198 CR 551; *Overgaard v Johnson* (1977) 68 CA3d 821, 137 CR 412 (out-of-pocket rule applies to real estate fraud cases under both CC §§3333 and 3343). The distinction is crucial because under the benefit-of-the-bargain measure of damages, the plaintiff recovers the difference between the actual value of what the plaintiff has received and that which he or she expected to receive. An out-of-pocket measure allows recovery of only the difference between the actual value received and the actual value paid.

Although the supreme court stated in dicta in *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1249, 44 CR2d 352 that the measure of damages under CC §§1709 and 3333 might be greater for a fiduciary's intentional misrepresentation, that issue was not before it in *Alliance*. 10 C4th at 1250.

In *Hensley v McSweeney, supra,* the court (the same court that decided *Overgaard v Johnson, supra*) squarely held that it was error to instruct the jury about both measures, and that the out-of-pocket measure was the only measure applicable to claims for intentional misrepresentation against a fiduciary. The *Hensley* court acknowledged that there is a split of authority among the appellate courts with respect to the measure of damages for intentional fraud by a fiduciary and noted that the California Supreme Court has yet to definitively decide the issue. The court distinguished *Onofrio v Rice* (1997) 55 CA4th 413, 64 CR2d 74, on the grounds that it involved a statutory cause of action under CC §2945.6 against a foreclosure consultant. *Hensley,* 90 CA4th at 1086.

The Court of Appeal for the Second District in *Fragale v Faulkner* (2003) 110 CA4th 229, 1 CR3d 616 also acknowledged that the supreme court has not decided the issue and that the authorities from the courts of appeal are not uniform. 110 CA4th at 237. The court stated that "[t]he preferable view is that damages for fraud by a fiduciary should not be limited to out-of-pocket losses." 110 CA4th at 238. The court relied on both CC §§1709 and 3333, and stated the remedy in those sections provides compensation for any and all detriment proximately caused by the fraud. 110 CA4th at 238.

Some courts allow noneconomic (*e.g.,* pain and suffering) damages in fiduciary fraud actions. See, *e.g., Warren v Merrill* (2006) 143 CA4th 96, 116, 49 CR3d 122.

For further discussion, see Caron, *Measure of Damages for Liability in Real Estate Sales*, 23 Cal Real Prop J 13 (Summer 2005).

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§3.57A b. Negligent Misrepresentation

In *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1249, 44 CR2d 352, the supreme court cited well established case law holding that a plaintiff is entitled only to its actual or out-of-pocket losses suffered under CC §3333 when a fiduciary commits negligent misrepresentation. See also *Christiansen v Roddy* (1986) 186 CA3d 780, 231 CR 72. But see *Salahutdin v Valley of Cal., Inc.* (1994) 24 CA4th 555, 565, 29 CR2d 463 (apparently holding that benefit-of-bargain damages apply whether fiduciary's conduct is intentional or negligent).

PRACTICE TIP: *Alliance's* apparent distinction between negligent and intentional misrepresentation as having an effect on the measure of damages under CC §3333 should not be hastily embraced. First, the text of §3333 contains no such distinction. Second, the narrow facts alleged in *Alliance* suggested only an out-of-pocket-type measure of damages for *lenders*. Third, as a corollary to the second reason, it is unclear how a lender might claim a measure of damages greater than the out-of-pocket measure because the lender is typically satisfied with its security interest rather than the bargain of a hypothetical greater market value. The combined application of both CC §§1709 and 3333 in intentional fraud cases may be the key, however, because §1709 provides that anyone guilty of willful deceit is liable for "any damages" that the injured party suffers. See *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 1241, 44 CR2d 352.

The problem of anticipating which rule or jury instruction will be applied by the trial judge is further complicated by the language of the constructive fraud statute pertaining to the "breach of any duty." See CC §1573, discussed in §3.22. If the breach-of-any-duty component of the constructive fraud statute includes the duty to disclose, then the *sellers* may be exposed to the wider measure of damages for constructive fraud because of the language in opinions such as *Alliance* and *Salahutdin*. An argument can be made for limiting the scope of damage measurement in constructive fraud because the legislature said so, *i.e.,* because CC §3343 arguably preempts all other salutatory formulas for measuring damages in real estate fraud actions.

PRACTICE TIP: If nonfiduciary fraud is the cause of action, the damages are CC §3343 damages (requiring appraisal and value testimony), not cost-of-repair damages. See §§3.43-3.47.

For further discussion of damages for brokers' fraud, see California Real Property Sales Transactions §§2.152-2.162 (4th ed Cal CEB 2007); California Real Estate Brokers: Law and Litigation §§11.89-11.106 (Cal CEB 2009).

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§3.57B c. Misrepresentation of Material Fact Unrelated to Property Value

In certain situations involving fiduciary fraud, neither the out-of-pocket nor the benefit-of-the-bargain measure of damages is appropriate. See, *e.g., Strebel v Brenlar Invs., Inc.* (2006) 135 CA4th 740, 747, 37 CR3d 699. In that case, a real estate agent concealed from Strebel information about the severity of tax liens and judgments encumbering a house for sale. In reliance on the agent's assurances that the sale would proceed, Strebel sold his former home but, due to the excessive encumbrances, was ultimately unable to complete the purchase of the new home. The court noted that at times neither the out-of-pocket rule nor the benefit-of-the-bargain rule is truly applicable. In this case, Strebel's damages could not be measured in terms of his out-of-pocket loss or expected contractual benefits, because here, unlike the more common situation in which the fraud relates to the value of the property held for sale, the loss occurred through the sale of another property. The court concluded that a reasonable measure of damages was the amount by which the value of Strebel's former home appreciated after he was fraudulently induced to sell, plus his loss of use damages.

NOTE: *Strebel* involved intentional fraud by a fiduciary. The court noted that nonfiduciary fraud cases are "governed by the special 'out-of-pocket loss' rule espoused in section 3343" (135 CA4th at 747) and cautioned that a defrauded plaintiff may not recover appreciation damages by unreasonably delaying a lawsuit (135 CA4th at 754 n14). In an unpublished portion of the opinion, the court rejected Strebel's claims for emotional distress.

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Source: Real Property/California Real Property Remedies and Damages/3 Damages for Fraud and Nondisclosure/§3.58 6. Damages Versus Equitable Remedies

§3.58 6. Damages Versus Equitable Remedies

Usually a defrauded plaintiff must choose (elect) between either damages or an equitable remedy. See §1.29. Occasionally, a plaintiff may be entitled to a hybrid of these remedies. In *Persson v Smart Inventions, Inc.* (2005) 125 CA4th 1141, 1153, 23 CR3d 335, for example, a court of appeal allowed a defrauded party to rescind only the release clause in the contract and sue for damages for the underlying fraud. See also *Warren v Merrill* (2006) 143 CA4th 96, 49 CR3d 122 (allowed defrauded buyer to quiet title and recover compensatory, noneconomic, and punitive damages).

An action for damages may not be the best remedy for the plaintiff in every instance of fraud in a real property transaction. A comparison between damages and rescission with restitution is illustrated by the following examples of the application of each remedy to the same set of facts. On the measure of recovery of incidental damages in rescission actions, see chap 1.

EXAMPLES: Assume that, because of misrepresentations, a buyer pays $100,000 for a house that is actually worth $70,000. The buyer pays the seller $10,000 cash as a down payment, pays $3500 for closing costs and title insurance, obtains a first loan from a bank for $70,000, and gives the seller a note and second deed of trust for the remaining $20,000. After living in the house for 6 months, the buyer discovers the fraud. In that time, the buyer pays $2800 interest and $2000 principal on the two loans. Finally, assume that the property has a fair rental value of $700 per month.

Rescission Remedy: If the buyer rescinds, the buyer is entitled to an award of $14,100 and the property will be returned to the seller. The $14,100 represents the $10,000 paid to the seller plus the $2000 paid to reduce the principal of the loans, plus the $2800 interest paid, plus the $3500 closing costs and title insurance, less $4200 rent for 6 months of possession.

Damages Remedy: If the buyer sues for fraud damages, the buyer will be entitled to keep the property and receive a judgment of $30,000, which represents the out-of-pocket loss measured by the difference between the purchase price of $100,000 and the actual value of $70,000.

This simplified comparison can be misleading, however, because in another case in which the assumptions are changed, the rescission award could exceed the damage award, depending on the CC §3343 computation as well as on the additional damages components authorized by §3343. Thus, if there is little or no difference between the contract price and the market value even if fraud occurred (*i.e.*, in either a stable or a rapidly rising real estate market), and there are few or no additional damages, rescission may afford the better monetary relief.

A damages action imposes heavier problems of proof than does an action based on rescission because the buyer must prove the §3343 differential by competent evidence. In a rescission action, the rescinding party need not establish such evidence. Rescission does not always require proof of a reduced market value. The buyer need show only that the purpose for which the property was bought cannot be fulfilled or some other sort of prejudice from the fraud. *Hefferan v Freebairn* (1950) 34 C2d 715, 721, 214 P2d 386; *Thomas v Krug* (1956) 139 CA2d Supp 941, 944, 294 P2d 785. In fact, the seller cannot avoid rescission even if the misstated fact actually increased rather than decreased the value of the property. *Wood v Jotham Bixby Co.* (1938) 29 CA2d 294, 297, 84 P2d 204.

However, proving the value of the consideration given in a rescission cause of action may be a problem in an exchange transaction if the defrauding party subsequently disposed of the property received in the exchange. When the defrauded buyer trades other property as all or part of the purchase price of new property, the seller may also be able to show that the property received was as overvalued as the property conveyed. See *Goren v Griffin* (1957) 152 CA2d 35, 44, 312 P2d 743. Some courts look only at the agreed valuation of the exchanged property (*Lobdell v Miller* (1952) 114 CA2d 328, 341, 250 P2d 357), but because paper values in exchanges may be unreliable, there is no error in looking past the represented value to the real value (*Feckenscher v Gamble* (1938) 12 C2d 482, 492, 85 P2d 885).

Although the buyer's general damages for fraud are fixed as of the date of sale, the seller's fraudulent representations can lead to further, later injuries to the buyer for which compensation may be available under CC

§3343, which may change the comparison between a rescission action and an action for fraud damages. *Garrett v Perry* (1959) 53 C2d 178, 184, 346 P2d 758. Similarly, the rescinding buyer is often able to recover more than the purchase price if necessary to restore the parties to their status quo. See chap 1; *Lobdell v Miller* (1952) 114 CA2d 328, 341, 250 P2d 357.

The rescinding buyer must also pay the seller reasonable rent for the time he or she was in possession of the property, and the seller therefore has a setoff for this charge. *Kent v Clark* (1942) 20 C2d 779, 784, 128 P2d 868. When the rescinding buyer recovers for improvements made to the property, there is an inference that the improvements may be depreciated to offset their use by the buyer. *Kalkruth v Resort Props., Ltd.* (1943) 57 CA2d 146, 148, 134 P2d 513. If the buyer is forced to remain in possession to protect the property because the seller refuses to take it back, the court may relieve the buyer of the rent charge. See *Smith v Rickards* (1957) 149 CA2d 648, 651, 308 P2d 758.

In a damages action, the buyer remains the owner of the property and thus does not owe rent. Even when the buyer recovers as damages the entire price paid (*e.g.*, when the property had a market value of zero because the seller lacked title), there is still no setoff for rent. *Sixta v Ochsner* (1960) 187 CA2d 485, 4912, 9 CR 617. But because a damages action is an affirmance of the contract, the buyer remains liable for any balance of the purchase price owed to the seller. Thus the seller may have a setoff for any arrearages in payment. *Bagdasarian v Gragnon* (1948) 31 C2d 744, 763, 192 P2d 935; *Pat Rose Assocs. v Coombe* (1990) 225 CA3d 9, 21, 275 CR 1, disapproved on other grounds in *Adams v Murakami* (1991) 54 C3d 105, 116, 284 CR 318. The seller has no setoff of damages for payments that have not yet matured. *Haines v Fisher* (1957) 147 CA2d 415, 416, 305 P2d 124. The buyer, however, may set off the judgment for damages against the balance due the seller, including the part of it that has not yet matured. See *Bagdasarian v Gragnon*, *supra*.

PRACTICE TIP: The facts of each case merit careful analysis of how the components of recovery compare in the causes of action for rescission and for damages. This may be equally true of causes of action for breach of contract and for negligence.

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F. Damages When Seller Is Victim

§3.59 1. Same Remedies and Defenses

The cases are fewer in which the seller sues the buyer for fraud. *Kahn v Lischner* (1954) 128 CA2d 480, 487, 275 P2d 539. Like defrauded buyers, defrauded sellers may also sue for damages (*Feckenscher v Gamble* (1938) 12 C2d 482, 500, 85 P2d 885), seek rescission (12 C2d at 492), or assert fraud as an affirmative defense to an action by the buyer (*Seeger v Odell* (1941) 18 C2d 409, 414, 115 P2d 977; *Rodes v Shannon* (1963) 222 CA2d 721, 35 CR 339). Because of the frequency with which buyers make promises to a seller (*i.e.*, in promissory notes and deeds of trust), a cause of action for promissory fraud may lie. *Vogelsang v Wolpert* (1964) 227 CA2d 102, 111, 38 CR 440; *Palm v Smither* (1942) 52 CA2d 500, 505, 126 P2d 428. An action for constructive fraud may also apply. *Gross v Needham* (1960) 184 CA2d 446, 456, 7 CR 664; *Martin v Martin* (1952) 110 CA2d 228, 233, 242 P2d 688. In addition, CC §3343(a)(1) should apply to enable the seller to recover expenses that the seller incurred in reliance on the fraud. See §3.51.

In one case, the buyer wrote to the seller and said that he offered a price for the property similar to the price he offered for similar property. Among other reasons, the court held that the statement about the value of the property did not support a cause of action for fraud. The court distinguished *Palm v Smither*, *supra,* in that there was evidence in that case that the seller relied on representations other than value and that the representations were made under circumstances that supported reliance. *Kahn v Lischner* (1954) 128 CA2d 480, 488, 275 P2d 539. See also *Seeger v Odell, supra* (statements of opinion are generally not actionable). Factors like these generally translate into a difficult case by a seller against a buyer unless promissory or constructive fraud is present.

A seller seeking damages from the buyer and the buyer's broker for misrepresenting the value of the consideration given for the property may recover the difference between the actual value of the consideration and its represented value. *Banville v Schmidt* (1974) 37 CA3d 92, 98, 112 CR 126; *Metz v Malley* (1957) 155 CA2d 848, 849, 318 P2d 843. The seller may also be awarded punitive damages if the requirements of fraudulent conduct in CC §3294 are met (see §3.55). *Banville v Schmidt*, *supra; Austin v Duggan* (1958) 162 CA2d 580, 584, 328 P2d 224. Sellers, of course, are entitled to sue their brokers for misrepresentations that cause damages (*Earle v Lambert* (1962) 205 CA2d 452, 457, 23 CR 79), but they are not entitled to recover emotional distress damages (205 CA2d at 459).

A seller who was induced to accept 24 worthless second deeds of trust in exchange for land recovered damages from the buyer on the ground that the transaction was a sale of securities without a license or permit, in violation of the Real Property Securities Dealers Act (Bus & P C §§10237-10239.36). *Harvey v Davis* (1968) 69 C2d 362, 71 CR 129. (The Act was substantially amended after *Harvey* was decided. See Stats 2003, ch 901, §2; Stats 2003, ch 902, §4.)

A seller who is victimized by fraud is entitled to assert the buyer's fraud as a defense and rescind, get the property back, recover the "monetary equivalent of its use" (*i.e.,* rent), and get punitive damages. *Millar v James* (1967) 254 CA2d 530, 532, 62 CR 335. However, the defrauding buyer may be entitled to credits for the amount paid to the seller or expended for the benefit of the property. 254 CA2d at 532. Reformation may also be granted to make the security correspond to the buyer's description of it. See chap 2. A constructive trust may be imposed if the property devolves to the heirs of the guilty buyer. *Mills v Mills* (1956) 147 CA2d 107, 123, 305 P2d 61. See chap 15.

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§3.60 2. Special Lost Profits Rule

Civil Code §3343(a)(3) entitles a defrauded seller to recover "for profits or other gains which might reasonably have been earned by use of the property had he retained it." For the most part, this section grants the right to recover the portion of rents that represents the profit portion of such receipts. With respect to a *seller's* action for fraud, one court held that sellers could maintain an action for fraud in the sale of their business against the officer of the corporate buyer for his promissory fraud. The sellers were precluded from recovering lost profits that they might have earned had they kept the business because such an award would amount to a double recovery inasmuch as the sellers effectively "sought to enforce the sale" and keep the sales price. *Croeni v Goldstein* (1994) 21 CA4th 754, 759, 26 CR2d 412.

The appellate court reversed the judgment on the pleadings ruling by the trial court to enable the sellers to establish a loss-of-profit component measured by the consideration paid to the sellers for a covenant not to compete. The court explained that the payment for the covenant represents income or profits that the appellants might have earned had they not been fraudulently induced to refrain from engaging in that type of business. 21 CA4th at 760. But see *Channell v Anthony* (1976) 58 CA3d 290, 316, 129 CR 704 (sellers entitled to certain profits from property because of contract clause that entitled them to generate such profits). Civil Code §3343(a)(3) claims, however, present for the seller the same kind of problem of proving lost profits that any such claims present for the buyer under CC §3343(a)(4). See §3.52.

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V. LITIGATION CONSIDERATIONS

§3.61 A. Pleading Requirements

The facts supporting each element in a fraud action must be alleged in a clear, unequivocal, and specific manner. *Committee on Children's Television, Inc. v General Foods Corp.* (1983) 35 C3d 197, 197 CR 783, superseded by statute on other grounds as stated in *Gartin v S&M NuTec LLC* (CD CA 2007) 245 FRD 429, 437 n6. For example, on fraud charges arising from a fiduciary relationship (outside of a relationship deemed fiduciary as a matter of law), the complaint should not just allege the existence of the fiduciary relationship, but also the facts underlying that conclusion, *i.e.,* that the defendant knowingly undertook to act on behalf and for the benefit of another. 35 C3d at 217; *City of Hope Nat'l Med. Ctr. v Genentech, Inc.* (2008) 43 C4th 375, 75 CR3d 333.

The absence of facts to allege an element will defeat the action. *Gonsalves v Hodgson* (1951) 38 C2d 91, 100, 237 P2d 656; *Ach v Finkelstein* (1968) 264 CA2d 667, 674, 70 CR 472. Whether a defendant's actions constitute actual fraud is a question of fact (CC §1574), which may be proved by direct evidence or inferred from the circumstances. *Palmquist v Mercer* (1954) 43 C2d 92, 100, 272 P2d 26; *Ach v Finkelstein* (1968) 264 CA2d 667, 675, 70 CR 472. The requirement of specificity in a fraud action against a corporation requires the plaintiff to identify in the complaint the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written. *Tarmann v State Farm Mut. Auto. Ins. Co.* (1991) 2 CA4th 153, 157, 2 CR2d 861.

Plaintiff's allegations must identify time, place, and content of the alleged misrepresentation so that the defendant can identify the statement at issue. Plaintiff must also plead facts explaining why the statement was false when it was made. Plaintiff cannot simply point to the defendant's statement and allege that the content of the statement conflicts with the current state of affairs then conclude that the statement in question was false when it was made. For example, a promise made without intention to perform can be actionable fraud, but the fraudulent intent cannot be proven by simply pointing to the defendant's subsequent failure to perform as promised. *Smith v Allstate Ins. Co.* (SD Cal 2001) 160 F Supp 2d 1150. In *Smith*, the court held an insurer's slogan indicating that the insured would be in "good hands" lacked meaningful specificity necessary to be considered a representation of fact. The court stated that sales talk and advertising slogans are examples of statements that are not actionable fraud. However, the California Supreme Court held that a manufacturer's statement about the labor practices and working conditions of a competitor who makes athletic shoes and apparel was commercial speech that was unprotected constitutionally and could be the basis for a claim under California's unfair competition laws. These laws define unfair competition as any unfair or fraudulent business practice or act. *Kasky v Nike, Inc.* (2002) 27 C4th 939, 119 CR2d 296.

Allegations that "the building was in a state of disrepair," "the units … were illegal," and "the building had been placed for condemnation by the proper officials" were held to be inadequate in *Lingsch v Savage* (1963) 213 CA2d 729, 738, 29 CR 201. Despite the lack of clarity in the pleading, the court remanded to allow the plaintiff an opportunity to amend. 213 CA2d at 739. See also *Ward v Taggart* (1959) 51 C2d 736, 742, 336 P2d 534 (opinion stated "it is settled" that change in theory is permitted on appeal when sole issue before court was question of law). But see *Loken v Century 21-Award Props.* (1995) 36 CA4th 263, 271, 42 CR2d 683. See also *Blickman Turkus, LP v MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 76 CR3d 325 (lessor's claim for concealment failed, because lessor did not allege, and could not rationally have alleged, its belief that lessee's agent represented lessor's interest or its reliance on the agent's conduct in signing the lease).

In nondisclosure actions involving multiple plaintiffs, the specific pleading requirement normally applied to fraud actions founded on affirmative misrepresentations may be relaxed. As the court observed in *Alfaro v Community Hous. Improvement Sys. & Planning Ass'n, Inc.* (2009) 171 CA4th 1356, 89 CR3d 659, it is more difficult to apply this standard in nondisclosure actions.

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§3.62 B. Statute of Limitations

Actions for damages based on fraud must generally be filed within 3 years after the date of discovery of the fraud. CCP §338(d). The period is 4 years under CCP §337(3) if "the ground for rescission is fraud." For a case applying this defense in an action by multiple plaintiffs for nondisclosure of a deed restriction limiting the homeowner's equity, see *Alfaro v Community Hous. Improvement Sys. & Planning Ass'n, Inc.* (2009) 171 CA4th 1356, 89 CR3d 659. In *Alfaro*, the preliminary reports given to plaintiffs at the time of purchase referred to CC&Rs and deed restrictions of record but did not describe any limits on the sale prices of the properties or the ability of plaintiffs to encumber the properties for financing. Although the reports could not have satisfied the sellers' duty to disclose the deed restriction, the court stated they were relevant to whether plaintiffs were put on inquiry notice for determining whether plaintiffs could have discovered the fraud and brought their action before the statute of limitations expired.

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§3.63 C. Burden of Proof

The burden of proving fraud is by a preponderance of the evidence. *Liodas v Sahadi* (1977) 19 C3d 278, 137 CR 635. When fraud is alleged against a real estate agent, the plaintiff has a considerable advantage of the common law rebuttable presumption of constructive fraud. *Batson v Strehlow* (1968) 68 C2d 662, 675, 68 CR 589. When the principal questions the acts done by the agent in the course of the agency, the burden is on the latter to prove that he or she acted with the utmost good faith toward the principal and that before the transaction the agent fully disclosed all the facts relating to the acts under attack. *Batson v Strehlow, supra*. This presumption of fraud by a fiduciary does not, however, extend to the ordinary buyer-seller relationship. *Committee on Children's Television, Inc. v General Foods Corp.* (1983) 35 C3d 197, 222, 197 CR 783, superseded by statute on other grounds as stated in *Gartin v S&M NuTec LLC* (CD CA 2007) 245 FRD 429, 437 n6. For example, on fraud charges that depend on the existence of a fiduciary relationship (outside of a relationship deemed fiduciary as a matter of law), the plaintiff has the burden of proving that the defendant knowingly undertook to act on behalf and for the benefit of another. 35 C3d at 222; *City of Hope Nat'l Med. Ctr. v Genentech, Inc.* (2008) 43 C4th 375, 75 CR3d 333.

If the plaintiff seeks punitive damages for the defendant's conduct that was malicious, fraudulent, or oppressive, the burden of proof must be made by clear and convincing evidence. CC §3294(a). See §3.55.

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§3.64 D. Notice Issues

A defrauded party need not notify the defrauding party of the action for fraud before instituting an action for fraud damages only. Some contracts, however, may contain the seller's warranties that are implicated by allegations of fraud, which might obligate a buyer to notify a seller under warranty law. *Pollard v Saxe & Yolles Dev. Co.* (1974) 12 C3d 374, 380, 115 CR 648 (requirement of notice of breach is based on sound commercial rule designed to give defendant opportunity to repair defective item). Civil Code §1691 has arguably eliminated the earlier need to give notice of rescission by providing that service of a pleading seeking rescission constitutes notice. Also, sending notice of rescission does not commit the buyer to that remedy when the guilty party refuses to restore the consideration to the buyer (*Karapetian v Carolan* (1948) 83 CA2d 344, 354, 188 P2d 809) unless the offer to rescind is accepted (see *Evans v Rancho Royale Hotel Co.* (1952) 114 CA2d 503, 508, 250 P2d 283). See chap 1.

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§3.65 E. Affirmative Relief and Fraud as Defense

A defrauded party may stand on the contract and set up the fraud as a defense against claims by the defrauding party. *Kent v Clark* (1942) 20 C2d 779, 783, 128 P2d 868; *Filet Menu, Inc. v C.C.L. & G., Inc.* (2000) 79 CA4th 852, 862, 94 CR2d 438; *McCauley v Dennis* (1963) 220 CA2d 627, 632, 34 CR 90 (defense may be complete or only in abatement but party guilty of fraud is entitled to have damages mitigated to extent of other party's nonperformance).

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§3.66 F. Rents

The buyer incurs no jeopardy by continuing to collect rent from the property after discovering the fraud. A buyer who sues for damages has elected to affirm the contract and is thus entitled to retain whatever benefits it offers. Although rescission does not constitute an affirmance, the buyer owes the seller rent as a condition of restitutionary relief, and collection of rents is thus consistent with the relief that will ultimately be granted in the action and is neither a waiver of a right nor an election of a remedy. See *Soderling v Tomlin* (1959) 170 CA2d 169, 174, 338 P2d 946.

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§3.67 G. Selling Property; Involuntary Foreclosure

A sale by a buyer before fraud is discovered seriously limits any recovery from the seller. The buyer has received the desired price and has therefore suffered no injury from the fraud. See *Donkin v Killefer* (1939) 32 CA2d 729, 732, 90 P2d 810. But if the next buyer sues the first buyer for repeating the earlier seller's misrepresentation, the first buyer then has a cause of action against that seller or can assign this cause of action to the second buyer. *Sixta v Ochsner* (1960) 187 CA2d 485, 487, 494, 9 CR 617; *Burkett v J. A. Thompson & Son* (1957) 150 CA2d 523, 526, 310 P2d 56. If the seller knows that the property will be resold, the ultimate purchaser may sue that seller directly. *Massei v Lettunich* (1967) 248 CA2d 68, 73, 56 CR 232.

A sale after discovery of fraud has a different effect. Because the buyer cannot restore the property to the seller, rescission is impossible, but an action for damages will survive. *Hancock v Williams* (1950) 99 CA2d 80, 82, 221 P2d 129. Further, if the defrauded plaintiff can negotiate better terms on the indebtedness against the property, the defrauding party is not entitled to the benefits of such arrangements. *Hancock v Williams, supra*. When the benefit should accrue to a seller, however, an adjustment in the award should be made. For example, in one case a seller foreclosed on a note secured by a deed of trust resulting in the elimination of further liability because of the antideficiency effects of CCP §580b. That reduction in liability was allocated to the defrauding seller in the computing CC §3343 damages. *Garrett v Perry* (1959) 53 C2d 178, 185, 346 P2d 758.

In some cases, the "sale" is a foreclosure sale and the defrauded party has suffered additional damage because of the fraud. In one case, the plaintiff, a lender, alleged that the defendants engaged in an elaborate scheme to defraud the plaintiff to make loans that were secured by deeds of trust against nine properties. The lender foreclosed by bidding its full credit value of the indebtedness on several of the deeds of trust. The supreme court held that, because the lender was induced by the fraud of a third party appraiser to make the loans (and later to make full credit bids on foreclosure), the lender may recover in tort for the fraud, despite its full credit bids. *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 44 CR2d 352. Thus, the foreclosure sale did not preclude fraud liability. Because of the lender's allegation that it relied on the fraudulent conduct before its full credit bid was made, it appears that a full credit bid after discovery of the fraud may preclude fraud liability under a waiver or estoppel defense. For further discussion of the *Alliance* decision and other reported cases involving fraud claims brought by lenders after foreclosure, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 2 (4th ed Cal CEB 2009).

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§3.68 H. Contract Performance

The position of a buyer who still owes performance under the executory provisions of a contract will not be prejudiced by the fact that he or she continues to perform under that contract. For example, if a buyer continues to make installment payments to the seller after discovery of the fraud, the buyer will not be estopped, held to have waived the fraud, or otherwise prejudiced by such payments. This rule is based on the principle that the affirmance of the contract in a damages suit requires the buyer to continue to make payments owed under the contract. *Bagdasarian v Gragnon* (1948) 31 C2d 744, 750, 192 P2d 935; *Williamson v Clapper* (1948) 88 CA2d 645, 653, 199 P2d 337. But if a defrauded buyer stops making payments, this default does not preclude a cause of action for the seller's fraud or a defense based on the seller's fraud. *Kent v Clark* (1942) 20 C2d 779, 783, 128 P2d 868; *Nevada Land & Inv. Corp. v Sistrunk* (1934) 220 C 174, 178, 30 P2d 389. In addition, a buyer who continues to make payments after giving notice of rescission can be justified in doing so as an attempt to avoid default and foreclosure rather than as a ratification of the fraud. *Hefferan v Freebairn* (1950) 34 C2d 715, 722, 214 P2d 386.

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§3.69 I. Potential Defendants

Fraud actions create a wide variety of circumstances that may warrant the imposition of individual liability on all who participate in the fraud. *Tide Water Assoc. Oil Co. v Superior Court* (1955) 43 C2d 815, 827, 279 P2d 35 (with a common plan or design to commit a tort, all who participate are jointly liable whether or not they commit the wrongful acts); *Filet Menu, Inc. v C.C.L. & G., Inc.* (2000) 79 CA4th 852, 866, 94 CR2d 438 (personal liability may attach to shareholders through alter ego doctrine or when shareholder specifically directed or authorized wrongful act); *PMC, Inc. v Kadisha* (2000) 78 CA4th 1368, 1381, 93 CR2d 663 (all persons who are shown to have participated in intentional tort are liable for full amount of damages suffered). The alter ego doctrine does not immunize officers, directors, or shareholders of a corporation from tortious conduct that they themselves commit in the course of acting for the corporation. *Filet Menu, Inc. v C.C.L. & G., Inc., supra*.

In damages actions, the proper defendants are those who have participated in the fraud, whereas in rescission actions the proper defendants are those who were privy to the contract. But see *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 252, 84 CR 800 (agents also held liable for monetary portion of rescission judgment). A coconspirator who obtained no direct profit from the sale proceeds should be sued for damages rather than for restitution (*Conger v White* (1945) 69 CA2d 28, 31, 158 P2d 415) while innocent parties to the contract who received some of the cash without knowing of the fraud should be sued for restitution rather than for damages (*Leavens v Sharp* (1944) 66 CA2d 425, 428, 152 P2d 460).

On particular defendant parties in fraud actions, see §§3.70-3.76.

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§3.70 1. Sellers and Their Predecessors

The seller is properly joined as a defendant in any damages or rescission action. It is immaterial that all negotiations were handled through the broker and that the two principals never met. The broker is the seller's agent, which means that the seller cannot retain any of the benefits resulting from the agent's fraud if the buyer seeks to rescind. *Worthen v Jackson* (1956) 139 CA2d 615, 617, 293 P2d 797. It also means that the seller can be liable in damages, on respondeat superior grounds, for the broker's deceit. *Wilbur v Wilson* (1960) 179 CA2d 314, 317, 3 CR 770. See also *Sanfran Co. v Rees Blow Pipe Mfg. Co.* (1959) 168 CA2d 191, 205, 335 P2d 995 (agent's knowledge of corporation imputed to corporation). This potential liability applies to both nondisclosures and misrepresentations by the broker. If the broker failed to reveal to the buyer an adverse fact that the seller communicated to the broker, the seller is liable to the buyer as a principal for the agent's tortious nondisclosure (*Herzog v Capital Co.* (1945) 27 C2d 349, 353, 164 P2d 8) and for personal failure to communicate the adverse fact directly to the buyer (*Rothstein v Janss Inv. Corp.* (1941) 45 CA2d 64, 73, 113 P2d 465).

To make the seller responsible for the broker's acts, the buyer must prove that the broker was the seller's agent. *Blackburn v McCoy* (1934) 1 CA2d 648, 656, 37 P2d 153. The existence of a listing agreement between the seller and the broker can prove the agency (see *Williamson v Clapper* (1948) 88 CA2d 645, 650, 199 P2d 337), but there can be an agency without an agreement (see *Wilbur v Wilson*, *supra* (agency created by escrow instructions)). Even with a listing, the seller can sometimes prove that the broker was really the buyer's agent. *Wright v Lowe* (1956) 140 CA2d 891, 896, 296 P2d 34. Payment of a commission is also evidence of agency. *Feckenscher v Gamble* (1938) 12 C2d 482, 498, 85 P2d 885.

A seller who makes false representations about the condition of the property may be held liable not only to the purchaser, but to subsequent buyers who purchase from the purchaser, if the seller intends, or has reason to expect, that those representations will be repeated to and acted on by the subsequent purchasers. The "reason to expect" standard was a more difficult standard of proof than "foreseeability," and it more closely resembled a showing of intent. Whether the seller had a "reason to expect" conveyance to the plaintiff depends on (1) the extent of the seller's knowledge of resale to a particular person or class of persons and (2) the likelihood that the particular misrepresentation (or concealment) would be passed on to them. *Geernaert v Mitchell* (1995) 31 CA4th 601, 37 CR2d 483. Although *Geernaert* appears to permit a spreading of the risk and a search for deep pockets, it could create numerous difficulties, not the least of which is a diversity problem (if a prior owner lives out of state).

PRACTICE TIP: Clearly, each intervening resale creates a more difficult proof problem for an eventual plaintiff, as does each passing year between the occurrence of the original fraud and the lawsuit. Counsel must consider whether naming the last seller's predecessor will destroy the ability to arbitrate the claim (when the transactional documents require arbitration between the plaintiff buyer and the defendant seller), assuming one thinks that arbitration is preferable to judicial action. The right to compel arbitration would not apply to the predecessor, and arbitrating with the immediate seller may be futile. Counsel should try to get a copy of the contract between the seller and its predecessor, who may have initiated the fraud. If that contract included an arbitration clause, it may be enforceable in the present action.

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§3.71 2. Seller's Spouse

Counsel for the buyer always should thoroughly investigate the seller's marital status. If the seller is married, the spouse should also sign the sales contract or should be required to file a quitclaim deed. Under Fam C §1102(a), both spouses must consent to the transfer of community real property. This rule means that one spouse, without the other's consent, may not sell, convey, encumber, or lease for more than a year his or her half interest in the property. Such unilateral transfers can be avoided in their entirety by a timely action during the marriage. *Droeger v Friedman, Sloan & Ross* (1991) 54 C3d 26, 30, 36, 38, 283 CR 584. See also *Clar v Cacciola* (1987) 193 CA3d 1032, 1036, 238 CR 726 (husband signed both his and his wife's name on deed of trust).

Under Fam C §1102(e), either spouse may encumber his or her interest in community real property, as provided in Fam C §2033, to pay reasonable attorney fees in order to retain or maintain legal counsel in an action under the Family Code. For an example of the application of the predecessor statute to Fam C §1102 (former CC §5127) to defeat a sale, see *Andrade Dev. Co. v Martin* (1982) 138 CA3d 330, 187 CR 863, approved by the supreme court in *Droeger v Friedman, Sloan & Ross* (1991) 54 C3d 26, 36, 283 CR 584.

If the seller's spouse had an interest in the property and signed the deed, he or she should be named in an action for rescission based on fraud. *Miller v Busby* (1950) 101 CA2d 83, 91, 224 P2d 754 (prima facie case of agency shown). The spouse is liable for a restitutionary award unless the property was the seller's separate property and the spouse's signature was merely a matter of accommodation. *Younis v Hart* (1943) 59 CA2d 99, 103, 138 P2d 323 (wife had no part in transaction). See California Real Property Sales Transactions §4.19 (4th ed Cal CEB 2007).

The seller's spouse may also be liable for damages for fraud under traditional agency principles. If the property is community property, the selling spouse may be held to have acted as the other spouse's agent and thus to have bound that spouse by acts of fraud. See *Hancock v Williams* (1950) 99 CA2d 80, 81, 221 P2d 129 (husband acted as agent for wife); *Engle v Farrell* (1946) 75 CA2d 612, 615, 171 P2d 588 (husband and wife liable, although wife not involved in transaction, when they participated in and kept benefits of transaction). See also *Swasey v de L'Etanche* (1936) 17 CA2d 713, 717, 62 P2d 753. Only if the innocent spouse signed the deed as a matter of accommodation for a conveyance of the selling spouse's separate property would he or she be exempt from liability for damages. *Central Mut. Ins. Co. v Schmidt* (1957) 152 CA2d 671, 673, 313 P2d 132 (corporate agent); *Younis v Hart*, *supra* (wife).

Although married individuals may obtain cancellation of instruments fraudulently signed by the other spouse under Fam C §1102, third party creditors cannot. See *Clar v Cacciola* (1987) 193 CA3d 1032, 238 CR 726. The beneficiaries under a third deed of trust (which purported to be in second position) brought an action against the holders of the second deed of trust on the same property. The borrower had signed both his and his wife's name on the second deed of trust. The court of appeal, in affirming the ruling that the second deed of trust had priority, held that the plaintiff lacked standing to challenge the priority of the second deed of trust. Even though former CC §5127 required both spouses to sign it, the statute was designed to protect only spouses from unauthorized alienation or encumbering of marital property by the other spouse.

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§3.72 3. Brokers

A broker who participates in defrauding the buyer is properly joined in a damages action. *Strebel v Brenlar Invs., Inc.* (2006) 135 CA4th 740, 747, 37 CR3d 699 (broker who was dual agent admitted guilt, but disputed damages); *Crawford v Nastos* (1960) 182 CA2d 659, 665, 6 CR 425; *Isaacs v Frank Meline Co.* (1934) 2 CA2d 341, 342, 37 P2d 1045. But see *Coldwell Banker Residential Brokerage Co. v Superior Court* (2004) 117 CA4th 158, 11 CR3d 564 (no duty to third parties). An agent's nondisclosure binds the principal for fraud. *Curran v Heslop* (1953) 115 CA2d 476, 482, 252 P2d 378. A broker who is merely an innocent conduit of the seller's fraud may be innocent of actual fraud (*Gardner v Murphy* (1975) 54 CA3d 164, 167, 126 CR 302; *Saporta v Barbagelata* (1963) 220 CA2d 463, 474, 33 CR 661), but the broker may be liable for negligence on a constructive fraud theory if he or she passes on the misstatements as true without personally investigating them. *Gardner v Murphy*, *supra; Schoenberg v Romike Props.* (1967) 251 CA2d 154, 162, 59 CR 359; *Tackett v Croonquist* (1966) 244 CA2d 572, 578, 53 CR 388. See also *Tyler v Children's Home Soc'y* (1994) 29 CA4th 511, 548, 35 CR2d 291 (constructive fraud can serve as basis for rescission cause of action); *Cooper v Jevne* (1976) 56 CA3d 860, 128 CR 724 (cause of action stated against sales agents, architects, and county building inspectors for undisclosed construction defects).

In most damages cases, the broker's liability is the same as the seller's. *Saporta v Barbagelata*, *supra*. If the broker deceives both buyer and seller, however, by selling the property for more than is disclosed to the seller, a different measure of damages may apply. If the property is worth what was paid for it, the buyer has no out-of-pocket damages under CC §3343. If the broker can be shown to have been the buyer's agent, however, the buyer may recover the difference between the price paid and the seller's price on a theory of secret profits. *Crogan v Metz* (1956) 47 C2d 398, 404, 303 P2d 1029. Even when the broker is not the buyer's agent, the buyer may be able to recover damages and exemplary damages from the broker. *Ward v Taggart* (1959) 51 C2d 736, 741, 336 P2d 534.

The seller's broker may be a proper party to the buyer's rescission action even if the broker is not a party to the sale agreement. *Burkhouse v Phillips* (1971) 18 CA3d 661, 666, 96 CR 197; *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 252, 84 CR 800. A broker may be included in an action based on rescission as readily as in one for damages. The broker defendant may be held liable jointly with the seller for the buyer's consequential losses (improvements and loan payments), even if the award is far in excess of the broker's original commission and the broker received no benefit from the property's return to the seller. *Snelson v Ondulando Highlands Corp.*, *supra*.

PRACTICE TIP: Insurance companies providing professional liability insurance for real estate brokers and salespersons may not exclude coverage for negligent failure to inspect and provide disclosure as required by CC §§2079-2079.12. See Ins C §11589.5. However, the supreme court held that standard commercial general liability policy language providing coverage for bodily injury and tangible property damage does not cover economic losses that cause emotional distress. Such damages are derivative of and inseparable from a third party's allegations of intentional and business torts, allegations that cannot give rise to insurance coverage. See *Waller v Truck Ins. Exch.* (1995) 11 C4th 1, 44 CR2d 370. But see *Karsant Family Ltd. Partnership v Allstate Ins. Co.* (ND Cal, Jan. 27, 2009, No. C08-01490 SI) 2009 US Dist Lexis 7558 (emotional distress award arising from invasion of tenants' right of private occupancy constitutes an award for "personal injury" within meaning of insurance policy). For more on broker errors and omissions insurance policies, see California Real Estate Brokers: Law and Litigation, chap 10 (Cal CEB 2009).

For discussion of a broker's statutory duties, see §§3.32-3.33; California Real Estate Brokers: Law and Litigation, chaps 3-4 (Cal CEB 2009)

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§3.73 4. Experts

A buyer who conditions the purchase on obtaining a satisfactory inspection and report on the property from a third person may have an action for fraud against that person if the report is inaccurate. Even a careless examination may constitute constructive fraud, because it is a negligent misrepresentation incident to a sale. *Gagne v Bertran* (1954) 43 C2d 481, 488, 275 P2d 15; *Hardy v Carmichael* (1962) 207 CA2d 218, 227, 24 CR 475. It is immaterial whether the inspector is paid by the buyer or the seller, because lack of privity of contract is no defense in such a case. *Hardy v Carmichael*, *supra*. This theory of liability has been invoked against:

- Appraisers (compare *Kolodge v Boyd* (2001) 88 CA4th 349, 105 CR2d 749, with *Neu-Visions Sports, Inc. v Soren/McAdam/ Bartells* (2000) 86 CA4th 303, 103 CR2d 159);
- Architects (*Cooper v Jevne* (1976) 56 CA3d 860, 867, 128 CR 724);
- Contractors (*McCauley v Dennis* (1963) 220 CA2d 627, 631, 34 CR 90);
- County building inspectors (56 CA3d at 869);
- Notaries (*Iselin-Jefferson Fin. Co. v United Cal. Bank* (1976) 16 C3d 886, 891, 129 CR 670; *McDonald v Plumb* (1970) 12 CA3d 374, 377, 90 CR 822);
- Soil analysts (*Gagne v Bertran*, *supra*);
- Surveyors (*Kent v Bartlett* (1975) 49 CA3d 724, 728, 122 CR 615 (negligence); *Roberts v Karr* (1960) 178 CA2d 535, 542, 3 CR 98); and
- Termite inspectors (*Hardy v Carmichael*, *supra; Wice v Schilling* (1954) 124 CA2d 735, 743, 269 P2d 231).

A municipality is immune from liability for its employees' fraudulent misrepresentations and their fraudulent suppression of fact. See Govt C §818.8. It is also immune from liability for its employees' fraudulent inspection of private residential property. Similarly, a municipality is immune from liability for the negligent hiring and supervision of a building inspector who made fraudulent misrepresentations. See Govt C §818.6; *Harshbarger v City of Colton* (1988) 197 CA3d 1335, 1342, 243 CR 463. A public employee, however, can still be liable as an individual, *e.g.*, a city building inspector can be liable for fraudulent building inspections. See Govt C §§821.4, 822.2; *Cooper v Jevne*, *supra*. See also §3.9.

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§3.74 5. Lenders

A lender whose misrepresentation induces the buyer to purchase is liable for damages for fraud; lack of privity is no defense. *De Zemplen v Home Fed. Sav. & Loan Ass'n* (1963) 221 CA2d 197, 202, 205, 34 CR 334 (negligent misrepresentation). In a case in which the lender falsely represented that the seller had title, causing the buyer to lose his entire investment, the lender was held liable for the total loss. *Smith v Schuttpelz* (1934) 1 C2d 158, 160, 33 P2d 836 (bank and its president acted as agents for the seller). A lender may be liable for fraud if it enters into a preworkout agreement with its borrower without intending to negotiate the loan workout in good faith. See *Auerbach v Great W. Bank* (1999) 74 CA4th 1172, 88 CR2d 718.

Similarly, when the seller finances the purchase of the property, but misrepresents to the buyer the value and the amount of rents collectible from the tenants, the buyer may sue for damages resulting from the fraud. *Stockton v Newman* (1957) 148 CA2d 558, 307 P2d 56.

Mortgage loan brokers owe a fiduciary duty of disclosure and good faith toward borrowers for whom they negotiate loans and may be held liable for fraud for breaching that duty by giving the borrower "materially misleading and incomplete information." *Wyatt v Union Mortgage Co.* (1979) 24 C3d 773, 782, 157 CR 392 (failure of mortgage loan broker to disclose true interest rate, late payment penalty, and size of balloon payment). In another case, however, loan brokers were found to owe no fiduciary duty to borrowers merely because of their subsequent affiliations with the foreclosing trustee. *Stephens, Partain & Cunningham v Hollis* (1987) 196 CA3d 948, 953, 242 CR 251. See also *Stetler v Greenpoint Mortgage Funding* (ED Cal, Jan. 23, 2008, No. 1:07cv0123 DLB) 2008 US Dist Lexis 4880 (refusing to extend *Wyatt* in loan transaction in which loan broker made no affirmative misrepresentations).

For comprehensive discussion of lender liability, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 7 (borrower strategies before and during foreclosure), 10 (lender liability in context of loan workout), 12 (lender liability in making and administering loan and in foreclosure process) (4th ed Cal CEB 2009).

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§3.75 6. Escrow Agents

An escrow holder is the limited agent of all parties to an escrow and owes them fiduciary duties. *Kirby v Palos Verdes Escrow Co.* (1986) 183 CA3d 57, 64, 227 CR 785, disapproved on other grounds in *Summit Fin. Holdings, Ltd. v Continental Lawyers Title Co.* (2002) 27 C4th 705, 714, 117 CR2d 541. Escrow holder duties are generally limited to faithfully complying with the instructions of the principals in the transaction. *Summit Fin. Holdings, Ltd. v Continental Lawyers Title Co., supra; Schaefer v Manufacturers Bank* (1980) 104 CA3d 70, 77, 163 CR 402. In *Summit,* the supreme court disapproved *Kirby* insofar as it held that transactions involving third parties to an escrow can supersede and amend the instructions given by the principal parties. In *Summit,* the court concluded that the escrow agent, in connection with a refinancing transaction, had no duty to pay new loan proceeds to the assignee of the original lender, even though the agent knew of the assignment. The agent fulfilled its obligations by following the escrow instructions, which had required that payment be made to the original lender.

Some courts, however, have allowed fraud claims to proceed against escrow agents. In one case, a plaintiff lost commissions paid to a broker as a result of an escrow agent's alleged fraud and negligence. The court reversed a summary judgment in favor of the escrow agent, holding that such losses were compensable under CC §3333. *Romo v Stewart Title* (1995) 35 CA4th 1609, 1619, 42 CR2d 414. In another case, a demurrer to a complaint for fraud was overturned on conspiracy and direct allegation grounds. The plaintiff alleged nondisclosure and misrepresentations by the escrow agent. *Lee v Escrow Consultants, Inc.* (1989) 210 CA3d 915, 925, 259 CR 117.

An escrow agent has a duty to disclose to his or her principal knowledge of material facts acquired in the course of the agency relationship that might affect the principal's decision on a pending transaction, particularly when the agent knows that the principal expects the agent to provide protection on facts of which the agent is aware. *Contini v Western Title Ins. Co.* (1974) 40 CA3d 536, 547, 115 CR 257. See also *Spaziani v Millar* (1963) 215 CA2d 667, 684, 30 CR 658. These decisions paved the way for the prospect of imposing fraud-based liability on escrow agents despite other cases that limited liability against them. See, *e.g*., *Lee v Title Ins. & Trust Co.* (1968) 264 CA2d 160, 70 CR 378 (escrow agent had no duty to disclose suspicious facts to buyers that sellers might be defrauding buyers); *Bonaccorso v Kaplan* (1962) 218 CA2d 63, 68, 32 CR 69 (escrow agent's alleged fraud unfounded because knowledge possessed by agent is imputed to both parties); *Blackburn v McCoy* (1934) 1 CA2d 648, 654, 37 P2d 153.

In specific situations, escrow agents may have statutorily imposed duties to buyers or sellers. See, *e.g.,* Health & S C §18035(f) (imposing duties on escrow holders in manufactured homes transactions to hold funds in escrow after written notice of dispute). In *Castillo v Express Escrow Co*. (2007) 146 CA4th 1301, 53 CR3d 485, the buyer of a mobilehome copied the escrow agent with a letter to the seller complaining of structural damage to the mobilehome. The court held that the letter was sufficient notice to the escrow holder to require it to hold funds in escrow under Health & S C §18035(f). In response to *Castillo*, Health & S C §18035(f) was amended to require the escrow agent to inform a party, at the opening of escrow and upon notification of a dispute, of the right to submit a request to hold funds in escrow. The escrow agent must hold funds in escrow after receiving written notification from a party requesting that funds be held in escrow.

For further discussion of escrow agent liability, see California Title Insurance Practice (2d ed Cal CEB 1997). See also California Real Property Sales Transactions (4th ed Cal CEB 2007); California Mortgages, Deeds of Trust, and Foreclosure Litigation (4th ed Cal CEB 2009).

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§3.76 7. Agents and Co-Conspirators

The law is fairly well established on agents' liability for their fraud. Anyone may be authorized to act as an agent, including an adverse party to a transaction. *Michelson v Hamada* (1994) 29 CA4th 1566, 1579, 36 CR2d 343. Whether a person performing work for another is an agent depends primarily on whether the one for whom the work is done has the legal right to control the activities of the alleged agent. *Malloy v Fong* (1951) 37 C2d 356, 370, 232 P2d 241. Even if an agent exceeds its authority, the principal may be liable for the torts committed by its agent. CC §§2338-2339; *Herzog v Capital Co.* (1945) 27 C2d 349, 352, 164 P2d 8; *Hartong v Partake, Inc.* (1968) 266 CA2d 942, 960, 72 CR 722; *Ach v Finkelstein* (1968) 264 CA2d 667, 677, 70 CR 472. By operation of law, however, an agent dealing with a third party on behalf of his principal never has authority, either actual or ostensible, to do an act that is, and is known or suspected by the third party to be, a fraud on the principal. CC §2306.

Conspirators are liable for the damages that their co-conspirators cause. *Applied Equip. Corp. v Litton Saudi Arabia Ltd.* (1994) 7 C4th 503, 28 CR2d 475. However, civil conspiracy to interfere with contract rights does not lie against an alleged conspirator that is itself a party to the contract. *Applied Equip. Corp.,* 7 C4th at 514; *PG&E Co. v Bear Stearns & Co.* (1990) 50 C3d 1118, 1126, 270 CR 1. In addition, the "agent's immunity" rule provides that duly acting agents and employees of the contracting party cannot be co-conspirators. *Applied Equip. Corp.,* 7 C4th at 512; *Shoemaker v Myers* (1990) 52 C3d 1, 24, 276 CR 303.

Owners, officers, and directors of a contracting party, however, may have co-conspirator liability if it can be shown that they used improper means and acted to protect the interest of their own company. *Woods v Fox Broad. Subsidiary, Inc.* (2005) 129 CA4th 344, 351, 28 CR3d 463.

Finally, co-conspirator liability may be found when the claim sounds in tort. See, *e.g., Filip v Bucurenciu* (2005) 129 CA4th 825, 28 CR3d 884 (property transfer between husband and ex-wife conspirators was fraudulent transaction under Uniform Fraudulent Transfer Act (UFTA) (CC §§3439-3439.12)).

In federal court, plaintiff borrowers have sued lenders, real estate agents, mortgage brokers, trustees, and others involved in mortgage lending, often alleging conspiracy. At least one court has followed the rule in *Applied Equipment Corp.* to preclude a claim against a lender for civil conspiracy in a breach of the broker's fiduciary duties because the lender, unlike the broker, owes no underlying fiduciary duty to the borrower. See *Champlaie v BAC Home Loans Servicing, LP* (ED Cal, Oct. 22, 2009, No. S-09-1316) 2009 US Dist Lexis 102285. The ruling leaves open the question of whether a lender or other co-conspirator might be held liable for other torts, such as fraud, when a duty is generally owed. See also *Yulaeva v Greenpoint Mortgage Funding, Inc.* (ED Cal, Sept. 3, 2009, No. S-09-1504) 2009 US Dist Lexis 79094 (suggesting that *Applied Equipment* does not bar conspiracy claim when some involved parties do not owe primary duty but are necessary for success of conspiracy).

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J. Defenses

§3.77 1. Statute of Limitations; Laches

The statute of limitations for fraud actions is 3 years, and the statutory period begins when the aggrieved party discovers the fraud (CCP §338(d); *Allen v Sundean* (1982) 137 CA3d 216, 222, 186 CR 863; *Herzog v Capital Co.* (1945) 27 C2d 349, 351, 164 P2d 8) or should have discovered it (*Balfour, Guthrie & Co. v Hansen* (1964) 227 CA2d 173, 190, 38 CR 525). When the buyer should become suspicious and begin investigating is a question of fact. *Tarrant v Butler* (1960) 180 CA2d 235, 240, 4 CR 230. If the deceitful seller has allayed the buyer's suspicions, the statute does not begin to run during the time the buyer's suspicions were lulled. *Kalkruth v Resort Props., Ltd.* (1943) 57 CA2d 146, 149, 134 P2d 513. Also, a defendant relying on the statute may be estopped to invoke it if the plaintiff's delay is induced by fraud. *Kleinecke v Montecito Water Dist.* (1983) 147 CA3d 240, 245, 195 CR 58; *Mills v Mills* (1956) 147 CA2d 107, 119, 305 P2d 61. On asserting the doctrine of equitable estoppel to extend the statute of limitations, see §12.79.

Laches is a defense that may apply to rescission causes of action (*Williams v Marshall* (1951) 37 C2d 445, 455, 235 P2d 372 (15-month delay not unreasonable)), and it may also defeat a fraud cause of action for damages. A delay may also be evidence of a waiver of the fraud, which is a defense. 37 C2d at 456; *Lobdell v Miller* (1952) 114 CA2d 328, 335, 250 P2d 357. See §3.84.

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§3.78 2. Exculpatory Clauses

Parties often try to immunize themselves against a wide variety of claims by inserting exculpatory language in the contract. Typical clauses of this nature provide that (a) the buyer *represents* that it has inspected the property and as a result of the inspection it has accepted or is satisfied with its condition; (b) the buyer is purchasing the property in an "as is" or "with all faults" condition, including matters affecting the property not observable or visible; (c) integration provisions; or (d) a combination of these.

Civil Code §1668 invalidates all contractual provisions that have for their object, directly or indirectly, to exempt anyone from responsibility for his or her own fraud, whether willful or negligent. Section 1668 precludes contractual provisions from trumping fraud claims. *Manderville v PCG&S Group, Inc.* (2007) 146 CA4th 1486, 55 CR3d 59 (exculpatory clause did not as a matter of law bar claims that broker intentionally misrepresented that lot could be split). Generally, all such clauses are ignored in the face of fraud in the inducement charges except for promissory fraud claims.

An exculpatory clause read in conjunction with contract provisions allowing the buyer to inspect and approve title conditions and physical conditions, however, may be enforceable if the buyer waives (formally or by inaction) the ability to learn the information from another source before releasing the title contingency or the inspection contingency.

Civil Code §2079.5 provides that "nothing in this article (relating to the broker's duty to inspect residential real estate) relieves a buyer or prospective buyer of the duty to exercise reasonable care to protect himself or herself, including those facts which are known to or within the diligent attention and observation of the buyer or prospective buyer." Some exculpatory clauses may be enforceable, therefore, because §2079.5 essentially obligates a buyer to perform at least a visual inspection when purchasing residential property.

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§3.79 a. Promissory Fraud

The parol evidence rule (see §3.19) precludes promissory fraud claims. *Bank of America Nat'l Trust & Sav. Ass'n v Pendergrass* (1935) 4 C2d 258, 263, 48 P2d 659; *Banco Do Brasil, S.A. v Latian, Inc.* (1991) 234 CA3d 973, 1009, 285 CR 870; *Price v Wells Fargo Bank* (1989) 213 CA3d 465, 484, 261 CR 735. Thus, well-drafted integration clauses or disclaimers of promises should defeat promissory fraud claims. This special rule does not apply to other types of fraud.

PRACTICE TIP: In promissory fraud claims, both counsel should inquire whether the alleged promise was made before the formation of the contract, and if it contradicts the contract. If a contract provision says that the contract supersedes all prior statements, a claim for promissory fraud may not be viable. See §§3.19, 3.23.

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§3.80 b. Recitals

Real property agreements often have "recital clauses" at the outset of the agreement. See, *e.g., Plaza Freeway Ltd. Partnership v First Mountain Bank* (2000) 81 CA4th 616, 621, 96 CR2d 865 (tenant estoppel certificates). Such clauses often contain facts, statements of intention, and other matters. Evidence Code §622 provides: "The facts recited in a written instrument are conclusively presumed to be true as between the parties thereto, or their successors in interest; but this rule does not apply to the recital of a consideration."

Arguably, Evid C §622 might trump all types of fraud claims if the recital of a fact is clearly stated and operates to contradict a party's allegation contrary to the recited fact. Since its effective date on January 1, 1967, however, it has not been tested against fraud claims. The former statute also did not receive an interpretation involving fraud in the inducement claims. One court noted that certain facts stated in a guaranty agreement were conclusively presumed to be true. However, the court was considering promissory fraud claims, not fraudulent inducement claims. *Banco Do Brasil, S.A. v Latian, Inc.* (1991) 234 CA3d 973, 995, 1009, 285 CR 870. As discussed in §3.79, integrated agreements are frequently immunized from promissory fraud claims. Thus, the court in *Banco Do Brasil* did not have before it a clash between Evid C §622 and fraud in the inducement claims. The question of whether §622 overrides fraud in the inducement claims is therefore unsettled.

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§3.81 c. Warranties

Real property agreements may contain warranties or statements that there are no warranties. In one case, a contract contained a disclaimer that there were no representations, guaranties, or warranties of any kind or character by any party, or their representatives, that were not expressed. The court ignored the language and held that evidence of fraudulent representations inducing the execution of a contract is admissible as an exception to the parol evidence rule. *Buist v C. Dudley DeVelbiss Corp.* (1960) 182 CA2d 325, 331, 6 CR 259. In some instances warranties are drafted in the form of representations, and in other instances in the form of traditional warranties. If real property is likened to goods under the Commercial Code, warranties of the latter type are made in terms of statements about the condition or performance of the real property for which an action would lie for breach of warranty.

On other considerations affecting the viability of a defense based on warranty limitations in real property purchase contracts (and other types of written waivers), see chap 14.

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§3.82 d. "As-Is" Clauses

Generally speaking, exculpatory provisions limited to "as is" or "with all faults" clauses do not protect a seller who has perpetrated fraud. CC §1668; *Herzog v Capital Co.* (1945) 27 C2d 349, 352, 164 P2d 8; *Wilson v Century 21 Great W. Realty* (1993) 15 CA4th 298, 304, 306, 18 CR2d 779 (nondisclosure and negligent misrepresentation claims not barred); *Shapiro v Hu* (1986) 188 CA3d 324, 332, 233 CR 470; *Lingsch v Savage* (1963) 213 CA2d 729, 742, 29 CR 201. If the seller's broker affirmatively misrepresented the condition of the property, the court may find that the seller, although innocent of affirmative misrepresentation, had a duty of disclosure to the buyer and is therefore liable for fraud despite the exculpatory clause. *Crawford v Nastos* (1960) 182 CA2d 659, 665, 6 CR 425.

A defrauded purchaser is not precluded by an as-is clause from rescinding and pursuing the innocent seller far enough to secure a return of the consideration paid. Such a clause, however, will relieve an honest seller from liability for *damages* arising from the fraudulent representations of his or her negotiating agent. *Herzog v Capital Co.* (1945) 27 C2d 349, 353, 164 P2d 8.

As a rule, an as-is clause means that the buyer takes property in the condition visible to or observable by him or her. If the seller actively misrepresents the condition of the property or fails to disclose the true facts of its condition not within the buyer's reach, the as-is clause is ineffective. Therefore, an as-is clause may be effective for an obviously dilapidated stairway, but not for a missing structural member, a subterranean creek in the backyard, or an unexploded bomb buried in the basement, if known to the seller. See *Lingsch v Savage* (1963) 213 CA2d 729, 742, 29 CR 201. See also §3.78.

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§3.83 e. Representation and Integration Clauses

A statement in a contract that all representations are included in the contract will not defeat a fraud in the inducement action between a buyer and a seller, but a provision disclaiming promises, representations, verbal understandings, or agreements except those in the contract relieve an innocent seller from damages (but not rescission) for its negotiating agents' fraudulent representations. *Herzog v Capital Co.* (1945) 27 C2d 349, 164 P2d 8. See *Ron Greenspan Volkswagen, Inc. v Ford Motor Land Dev. Corp.* (1995) 32 CA4th 985, 992, 38 CR2d 783. Specific written language directly contradicting the alleged oral statements precludes a finding of reasonable reliance. *Omni Home Financing, Inc. v Hartford Life & Annuity Ins. Co.* (SD Cal 2008) 2008 US Dist Lexis 35259. For a comprehensive analysis of integration clauses, see *Alling v Universal Mfg. Corp.* (1992) 5 CA4th 1412, 1433, 7 CR2d 718; *Banco Do Brasil, S.A. v Latian, Inc.* (1991) 234 CA3d 973, 999, 285 CR 870. See also §§3.19, 4.53. Release clauses are also vulnerable to fraud in the inducement claims when the remedy sought is rescission. *Edwards v Centex Real Estate Corp.* (1997) 53 CA4th 15, 42, 61 CR2d 518.

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§3.84 3. Waiver and Estoppel

Waiver (a legal defense) and estoppel (an equitable defense) are distinct rules, although they are sometimes used interchangeably. *Old Republic Ins. Co. v FSR Brokerage, Inc.* (2000) 80 CA4th 666, 678, 95 CR2d 583. Waiver is the intentional relinquishment of a known right after knowledge of the facts. *Waller v Truck Ins. Exch.* (1995) 11 C4th 1, 31, 44 CR2d 370. It is based on intent and must be established under the clear and convincing evidence standard. The question cannot be left to speculation, and doubtful cases will be decided against it. Waiver may be express (based on words of the waiving party) or implied (based on conduct indicating an intent to relinquish the right). *Waller v Truck Ins. Exch.*, *supra*. See also *Oakland Raiders v Oakland-Alameda County Coliseum, Inc.* (2006) 144 CA4th 1175, 1189, 51 CR3d 144 (implied waiver operates more as equitable estoppel than as traditional waiver, which generally rests on party's intent).

Remaining at the property for 15 months after discovering the fraud and requesting and receiving a modification in contractual obligations was found by the jury not to have established a waiver in *Lawson v Town & Country Shops, Inc.* (1958) 159 CA2d 196, 200, 323 P2d 843. But see *Wice v Schilling* (1954) 124 CA2d 735, 746, 269 P2d 231 (endorsement marked "O.K." did not constitute waiver of fraud in termite report).

When a buyer after discovery of the fraud affirms the contract and recognizes it as valid, either by written agreement or by acts and conduct, and accepts substantial payments, property, or the performance of work or labor not required by the original contract, the buyer waives the right to damages from the fraud. *Schied v Bodinson Mfg. Co.* (1947) 79 CA2d 134, 142, 179 P2d 380. See *Storage Servs. v Oosterbaan* (1989) 214 CA3d 498, 512, 262 CR 689 (distinguishing *Scheid* on ground that plaintiff did not receive substantial concessions in settlement agreement). See also *Oakland Raiders*, 144 CA4th at 1193 (waiver rule does not require that party affirming contract receive greater consideration than opposing party, or that fact finder weigh and compare benefits received by each party). See also *Denevi v LGCC, LLC* (2004) 121 CA4th 1211, 1218, 18 CR3d 276 (an individual does not waive personal claims that do not arise from the "same set of facts" as derivative claims).

A waiver, however, may be prohibited by public policy or statute. For example, in residential sales transactions, the seller must deliver a transfer disclosure form required by CC §§1102-1102.17 to a prospective buyer (see §3.30), and delivery is a nonwaivable condition precedent to the buyer's duty to perform (CC §1102(c)). See *Realmuto v Gagnard* (2003) 110 CA4th 193, 1 CR3d 569. Consequently, if the seller fails to deliver the disclosure form, the buyer may either rescind the contract before the close of escrow (see CC §1102.3) or complete the sale and sue for damages (see CC §1102.13).

Unlike estoppel, waiver does not depend on any act of the opposing party. *Old Republic Ins. Co. v FSR Brokerage, Inc., supra*. Estoppel will succeed as a defense only if the defendant was prejudiced by the plaintiff's conduct (*e.g.,* was induced to take a position detrimental to itself). See *Wilcox v Ford* (1988) 206 CA3d 1170, 1179, 254 CR 138. Waiver is generally regarded as a question of fact for the jury, whereas estoppel is a nonjury question. *Old Republic Ins. Co. v FSR Brokerage, Inc.* (2000) 80 CA4th 666, 679, 95 CR2d 583; *Lawson v Town & Country Shops, Inc.* (1958) 159 CA2d 196, 201, 323 P2d 843; see also *Oakland Raiders*, 144 CA4th at 1191 (implied waiver may be determined as matter of law if facts are susceptible to only one conclusion about waiving party's intent).

The party asserting an estoppel has the burden of pleading and proving supporting facts. *Windsor Mills v Richard B. Smith, Inc.* (1969) 272 CA2d 336, 341, 77 CR 300; *Judelson v American Metal Bearing Co.* (1948) 89 CA2d 256, 266, 200 P2d 836. Four elements must ordinarily be proved to establish an equitable estoppel (*City of Long Beach v Mansell* (1970) 3 C3d 462, 489, 91 CR 23; see also Evid C §623):

- The party to be estopped (*i.e.,* the plaintiff) must know the facts;
- The plaintiff must have intended that his or her conduct be acted on, or must so act that the defendant had the right to believe that it was so intended;
- The defendant must have been ignorant of the true state of facts; and
- The defendant must have relied on the conduct to his or her injury.

To satisfy the second element, the party to be estopped may have acted negligently, which is (as a matter of law) equivalent to acting with an intent to deceive and will satisfy the element of fraud necessary to an estoppel defense. But negligence will suffice only if the plaintiff owes a duty to the party asserting estoppel. *Honeywell v WCAB* (2005) 35 C4th 24, 37, 24 CR3d 179. Estoppel may arise from silence when there is a duty to speak. *Spray, Gould & Bowers v Associated Int'l Co.* (1999) 71 CA4th 1260, 1268, 84 CR2d 552. The mere asking of a favor, such as an extension of time, does not constitute a waiver of a fraud. *Bagdasarian v Gragnon* (1948) 31 C2d 744, 751, 192 P2d 935. If a favor is granted, however, it is generally for the trier of fact to decide whether waiver or estoppel is present. *Bagdasarian v Gragnon, supra*; but see *Oakland Raiders*, 144 CA4th at 1191 (implied waiver may be determined as a matter of law).

The passage of time may indicate a waiver or an estoppel. One court rejected the defendant's assertion that the passage of 7 months operated to show a waiver and an estoppel. *Vogelsang v Wolpert* (1964) 227 CA2d 102, 123, 38 CR 440.

PRACTICE TIP: Although the mere passage of time seldom justifies the application of either defense, the longer the passage of time, the more likely it is that evidence exists that the plaintiff knew about the alleged fraud. Thus a delay warrants careful investigation by the lawyer defending a fraud claim to find the reasons for the plaintiff's delay in asserting the claim.

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§3.85 4. Plaintiff's Ratification

Ratification is the voluntary election by a person to adopt in some manner (as his or her own) the act of another, the effect of which, as to some or all persons, is to treat the act as if originally authorized by him or her. *Rakestraw v Rodrigues* (1972) 8 C3d 67, 73, 104 CR 57. Ratification may occur by conduct that is inconsistent with any reasonable contention other than there has been an approval and adoption of the act. *Common Wealth Ins. Sys. v Kersten* (1974) 40 CA3d 1014, 1026, 115 CR 653. However, ratification of a fraudulent transaction can occur only when the ratifying person has full knowledge of the facts. *Lobdell v Miller* (1952) 114 CA2d 328, 339, 250 P2d 357; *McNulty v Copp* (1949) 91 CA2d 484, 492, 205 P2d 438. One who ratifies an allegedly fraudulent contract by entering into a new contract will waive the right to assert that assent to the original contract was fraudulently induced. *Oakland Raiders v Oakland-Alameda County Coliseum, Inc.* (2006) 144 CA4th 1175, 1192, 51 CR3d 144. For a discussion of the interplay between ratification, waiver and estoppel see *Oakland Raiders*, 144 CA4th at 1186-1192. For further discussion of waiver and estoppel, see §3.84.

EXAMPLE: One court held that the buyers' retention and use of a motel in an exchange amounted to ratification of a broker's misrepresentation. The court held that the intention to ratify the agent's acts must rest on unequivocal evidence and must be manifested by acts inconsistent with any other hypothesis. The buyers' retention and use of the motel was consistent, not with ratification, but with the perpetuation of the agent's fraud, for which he was held liable. *Earle v Lambert* (1962) 205 CA2d 452, 457, 23 CR 79.

It is not necessary for a defendant to plead the plaintiff's ratification as a defense. *Earle v Lambert, supra*. Some courts state that the defrauded person may waive the fraud by acquiescence or ratification of the transaction. See *e.g.*, *Holcomb v Long Beach Inv. Co.* (1933) 129 CA 285, 292, 19 P2d 31. The cases sometimes treat the concepts of ratification and waiver as though they were the same. See, *e.g., Schmidt v Mesmer* (1897) 116 C 267, 271, 48 P 54; *Holcomb v Long Beach Inv. Co.*, *supra*.

PRACTICE TIP: The ratification defense is often used in the context of a principal's ratification of an agent's act. See, *e.g.*, *Common Wealth Ins. Sys. v Kersten, supra*. Occasionally, the rule is raised in real property cases. *Lobdell v Miller, supra* (inspection of real property did not rise to ratification); *McNulty v Copp, supra* (decedent did not ratify fraud in execution of deed). Like waiver, ratification focuses on the conduct of the defrauded person and must consist of substantial conduct to amount to a "voluntary adoption" of a fraud, in the words of *Rakestraw v Rodrigues, supra*. Thus, it is more likely that the defenses of waiver or estoppel would be established before a ratification defense would be.

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§3.86 5. Setoff

Real property transactions sometimes include arrangements in which the seller agrees to finance a portion of the purchase price, resulting in the buyer owing executory contractual obligations to the seller. Whether in the form of installment payments or other obligations, damages caused by failure to perform a promise may serve as a ground for a claim of setoff in a fraud action, even if those obligations do not arise from the same transaction and despite the expiration of the statute of limitations on the claim used as the setoff. See CCP §431.70.

A seller may claim as a setoff the unpaid and past-due payments that a defrauded buyer has not paid. The seller may not, however, set off unmatured payments. *Bagdasarian v Gragnon* (1948) 31 C2d 744, 764, 192 P2d 935. The rationale for the defense is that in seeking fraud damages, the defrauded party seeks to affirm the contract. *Pavlovich v Neidhardt* (1954) 128 CA2d 559, 561, 275 P2d 836.

WARNING: A buyer who stops payments to the seller based on an allegation of fraud risks finding itself "deeply in default" if fraud cannot be established. *Pavlovich v Neidhardt, supra.*

Other types of loss may serve as a basis for the setoff defense. *Sangster v Paetkau* (1998) 68 CA4th 151, 171, 80 CR2d 66. Thus, when a defrauded party, as the result of a tort of another, "is entitled to compensation for the reasonably necessary loss of time, attorney's fees, and other expenditures" (*Prentice v North Am. Title Guar. Corp.* (1963) 59 C2d 618, 620, 30 CR 821), such damages may constitute a basis for asserting them as a setoff (*Sangster v Paetkau*, *supra*). See also *Gray v Don Miller & Assocs., Inc.* (1984) 35 C3d 498, 507, 198 CR 551.

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§3.87 6. Mitigation

A defrauded party must attempt to mitigate its damages to the extent of the other party's nonperformance of the contract. *Kent v Clark* (1942) 20 C2d 779, 783, 128 P2d 868; *Paolini v Sulprizio* (1927) 201 C 683, 687, 258 P 380; *McCauley v Dennis* (1963) 220 CA2d 627, 632, 34 CR 90. A buyer, however, need not resell the property purchased because of its right to affirm the contract (*Harold v Pugh* (1959) 174 CA2d 603, 610, 345 P2d 112), but a resale can be a form of mitigation (see *Kruse v Miller* (1956) 143 CA2d 656, 300 P2d 855).

One court rejected the defendant's argument that the rent the plaintiff received was a means of mitigating damages. Because the action was not for rescission, the court felt that its hands were tied even though there might appear to be an element of unjust enrichment. *Birch v Ciria* (1962) 205 CA2d 1, 8, 22 CR 798. If a plaintiff proceeds to build on property without knowing the true facts (*e.g.*, presence of fill), it may reach a point when it would be unreasonable to require mitigation of damages by termination of (or change in) the building plans. *Gagne v Bertran* (1954) 43 C2d 481, 491, 275 P2d 15.

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§3.88 7. Antideficiency

The antideficiency provisions of CCP §§580b, 580d, and 726 do not bar an action for fraud against a buyer/borrower or a third party, because a fraud action is for damages, not for a deficiency judgment. *Lassar & Gross Int'l v Dunham* (1987) 196 CA3d 496, 241 CR 854 (investor who purchased note secured by second deed of trust in condominium unit sued for fraud in execution and sale of note after investor's interest was wiped out by foreclosure on first deed of trust). See also *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 44 CR2d 352 (ruling on effect of full credit bid in nonjudicial foreclosure on lender's fraud action), discussed in §§3.26, 3.38-3.39, 3.43-3.44, 3.48, 3.57-3.57B, 3.67.

For further discussion of the one-action and antideficiency rules, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 2, 4-5 (4th ed Cal CEB 2009). For further discussion of *Alliance* and other reported cases discussing the effect of the rules on defrauded lenders, see Mortgage Deed of Trust Foreclosure, chap 2.

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§3.88A K. Offers to Settle

An offer to settle before trial under CCP §998 can be an effective litigation fee-shifting tool and provide an incentive to settle. A party who refuses the offer and then fails to get a more favorable judgment may have to pay the other party's attorney fees and costs (such as expert witness fees) that otherwise would have been borne by that other party. For discussion and forms, see California Civil Procedure Before Trial, chap 47 (4th ed Cal CEB 2004). The following are examples of real property actions upholding fees and costs awarded under §998:

- *Vick v Dacorsi* (2003) 110 CA4th 206, 1 CR3d 626;
- *Wong v Thrifty Corp.* (2002) 97 CA4th 261, 118 CR2d 276.

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§3.89 L. Indemnity and Contribution

Indemnity is an important consideration in real property misrepresentation and nondisclosure actions, because the liability of several persons involved in the transaction may be implicated. See *e.g., Easton v Strassburger* (1984) 152 CA3d 90, 199 CR 383. Indemnity may be defined as the obligation of one party to make good a loss or damage incurred by another party. This obligation may be expressly provided for by contract, it may be implied from a contract not specifically mentioning indemnity, or it may arise from the equities of particular circumstances. *Rossmoor Sanitation, Inc. v Pylon, Inc.* (1975) 13 C3d 622, 628, 119 CR 449. Thus, indemnity is either contractual or equitable. *Gardner v Murphy* (1975) 54 CA3d 164, 168, 126 CR 302.

Indemnity is usually asserted in a cross-complaint by a defendant against a codefendant or another party involved in the transaction. See CCP §428.10(b); *Paragon Real Estate Group v Hansen* (2009) 178 CA4th 177, 182, 100 CR3d 234 (allowing buyer's broker to cross-complain for equitable indemnity against seller's broker); *Leko v Cornerstone Bldg. Inspection Serv.* (2001) 86 CA4th 1109, 103 CR2d 858 (allowing broker to pursue indemnity against home inspector). Indemnity is sometimes asserted in a complaint. *Paragon*, 178 CA4th at 180. For discussion of indemnity in construction defect context, see California Construction Contracts, Defects, and Litigation, chaps 12-13 (Cal CEB 2008).

WARNING: Defense counsel should carefully consider whether to file cross-complaints against other parties already named in the suit, because a cross-complaint may only serve to assist the plaintiff in pursuing its case against all of the defendants. The best strategy might be to file a separate action after the underlying action is over, but discovery for that action might be impaired by the lapse of time if the underlying action is appealed. In some situations, insurance considerations may suggest that resolving the dispute globally in one action is more efficient and practical for certain parties.

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§3.89A 1. Contractual Indemnity

Contractual indemnity is either express or implied. Whether an express contractual indemnity provision applies to a particular situation depends on the parties' intent as expressed in the contract, unless parol evidence is admissible to aid in that interpretation. *Centex Golden Constr. Co. v Dale Tile Co.* (2000) 78 CA4th 992, 996, 93 CR2d 259. Thus, the ordinary rules for interpreting contracts apply. *Centex Golden Constr. Co. v Dale Tile Co., supra*.

Express contractual indemnity is not ordinarily subject to equitable considerations or a joint legal obligation to the injured party; rather, it is enforced according to the terms of the indemnity agreement. *Markley v Beagle* (1967) 66 C2d 951, 961, 59 CR 809. In the context of noninsurance indemnity, if a party has an agreement to be indemnified for its own active negligence, or regardless of the indemnitor's fault, the contractual language "must be particularly clear and explicit, and will be construed strictly against the indemnitee." *Crawford v Weather Shield Mfg., Inc.* (2008) 44 C4th 541, 552, 79 CR3d 721. In this way, express indemnity allows the contracting parties the freedom to allocate indemnification responsibilities and to agree to protections beyond those granted by the doctrines of implied or equitable indemnity. 44 C4th at 551.

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§3.89B 2. Equitable Indemnity

Implied contractual indemnity and indemnity resulting from balancing the equities among the parties in the action are both forms of equitable indemnity. A party who wishes to recover a judgment for implied contractual indemnity must plead and prove that the other party breached a contract provision. *Cahill Bros. v Clementina Co.* (1962) 208 CA2d 367, 379, 25 CR 301, disapproved on other grounds in *Bay Dev., Ltd. v Superior Court* (1990) 50 C3d 1012, 1032 n12, 269 CR 720. A party who wishes to recover a judgment for equitable indemnity on the basis of balancing the equities usually must demonstrate the comparative fault of concurrent tortfeasors in causing damage to the injured party. See *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 146 CR 182. Because implied contractual indemnity is a type of equitable indemnity, the ruling in *American Motorcycle* (permitting equitable apportionment of loss based on the relative responsibility of the parties), equally applies to a claim for implied contractual indemnity. *Bay Dev., Ltd. v Superior Court* (1990) 50 C3d 1012, 1029, 269 CR 720. Attorney fees are available under CCP §1021.6 in successful actions for implied contractual indemnity. *Bear Creek Planning Comm. v Title Ins. & Trust Co.* (1985) 164 CA3d 1227, 1244, 211 CR 172, disapproved on other grounds in *Bay Dev., Ltd. v Superior Court* (1990) 50 C3d 1012, 1032 n12, 269 CR 720. See also *John Hancock Mut. Life Ins. Co. v Setser* (1996) 42 CA4th 1524, 50 CR2d 413.

In most real estate transactions, indemnity clauses in the sales agreement should not present much difficulty in breach of contract or negligence-based claims. Although many real estate sales contracts do not contain express indemnity clauses, equitable indemnity might still be available. See *City & County of San Francisco v Cambridge Integrated Servs. Group* (ND Cal, July 2, 2007, No. 04-1523) 2007 US Dist Lexis 51376 (holding equitable indemnity available in underlying action for negligent performance under professional services contract).

A broker may allege equitable indemnity against other brokers in the transaction, regardless of whether the indemnitors are already parties to the action. Even if both brokers are already defendants in an underlying action, a cross-complaint for indemnity may protect a broker from the possibility that the other broker might be dismissed from the case. See *Paragon Real Estate Group v Hansen* (2009) 178 CA4th 177, 100 CR3d 234 (buyer's broker cross-complained for equitable indemnity against seller's broker). Moreover, the arbitration clauses in many sales contracts make it expensive and difficult to obtain indemnity from other persons involved because of problematic dual forum issues created by the clauses. See §§14.38-14.39.

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3. Partial Equitable Indemnity and Comparative Fault

§3.89C a. Degree of Fault Affects Indemnity Obligation

The degree of fault attributed to a defendant party (*e.g.,* intentional versus negligent acts or active versus passive negligence) is a significant factor in determining equitable indemnity obligations. Before the supreme court's decision in *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 146 CR 182, indemnity was traditionally viewed as concerned solely with whether a loss should be entirely shifted from one tortfeasor to another, rather than whether the loss should be shared between the two. It was an "all-or-nothing" rule. 20 C3d at 593. *American Motorcycle* changed the all-or-nothing result and adopted a new rule that enables a concurrent tortfeasor to obtain partial indemnity from other concurrent tortfeasors on a comparative fault basis. 20 C3d at 598. But *American Motorcycle* was a negligence case, and the tort of fraud presents some unique problems in applying the *American Motorcycle* equitable indemnity rule to those problems. Thus, an intentional tortfeasor (developer who concealed poor quality of fill in property from buyers) was not permitted to obtain equitable indemnification from a negligent tortfeasor (property owner/contractor who negligently excavated property that contributed to landslide). *Allen v Sundean* (1982) 137 CA3d 216, 224, 186 CR 863.

In *Easton v Strassburger* (1984) 152 CA3d 90, 111, 199 CR 383, the court of appeal held that a jury instruction barring the actively negligent parties (real estate brokers) from seeking indemnity was erroneous; it ordered the trial court to enter a judgment for the brokers against the seller for indemnity. The jury had allocated liability on a comparative fault basis, finding the seller to be 65 percent at fault, the broker 5 percent, and allocated the balance to other defendants. The court of appeal reasoned that the brokers' active negligence did not preclude their right to seek indemnification from the seller.

In a later case, the supreme court explained some of the implications of equitable indemnification, ruling that it is not automatically available for all tortfeasors who injure the same plaintiff; the courts evaluate the circumstances of the case to decide whether it applies. The right to equitable indemnity is subject to qualification, and countervailing considerations may limit recovery. *Western S.S. Lines, Inc. v San Pedro Peninsula Hosp.* (1994) 8 C4th 100, 109, 32 CR2d 263. See *Prince v PG&E* (2009) 45 C4th 1151, 90 CR3d 732 (because equitable indemnity is derivative and subject to whatever immunities or other limitations on liability are available against injured party, immunity granted by CC §846 barred indemnity action against utility company by property owner sued for personal injuries sustained by recreational invitee).

In *Gardner v Murphy* (1975) 54 CA3d 164, 126 CR 302, a pre-*American Motorcycle* case, the buyer sued the seller and the real estate broker, alleging that they misrepresented the fact that the property purchased was landlocked. The broker cross-complained for indemnity, alleging that it was the seller who misrepresented the facts to the broker who merely relayed those facts to the seller. Demurrers to the cross-complaint were sustained and overturned on appeal. The court applied the concepts of active and passive negligence to the acts of the broker and the seller to conclude that, as between the intentional originator and the negligent transmitter of misrepresentations, the liability and negligence of the former appeared to be primary and active while that of the latter appeared to be secondary and passive. 54 CA3d at 169. *Gardner* distinguished *Schoenberg v Romike Props.* (1967) 251 CA2d 154, 59 CR 359, among other cases, on the ground that the brokers in that case, who were denied indemnity, had made their own misrepresentations to the sellers. *Gardner v Murphy* (1975) 54 CA3d 164, 170, 126 CR 302.

WARNING: The differences between *Gardner* and *Schoenberg* reveal the fluidity with which charges of intentional and negligent misrepresentation, nondisclosure, or constructive fraud of the negligent and intentional type are made in real estate transactions, making equitable indemnity analysis and forecasting a slippery and speculative enterprise. The permutations are too great and the disparity of fact patterns far too wide to generalize about equitable indemnity rules, which as in *Western S.S.* are nearly always decided case-by-case.

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§3.89D b. Joint and Several Liability Required

A restrictive feature of equitable indemnity is that, on matters of substantive law, the doctrine is "wholly derivative and subject to whatever immunities or other limitations on liability would otherwise be available" against the injured party. *Western S.S. Lines, Inc. v San Pedro Peninsula Hosp.* (1994) 8 C4th 100, 115, 32 CR2d 263. Consequently, no indemnity obligation arises among unless the indemnitor is liable to the injured party along with the indemnitee. This principle applies equally to traditional equitable indemnity and implied contractual indemnity. *Prince v PG&E* (2009) 45 C4th 1151, 90 CR3d 732.

Applying these principles requires a case-by-case analysis. In *Western S.S. Lines, Inc. v San Pedro Peninsula Hosp., supra,* the defendant steamship company settled with the person injured on its ship and sought indemnity against the treating hospital as a joint tortfeasor that had exacerbated the injuries. The court in *Western S.S.* held that the steamship company's indemnity recovery was limited by the statutory (MICRA) damage cap, which would limit the injured party's recovery against the hospital. The cap must be applied in indemnity situations, to effectuate MICRA's statutory scheme. In *Prince v PG&E, supra,* a landowner cross-complained for implied contractual indemnity against the utility company when a child was injured by power lines that were on the owner's property by virtue of an easement. There were no joint tortfeasors in *Prince,* and the court weighed two separate, somewhat competing legal issues: the recreational user immunity (CC §846) and the utility's duty to maintain the easement. The court concluded that because implied contractual indemnity and equitable indemnity are derivative, and both are subject to whatever immunities or other limitations on liability are available against the injured party, the immunity granted by §846 barred the owner's indemnity action against the utility company.

Another court held that *American Motorcycle* permits an intentional tortfeasor to obtain indemnity from a concurrent intentional tortfeasor. The court distinguished cases in which an intentional tortfeasor was denied equitable indemnity against negligent parties and reasoned that, if it is equitable and just to allocate loss between concurrent negligent tortfeasors, a negligent tortfeasor, and an intentional tortfeasor, or a negligent tortfeasor and a strictly liable defendant, then there is little logic in prohibiting an intentional tortfeasor from bearing his or her share of liability. *Baird v Jones* (1993) 21 CA4th 684, 686, 693, 27 CR2d 232.

NOTE: When fairness, public policy, equitable considerations, and other conceptions are the "test" of whether parties committing tortious acts should obtain equity from other tortfeasors, it is likely that a body of indemnity case law will develop that is shaped by the variety of factual differences among those cases.

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§3.89E c. Differing Duties of Care Do Not Impede Indemnity Rights

Comparative fault principles apply even if the joint tortfeasors do not have the same duty of care to the plaintiff. For example, if the plaintiff is a principal in a sales transaction, the defendant brokers may seek indemnity against each other. In *Paragon Real Estate Group v Hansen* (2009) 178 CA4th 177, 100 CR3d 234 the buyer sought damages against the seller's broker for failure to disclose an easement, and against her own broker for failure to properly advise her. The buyer's broker cross-complained for equitable indemnity against seller's broker.

Real estate professionals may seek equitable indemnity in nondisclosure actions from home inspection companies. In *Leko v Cornerstone Bldg. Inspection Serv.* (2001) 86 CA4th 1109, 103 CR2d 858, home buyers discovered structural damage and other defects in the property after escrow closed and sued the sellers and the real estate agents for both parties, alleging failure to disclose the defects. The agents then sued several home inspection companies for equitable indemnity, contribution, and declaratory relief, alleging that the inspectors were jointly and severally liable for nondisclosure. One of the inspectors had inspected the property for the buyers, and the two other inspectors had inspected the property for an unrelated prospective purchaser, less than a month before the buyers made an offer on the property. These inspectors had given copies of their reports to the listing agent.

The court of appeal held that the trial court erred in concluding in pretrial orders that the broker was barred as a matter of law from seeking equitable indemnity from the home inspection companies. Rather, when multiple parties have an obligation to discover and disclose the same property defects, each failure to disclose may be a proximate cause of a single indivisible injury to the person to whom the disclosure should have been made. In such cases, the realtors and home inspectors will be jointly and severally liable to the purchasers for that injury. The joint and several liability does not depend on whether the tortfeasors have a duty to one another. The critical issue is the relationship of the tortfeasors to the plaintiff.

In *Leko*, the court also found that joint and several liability can exist even though the joint tortfeasors do not have the same duty of care to the plaintiff. The indivisible injury requirement is met if both defendants fail to disclose or discover the same defect. Liability may be different if different parties fail to disclose different defects. The court noted that the inspectors may well have defenses to the claims against them; however, the procedural posture of the case did not require an analysis or determination of ultimate liability.

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§3.90 M. Real Estate Recovery Fund

Business and Professions Code §10471 allows a plaintiff to recover unsatisfied monetary judgments against real estate licensees from the Real Estate Recovery Account of the Real Estate Recovery Program administered by the Department of Real Estate. Recovery is limited to broker or salesperson transactions in which a real estate license is required. *Doyle v Department of Real Estate* (1994) 30 CA4th 893, 36 CR2d 193. To recover, an aggrieved claimant must obtain a final judgment against the licensee based on the licensee's fraud or conversion of trust funds in connection with licensed activities and must file an application with the Department of Real Estate no later than 1 year after the judgment has become final. *Mason v Department of Real Estate* (2002) 102 CA4th 1349, 126 CR2d 278.

Section 10471 was intended to protect the public from loss resulting from unsatisfied judgments against licensed real estate personnel arising from their fraud, misrepresentation, deceit, conversion, and breach of fiduciary duty. Thus, §10471 allows a recovery against the Real Estate Recovery Account when a stipulated judgment is based on a single cause of action alleging fraud. *Doyle v Department of Real Estate*, *supra*. However, recovery may be denied when the stipulation for the entry of judgment pertains only to claims for professional negligence and breach of duty and does not specifically stipulate that fraud was committed. *Yergan v Department of Real Estate* (2000) 77 CA4th 959, 968, 92 CR2d 189.

PRACTICE TIP: Attorneys representing claimants against the Real Estate Recovery Account should familiarize themselves with the requirements of §10471. Failure to satisfy them will preclude recovery against the fund, which is difficult even in the best of circumstances. The monetary limits of recovery are $50,000 for a single transaction and $250,000 for any one licensee.

For further discussion of recovery from the Real Estate Recovery Fund administered by the Department of Real Estate for unsatisfied judgments against real estate licensees, see §12.35. See also California Real Property Sales Transactions §§2.164-2.170 (4th ed Cal CEB 2007); California Real Estate Brokers: Law and Litigation §§4.20, 8.48, 9.37 (Cal CEB 2009).

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§3.90A N. Manufactured Home Recovery Fund

Under Health & S C §§18070-18070.7, a purchaser or seller of a manufactured home may recover unsatisfied monetary judgments against a manufactured home manufacturer, dealer, or salesperson, or other seller or purchaser, from the Manufactured Home Recovery Fund. Recovery is limited to claims for (1) failure to honor warranties or guarantees, (2) fraud or willful misrepresentation related to any financial provision, (3) fraud or willful misrepresentation of the kind or quality of the product sold or purchased, (4) conversion, (5) any willful violation of any provision in the Manufactured Housing Act of 1980 (Health & S C §§18000-18153), including sections regulating escrow accounts and regulations issued under the Act, or (6) violation of CC §§1797-1797.7 (mobilehome warranty law). Affected persons may file a claim with the Department of Housing and Community Development.

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§3.91 VI. FORM: MULTITHEORY COMPLAINT FOR FRAUD AND ALTERNATIVE REMEDIES

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	**)**	**No. _ _ _ _ _ _**
Plaintiff(s)	**)**	**COMPLAINT FOR DAMAGES**
	)	**FOR BREACH OF SALES**
vs	**)**	**CONTRACT, FRAUD,**
	)	**NEGLIGENT**
_ _[*Name(s)*]_ _,	**)**	**MISREPRESENTATION;**
Defendant(s)	**)**	**ALTERNATIVELY, FOR**
	)	**RESCISSION OF PURCHASE**
	)	**AGREEMENT AND**
	)	**FINANCING DOCUMENTS;**
	)	**AND FOR DAMAGES FOR**
	)	**BREACH OF TITLE**
_____	**)**	**INSURANCE POLICY**

Plaintiff alleges:

GENERAL ALLEGATIONS

1. The real property that is the subject of this action consists of an office building and the land on which it is located, is commonly known as _ _[*address*]_ _, located in _ _ _ _ _ County, is more particularly described as Assessor's Parcel No. _ _[*number*]_ _, and is referred to in this Complaint as "Property." A legal description of the Property is attached to this complaint as Exhibit A.

2. Plaintiff _ _[*name*]_ _ is, and at all times relevant to this complaint was, an individual who resides in _ _ _ _ _ County. Plaintiff purchased and became the owner of the Property on _ _[*date*]_ _ ("Closing Date").

3. Plaintiff is informed and believes and on that basis alleges that at all times relevant to this complaint Defendant _ _[*name*]_ _ is and was a banking corporation, and is referred to in this complaint as "Bank" or "Defendant Bank." Plaintiff purchased the Property from Bank, which financed the purchase, as described in Paragraph 8. Plaintiff is informed and believes and on that basis alleges that Bank claims an interest in the Property as the beneficiary under a deed of trust dated _ _[*date*]_ _, executed by Plaintiff, as trustor, to secure certain obligations in favor of Bank, as beneficiary, and recorded on _ _[*date*]_ _, as Instrument No. _ _[*number*]_ _, in the Official Records of the Office of the Recorder of _ _ _ _ _ County, California. Said deed of trust secures an obligation in the sum of $_ _[*dollar amount*]_ _ and is referred to in this Complaint as the "First Deed of Trust."

4. Plaintiff is informed and believes and on that basis alleges that Defendant _ _[*name*]_ _ ("Title Company") is a corporation doing business in California and is organized under the laws of a state that is unknown to Plaintiff at this time. Defendant Title Company issued a policy of title insurance to Plaintiff on the Closing Date in connection with his purchase of Property. Plaintiff is informed and believes and on that basis alleges that Title Company or its agents, including _ _[*name*]_ _ and Does 16-20, prepared one or more preliminary reports

on the Property before Title Company issued said policy of title insurance.

5. Plaintiff is informed and believes and on that basis alleges that Defendant _ _[*name*]_ _ ("Trustee") is a corporation duly organized and existing under the laws of the State of California and that said Defendant is the duly appointed trustee under the First Deed of Trust. Trustee is named in this Complaint for purposes of providing notice of this lawsuit and of the claims of Plaintiff, but at this time Plaintiff does not seek any monetary liability against Trustee.

6. Plaintiff does not know the true names or capacities of Defendants sued in this complaint as Does 1 through 30, inclusive, and who are sued by such fictitious names. Plaintiff will amend this complaint to allege said names and capacities when the information has been ascertained. Plaintiff is informed and believes and on that basis alleges that each of the fictitiously named Defendants is legally responsible in some manner for the acts or omissions alleged and the injuries and damages claimed in this complaint, or in some manner claims an ownership, security, or other interest in the Property.

7. Plaintiff is informed and believes and on that basis alleges that at all times relevant to this complaint, unless otherwise stated, each Defendant, including those fictitiously named, was the agent, servant, employee, partner and/or joint venturer of each remaining Defendant, and was acting within the course and scope of such agency, employment, partnership and/or joint venture with the permission and consent or ratification of each remaining Defendant, in doing the things alleged in this complaint.

8. On or about _ _[*date*]_ _, Plaintiff entered into a written agreement entitled Standard Offer, Agreement and Escrow Instructions for Purchase of Real Estate (Nonresidential), referred to in this complaint as "Agreement," under which Plaintiff proposed to buy the Property from Defendant Bank. Said Agreement required Bank to convey fee title "free and clear of all encumbrances, including liens, easements, conditions, covenants, and restrictions" to Plaintiff on or before the Closing Date. The Agreement also required Defendant Bank as seller to provide copies of all pertinent property management documents, including but not limited to leases, correspondence, litigation documents, and the like, to Plaintiff within 24 hours of execution of the Agreement. The Agreement also required Defendant Bank to finance the purchase of said office building on which Bank had foreclosed approximately 6 months before the date of the Agreement. The purchase price was $_ _[*dollar amount*]_ _, and Plaintiff put $_ _[*dollar amount*]_ _ down and the remaining sum was set forth in a promissory note, secured by the First Deed of Trust described in Paragraph 3.

9. The Agreement for the purchase of the building, however, did not disclose certain material facts, including that: (a) the Property was encumbered by a recorded easement on the South side, which was used as a driveway for trucks to access a warehouse business on the parcel adjacent to the Property; and (b) the owner of the adjacent business was claiming a prescriptive easement for an additional 20 feet as turn-around space for the trucks.

10. Further, during the negotiations leading up to the completion of the sale of the Property to Plaintiff, Plaintiff was not informed either by Defendant Bank or any of its agents of the facts stated in Paragraph 9, or that Bank and its predecessor had received letters from the adjacent property owner claiming the prescriptive easement, that Bank had been served with a lawsuit and a lis pendens by the adjacent property owner 3 days before the Closing Date, and that the easement of record had appeared on title documents concerning the Property before the trustee's deed recorded on _ _[*date*]_ _ in connection with the Bank's foreclosure on the Property, but had not appeared on the trustee's deed or in the title report issued in connection with Plaintiff's purchase of the Property. Neither Defendant Bank nor any of its agents made said disclosures to Plaintiff at any time before the Closing Date.

FIRST CAUSE OF ACTION

(Damages for Breach of Contract by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 5)

11. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 10 of the General Allegations, inclusive, as if fully set forth in this cause of action.

12. Plaintiff has performed all conditions, covenants, and promises required on its part to be performed in accordance with the Agreement for the purchase of the Property, except those terms for which performance was excused and/or waived by the conduct of Defendant Bank and its agents.

13. On or about _ _[*date*]_ _, Defendant Bank, and Does 1 through 5, and each of them, breached the Agreement for the purchase of the subject office building by, among other things, not conveying a fee title interest "free and clear of encumbrances" in the Property to Plaintiff and by failing to deliver Property-related documents as required by the Agreement.

14. As a result of Defendants' breach of the Agreement, Plaintiff has been damaged in an amount according to proof at trial, but in any event that sum _ _[*will/will not*]_ _ exceed $25,000. Plaintiff has also been required to engage the assistance of an attorney to intervene in the lawsuit brought by the adjacent property owner claiming a prescriptive easement in the Property, and has and will spend money for attorney fees in that action in an amount according to proof.

15. The Agreement provides _ _[*e.g.,*]_ _ _ _[*Paragraph 16*]_ _for reasonable attorney fees to the prevailing party in the event of litigation. As a result of Bank's breach of contract, Plaintiff has and will continue to incur attorney fees in the above-entitled action, the amount of which shall be established on a motion after trial.

WHEREFORE, Plaintiff prays judgment as set forth below.

SECOND CAUSE OF ACTION
(Damages for Breach of Warranty by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 5)

16. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 15, inclusive, as if fully set forth in this cause of action.

17. The Agreement for the purchase of the Property contained a representation and an express warranty that the Property would be "free and clear of encumbrances" and that Bank would convey fee title "free and clear of encumbrances" to Plaintiff on or before the Closing Date.

18. On or about _ _[*date*]_ _, Defendant Bank, and Does 1 through 5, and each of them, breached the express warranty in the Agreement by, among other things, not conveying a fee title interest "free and clear of encumbrances" to Plaintiff under said Agreement.

19. As a result of said Defendant's breach of warranty, Plaintiff has been damaged in an amount according to proof at trial, but in any event at least the sum of $_ _[*dollar amount*]_ _, the price paid for the Property, and reasonable attorney fees to resolve title issues.

WHEREFORE, Plaintiff prays judgment as set forth below.

THIRD CAUSE OF ACTION
(Damages for Fraudulent Misrepresentation by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 5)

20. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 19, inclusive, as if fully set forth in this cause of action.

21. In connection with the Agreement to purchase the Property, and in addition to the misrepresentations set forth in writing in Paragraphs 8 and 17, above, Defendant Bank and Does 1 through 5, and each of them, through its realtor agent(s) _ _[*name(s)*]_ _ orally represented to Plaintiff that the Property was "free and clear of encumbrances" and that the truck use of the Property for access to the warehouse on the adjacent parcel was temporary and would only last for a period of 6 months.

22. The true facts were as stated in Paragraphs 9 and 10. Neither Defendant Bank nor any of its agents disclosed the true facts to Plaintiff at any time before the Closing Date or thereafter.

23. Said Defendants, and each of them, had knowledge of the true facts. The failure to disclose the true facts as well as the intentional representations described above in Paragraph 21 were made by said Defendants with the intent to induce Plaintiff to enter into the Agreement to purchase the Property, and to take other acts described herein, including obtaining financing for the property from Defendant Bank, ultimately closing escrow to complete the transaction, and making substantial improvements to the building after the Closing Date.

24. Plaintiff, at the time of Defendants' misrepresentations and failure to disclose the true facts, and at the time Plaintiff took the actions alleged herein, was ignorant of the existence of those facts that said Defendants, and each of them, suppressed and failed to disclose. Had Plaintiff known the true facts, he would not have entered into the Agreement to purchase the Property, would not have entered into the security agreement under which the real property was given as collateral for the purchase money loan, would not have closed escrow, would not have spent in excess of $50,000 to improve the subject building, or taken other actions described in this complaint. Plaintiff's reliance was justified in that Plaintiff was misled by false misrepresentations and even after reasonable inquiry did not have knowledge of those facts that were suppressed. Furthermore, Plaintiff trusted and relied on the superior knowledge of Defendant Bank, its agents, and Does 1 through 5, who were more familiar with the Property than Plaintiff and were in a superior position to advise Plaintiff regarding conditions of the Property that would affect its value. Bank did not at any time prior to the Closing Date deliver any documents regarding the easement, either of record or on the claim of prescriptive easement.

25. As a proximate result of the misrepresentations and the failure to disclose the true facts, Plaintiff has been damaged in that the value of the property is far less than the sales price. The exact amount by which Plaintiff has been damaged is unknown at this time but it is at least the difference between what Plaintiff paid for the Property and its true value, or other damages, which are unknown to Plaintiff at this time. Plaintiff has also suffered consequential damages in the form of closing costs, escrow fees, loan origination fees, title insurance, moving expenses, payments of principal and interest on the purchase money loan, improvements made to the property, and other expenses, among other damages, according to proof at trial.

26. In doing the things alleged in this complaint, said Defendants, and each of them, acted with oppression, fraud, and malice, and said acts were approved and/or ratified by each of the remaining Defendants. Plaintiff is therefore entitled to punitive damages in a sum according to proof.

WHEREFORE, Plaintiff prays judgment as set forth below.

FOURTH CAUSE OF ACTION
(Damages for Negligent Misrepresentation by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 5)

27. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 27, inclusive, as if fully set forth herein, except Paragraphs 23 and 26.

28. At the time Defendants, and each of them, made the misrepresentations to the Plaintiff as set forth above, Defendants, and each of them, should have known that the representations were false. Said Defendants further should have discovered the true facts by a reasonable inquiry and diligence, even if said facts were not known to said Defendants at the time of making the misrepresentations. Said Defendants intended for Plaintiff to rely on the representations made to him.

29. The above-described acts of said Defendants, and each of them, constitute negligent misrepresentation to the Plaintiff, and these misrepresentations were intended to and did induce the Plaintiff to act in the manner as alleged in Paragraph 24 and were a substantial cause of the damage and injury to the Plaintiff as alleged in Paragraph 25.

30. As a proximate result of said negligence, Plaintiff has been damaged as alleged in Paragraph 25, which is hereby incorporated by reference and for purposes of this Fourth Cause of Action shall refer to acts that constitute negligent misrepresentation.

WHEREFORE, Plaintiff prays judgment as set forth below.

FIFTH CAUSE OF ACTION
(Damages for Fraudulent Concealment by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 5)

31. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 26, inclusive, as if fully set forth in this cause of action.

32. At the time Plaintiff entered into the Agreement to purchase the Property, Defendant(s) _ _[*name(s)*]_ _

and Does 1 through 5, and each of them, had an obligation to disclose to Plaintiff terms and conditions of the title of the Property, as well as conditions of the Property and claims against it that would materially affect its value.

33. Said Defendants, and each of them, had knowledge of the true facts as set forth above and deliberately concealed and failed to disclose said facts.

34. As a proximate result of said intentional concealment, Plaintiff has been damaged as alleged in Paragraph 25, which is hereby incorporated by reference and for purposes of this Fifth Cause of Action shall refer to acts that constitute fraudulent concealment.

WHEREFORE, Plaintiff prays judgment as set forth below.

SIXTH CAUSE OF ACTION
(Damages for Breach of Contract: Title Insurance Policy by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _) and Does 16 through 20)

35. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 34, inclusive, as if fully set forth in this cause of action.

36. On or about _ _[*date*]_ _, Defendant _ _[*name*]_ _ ("Title Company") and Does 16 through 20, and each of them, by and through their agent, _ _[*name*]_ _, located at _ _[*address*]_ _, issued a preliminary report for Plaintiff's information and review in connection with Plaintiff's purchase of a title insurance policy from Defendant Title Company. Among other things, said preliminary report represented that Defendant Bank had fee title to the Property, with no mention of easements, either recorded or claimed and no mention of pending litigation, and Defendant Title Company and Does 16 through 20, and each of them, issued by and through its agent _ _[*name*]_ _, on or about _ _[*date*]_ _, a policy of title insurance based on said preliminary report, insuring title to the estate or interest of Plaintiff described as vested. Upon learning of the title disputes (*i.e.*, easements of record and easement claims) with respect to the Property, Plaintiff first made an inquiry and later filed a claim against Defendant Title Company. As of the date of the filing of this complaint, Defendant Title Company and Does 16 through 20, and each of them, have refused to pay and continue to refuse to pay the contract benefits owing to Plaintiff under the policy of title insurance.

37. Plaintiff has performed all conditions of the policy on his part to be performed, in accordance with the terms of the policy, paid a premium at the close of escrow on the Closing Date, and further gave Defendants due and timely written notice of the losses sustained by Plaintiff in connection with the title defects, which were not discovered by Plaintiff until _ _[*date*]_ _. Said Defendants have refused and failed and continue to refuse to pay Plaintiff the sum demanded in the amount of $_ _[*dollar amount*]_ _, which is now due and owing and unpaid to Plaintiff. The maximum coverage under the policy is $_ _[*dollar amount*]_ _, which also represents the purchase price of the Property.

38. As a proximate result of Defendants', and each of them, failure and refusal as alleged in this complaint, Plaintiff has been damaged in a sum of $_ _[*dollar amount*]_ _, with interest on that sum at the legal rate from and after _ _[*date*]_ _.

39. Plaintiffs are informed and believe and on that basis allege that said policy of title insurance contains a clause allowing for attorney fees to be awarded to the prevailing party in an action brought to enforce its rights under the policy. If said policy contains such a clause, Plaintiff alleges that it should be entitled to recover its attorney fees according to proof by motion after trial.

WHEREFORE, Plaintiff prays judgment as set forth below.

SEVENTH CAUSE OF ACTION
(For Rescission and Cancellation of Purchase Agreement, Promissory Note, and Deed of Trust by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 5, inclusive)

40. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 39, inclusive, as if fully set forth in this cause of action.

41. Plaintiff intends service of this Complaint as Notice of Rescission of the following contracts entered into

by Plaintiff with Defendants Bank and Does 1 through 5, inclusive:

The Standard Offer, Agreement and Escrow Instructions for Purchase of Real Estate (Agreement);

The Deed of Trust, naming Plaintiff as Trustor and Defendant Bank as beneficiary (the "First Deed of Trust"); and

The Promissory Note for $_ _[*dollar amount*]_ _ executed by Plaintiff with the Agreement and the First Deed of Trust.

42. Plaintiff hereby offers to restore to said Defendants, and each of them, all consideration that has passed to Plaintiff on the condition that said Defendants restore to Plaintiff all that he has given to said Defendants, and each of them, including incidental or consequential damages. The grounds for rescission are the claims for fraud and negligent misrepresentation asserted in this complaint by Plaintiff against said Defendants, and each of them, and, in addition, or, in the alternative, material breach of contract, failure of consideration and/or mistake of fact, that Plaintiff diligently investigated the conditions of the Property, including making inquiries of the realtor agents and relying on the preliminary report and title policy by an independent party, Defendant Title Company.

43. Accordingly, Plaintiff is entitled to rescission based on fraud, negligent misrepresentation, mistake of fact, material breach of contract and/or failure of consideration, or any or all of them, each of which provides a separate and independent basis for full rescission under law and/or equity.

WHEREFORE, Plaintiff prays judgment as follows.

PRAYER

A. For compensatory damages according to proof;

B. For general damages in tort according to proof;

C. For special damages according to proof;

D. Alternatively, on causes of action One through Five, for a judicial declaration that the Agreements as set forth in Paragraph 41 of the Seventh Cause of Action between Plaintiff and Defendant Bank are rescinded, and ordering restitution, incidental damages, and other appropriate awards consistent with the remedy of rescission in an amount according to proof;

E. For punitive damages according to proof;

F. For reasonable attorney fees and costs incurred in this action, according to proof;

G. For costs of suit incurred herein; and

H. For such other and further relief as the Court deems just and proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk); copies for service (one for each defendant who is to be served); office copies.

Comment: A limited civil case must be identified as such in the court caption of all court-filed papers. CCP §422.30(b); Cal Rules of Ct 2.111(9). In a complaint filed as a limited civil case, immediately below the character of the action, the plaintiff must specify that the amount demanded in the complaint either does or does not exceed $10,000. Govt C §70613(b); Cal Rules of Ct 2.111(9). For a thorough discussion of the formal aspects of drafting a complaint, see California Civil Procedure Before Trial §§15.3-15.13 (4th ed Cal CEB 2004). See generally Cal Rules of Ct 2.100-2.119.

Paragraphs 8 and 9 are included to meet the requirement of CC §1691 that notice be given promptly (but see CC §1693; §1.33); they should be used if any possibility exists that the defendant may raise delay in rescinding as a defense to the action. The details of the consideration given and received by the plaintiff need not be specified, but it may be advisable that items that the defendant must restore be described particularly so that the eventual default judgment can be made specific on this point with no concern for lack of notice even if the defendant fails to respond after being served with the complaint. On notice requirements, see §§1.32-1.36; on grounds for rescission, see §§1.9-1.28; on consequential damages, see §§1.46-1.48. On attorney fees, see §1.49.

Verification is not required, but it can be useful to force the defendant to verify the answer and specifically deny the allegations of the complaint. See CCP §§431.30, 446. Under §431.30, answers to verified complaints need not be verified in limited civil cases governed by CCP §§90-100 (the economic litigation rules). See also CCP §128.7(a), providing that verification is unnecessary unless otherwise provided by law.

WARNING: Many practitioners believe that verification should be avoided if the facts are unclear or if the complaint contains inconsistent allegations, *e.g.,* to support alternative remedies such as rescission and damages for breach. For discussion of whether and how to verify a complaint, see Civ Proc Before Trial §§15.14-15.21. On venue, see §1.40; Civ Proc Before Trial, chap 8.

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§3.92 VII. FORM: MULTITHEORY COMPLAINT FOR BREACH OF FIDUCIARY DUTY AND RELATED CAUSES OF ACTION

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▶ To download **WordPerfect** version, right click and choose *Save Target As*

_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**COMPLAINT FOR DAMAGES FOR BREACH OF FIDUCIARY DUTY, BREACH OF CONTRACT, NEGLIGENT MISREPRESENTATION, NEGLIGENT SUPERVISION, AND FRAUD**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
_____	)	

Plaintiff alleges:

GENERAL ALLEGATIONS

1. This action concerns the sale (Sale) of residential real property (Property), formerly owned by Plaintiff and commonly known as _ _[*address*]_ _, located in _ _ _ _ _ County, California.

2. Plaintiff is informed and believes and on that basis alleges that at all times pertinent to this action, Defendant _ _[*name*]_ _ (Brokerage) is and was a licensed real estate brokerage company, with its principal place of business in _ _ _ _ _ County.

3. Plaintiff is informed and believes and on that basis alleges that at all times pertinent to this action Defendant _ _[*name*]_ _ (Qualifying Broker) is and was the licensed qualifying broker of Defendant Brokerage and is and was responsible for supervising all real estate licensees employed by or affiliated with Brokerage.

4. Plaintiff is informed and believes and on that basis alleges that at all times pertinent to this action Defendant _ _[*name*]_ _ (Agent) is and was licensed by the State of California Department of Real Estate as a real estate sales agent, and in doing the acts herein alleged was an agent and employee of Defendant Brokerage.

5. Plaintiff does not know the true names or capacities of Defendants sued in this complaint as Does 1 through 30, sued by fictitious names. Plaintiff will amend this complaint to allege said names and capacities when that information is ascertained. Plaintiff is informed and believes and on that basis alleges that each of the fictitiously named Defendants is legally responsible in some manner for the acts or omissions alleged and the injuries and damages claimed in this complaint. Whenever and wherever in this Complaint any Defendant is the subject of any charging allegations, it shall be deemed that Defendants Does 1 through 20 are the subject of such allegations.

6. Plaintiff is informed and believes and on that basis alleges that at all times relevant to this complaint, unless otherwise stated, each Defendant, including those fictitiously named, was the agent, servant, employee, partner, and/or joint venturer of each remaining Defendant, and was acting within the course and scope of

such agency, employment, partnership, and/or joint venture with the permission and consent or ratification of each remaining Defendant, in doing the things alleged in this complaint.

7. Before the Sale that is the subject of this action, Plaintiff was the owner of the Property described in Paragraph 1 for 20 years. On _ _[*date*]_ _, Plaintiff placed the Property on the market and hung a "For Sale By Owner" sign on the Property. Shortly after that, Defendant Agent contacted Plaintiff and offered to represent Plaintiff in procuring a buyer for the Property and to charge Plaintiff only a 3 percent commission on the Sale.

8. At all relevant times Plaintiff was inexperienced and unsophisticated in real estate transactions in that, among other things, Plaintiff _ _[*e.g., had owned only one residence and had only a high-school education*]_ _. Plaintiff is informed and believes and on that basis alleges that at all relevant times, Defendant Agent knew of and understood Plaintiff's lack of experience and sophistication, and further knew that _ _[*e.g., Plaintiff had all life savings invested in the Property and desired to sell the Property and move out of state*]_ _. Plaintiff is informed and believes and on that basis alleges that Defendant Agent also knew that _ _[*e.g., Plaintiff was a widow and spoke only broken English*]_ _.

9. Attached hereto and incorporated by this reference as Exhibit A is a true and correct copy of a document given by Defendant Agent to Plaintiff, which has Defendant Brokerage's name on it and states that Agent is a "knowledgeable, professional, experienced, and caring Realtor—with your real estate needs as our top priority! They don't come any better for your Real Estate needs!" Plaintiff reasonably relied on these representations.

10. On or about _ _[*date*]_ _, Defendant Brokerage, by and through Defendant Agent, entered into a written agreement entitled "Exclusive Authorization and Right to Sell" (Listing Agreement), under which Brokerage, by and through Agent, agreed to procure a buyer for the Property for a 3 percent commission. A true and correct copy of that Listing Agreement is attached hereto as Exhibit B and incorporated herein by this reference.

11. Defendant Agent showed the Property to Buyer, who later decided to purchase the Property.

12. Attached hereto as Exhibit C and incorporated herein by this reference is a true and correct copy of a "Disclosure Regarding Real Estate Agency Relations" (Agency Disclosure), which states that Defendant Agent is acting as the agent for both Plaintiff and Buyer on the Sale and that Agent owes to both, among other things, a fiduciary duty of utmost care, integrity, honesty, and loyalty.

13. On or about _ _[*date*]_ _, through Defendant Agent, Plaintiff and Buyer entered into a Residential Purchase Agreement and Deposit Receipt (hereinafter referred to as the "Purchase Contract"), under which Buyer agreed to purchase the Property for $_ _[*dollar amount; e.g., $500,000*]_ _. A true and correct copy of that Purchase Contract is attached hereto as Exhibit D and incorporated herein by this reference. The Purchase Contract on page 1, ¶1.C., provided that Plaintiff would take a note secured by a deed of trust from Buyer in the amount of $_ _[*dollar amount; e.g., $100,000*]_ _ in lieu of a down payment on the Property.

14. On or about _ _[*date*]_ _, on the advice of and through Defendant Agent, Plaintiff and Buyer entered into a revised Residential Purchase Agreement and Deposit Receipt (Amended Purchase Contract) a true and correct copy of which is attached hereto and incorporated herein by this reference as Exhibit F. This differed from the original Purchase Contract in that on page 1, ¶1.C., of Exhibit F, Buyer was obligated to make a cash down payment of $_ _[*dollar amount; e.g., $100,000*]_ _, but under Addendum "A" to Exhibit F, Buyer's down payment for the purchase was not to be cash, as stated on page 1, but in the form of a note and second deed of trust from Buyer to Plaintiff in the amount of $_ _[*dollar amount; e.g., $100,000*]_ _.

15. Plaintiff is informed and believes and on that basis alleges that Defendant Agent deliberately did not submit Addendum "A" to _ _[*name*]_ _ (Lender), the Buyer's purchase money lender for the Property, and that Agent did not inform but did conceal from Lender that the down payment from Buyer was not cash as stated on Exhibit F, page 1, ¶1.C., but was actually in the form of a loan from Plaintiff to Buyer.

16. Plaintiff is informed and believes and on that basis alleges that Defendant Agent failed to disclose to Plaintiff and Lender that Buyer did not qualify for purchase money lending on the Property under the actual terms of the Sale, and that Agent submitted the Amended Purchase Contract to Lender without attaching Addendum "A." Plaintiff is informed and believes and on that basis alleges that no lender, including but not limited to the Lender on the Sale, would have made a purchase money loan to Buyer, had it known of the actual terms.

17. Plaintiff is informed and believes and on that basis alleges that Buyer not only lacked the necessary cash for a down payment for the purchase of the Property but also had a number of outstanding personal debts totaling $_ _[*dollar amount; e.g., $20,000*]_ _, which Lender required to be paid off before making the loan to close the Sale. Subsequently, Defendant Agent advised and convinced Plaintiff to make a personal loan to Buyer for $_ _[*dollar amount; e.g., $20,000*]_ _ so that Buyer could pay off the debts and complete the Sale. Defendant Agent instructed Plaintiff to submit the loan money in the form of a cashier's check, which Plaintiff did. The check was not deposited into the escrow on the Sale, but into a private bank account in the name of Buyer that would credit Buyer with the financial ability to qualify for a loan.

18. Plaintiff is informed and believes and on that basis alleges that by persuading Plaintiff to make a cash loan and accept a note in lieu of a down payment, Defendant Agent severely reduced Plaintiff's profits from the Sale and provided Plaintiff with unreliable seller financing from the Sale in the total sum of $_ _[*dollar amount; e.g., $120,000*]_ _, whereas Buyer paid nothing down to purchase the Property and profited from the personal loan.

19. Attached hereto as Exhibit E and incorporated by this reference are true and correct copies of the actual note and deed of trust given from Buyer to Plaintiff (Second Note and Second Deed of Trust), indicating, among other things, _ _[*e.g., that payments on the note are to be interest only, with a balloon payment of the entire unpaid balance of principal and interest due 5 years after the execution of the note*]_ _. The Second Deed of Trust was recorded on _ _[*date*]_ _, as Instrument No. _ _[*number*]_ _, in the Official Records of the Office of the Recorder of _ _ _ _ _ County, California.

20. Plaintiff is informed and believes and on that basis alleges that Defendant Agent caused escrow closing statements on the Sale to be prepared that materially misrepresented the structure of the purchase financing, including but not limited to omitting a mention of the Second Note and Deed of Trust in the sum of $_ _[*dollar amount; e.g., $120,000*]_ _.

21. Plaintiff is informed and believes and on that basis alleges that unbeknownst to Plaintiff, Defendant Agent and other Defendants improperly instructed the preparation of escrow statements regarding commissions and took commissions on the Sale totaling approximately _ _[*dollar amount; e.g., $50,000*]_ _, which greatly exceeds the 3 percent commission stated in the Listing Agreement.

22. After the Sale, Plaintiff moved out of state. Plaintiff is informed and believes and on that basis alleges that prior to the Sale, Defendant Agent knew or should have known that Plaintiff, after moving away, would not be in a position to respond adequately to problems arising out of the Sale, including but not limited to, enforcing loan payments owing to Plaintiff.

23. Defendant Agent failed to advise Plaintiff of the consequences to Plaintiff of a default by Buyer on the Lender note, secured by a first deed of trust on the Property (First Note and Deed of Trust), which was recorded before and had priority over the Second Deed of Trust held by Plaintiff. Agent failed to advise Plaintiff to arrange to obtain notices of default of the First Note. Agent failed to arrange for Plaintiff to receive said notices of default.

24. Defendant Agent further failed to advise Plaintiff of the fact that Buyer had little equity in the Property, which significantly increased the risk of default on all notes secured by the Property.

25. Defendant Agent also failed to fully advise Plaintiff of the applicability of antideficiency statutes, including the risk that as a junior lienholder Plaintiff might be unable to recover some or all of the loan proceeds if the Property was sold in foreclosure by the Lender.

26. Plaintiff is informed and believes and on that basis alleges that Defendant Agent failed to include the Second Deed of Trust in favor of Plaintiff as part of the escrow to close the Sale and failed to record the Second Deed of Trust for approximately two (2) years after the close of the Sale.

27. Attached hereto and incorporated by this reference as Exhibit "H" is a true and correct sample copy of a Seller Financing Disclosure Statement, which an arranger of credit is required to prepare and submit to a buyer and seller of real property when the seller has agreed to extend credit to the buyer as part of the purchase price. At no time during the Sale did Defendant Agent submit to Plaintiff completed seller financing disclosure statements in accordance with Civil Code §§2956-2967.

28. Plaintiff is informed and believes and on that basis alleges that Buyer monetarily defaulted on the First Note. To protect Plaintiff's interest in the Property given by the Second Deed of Trust, Plaintiff made payments on the First Note.

29. On the advice and counsel of Defendant Agent, Plaintiff paid to Buyer the amount of $1,500 and agreed to accept a deed in lieu of foreclosure of the Second Deed of Trust, on the condition that Buyer vacate the Property on or before _ _[*date*]_ _.

30. Attached hereto and incorporated by this reference as Exhibit "I" is a true and correct copy of a Grant Deed in Lieu of Foreclosure, dated and recorded _ _[*date*]_ _, by which Buyer conveyed the Property to Plaintiff.

31. Attached hereto and incorporated by this reference as Exhibit "J" is a true and correct copy of the Exclusive Authorization and Right to Sell, by which Plaintiff and Defendant Agent, acting as the agent of Defendant Brokerage, agree that Defendant Agent shall be Plaintiff's agent for the anticipated resale of the Property. Plaintiff is informed and believes and on that basis alleges that instead the Property was sold at a trustee's sale held at the direction of the Lender holding the First Deed of Trust.

FIRST CAUSE OF ACTION
(Breach of Fiduciary Duty; by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 5)

32. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 31 of the General Allegations, inclusive, as if fully set forth.

33. By virtue of Plaintiff's lack of knowledge or experience in real estate transactions, and Defendant's protracted involvement with Plaintiff on the Sale and financing transactions as alleged, Defendants Brokerage, Qualifying Broker, and Agent, and each of them, owed to Plaintiff's a fiduciary duty, and by virtue of Plaintiff's having placed trust and confidence in the fidelity, good faith, and integrity of said Defendants, who voluntarily accepted and assumed that trust and confidence, a confidential and fiduciary relationship existed between Plaintiff and said Defendants and each of them at all times pertinent to this action.

34. Plaintiff is informed and believes and on that basis alleges that despite having voluntarily accepted the trust and confidence reposed in them by Plaintiff with regard to the Sale, and in violation of this relationship of trust and confidence, said Defendants abused the trust and confidence of Plaintiff by failing to properly represent Plaintiff and by asserting their own pecuniary interests and those of Buyer above those of Plaintiff, in that, among other things, Defendants

a. intentionally failed to disclose to Plaintiff material information concerning the risks involved in carrying a note and holding a second deed of trust on the Property, including but not limited to, the increased risk that Buyer, with little or no equity, would default on the financing obligations,

b. failed to inform Plaintiff that if not for the concealment of the Second Note and Deed of Trust, the Lender or any lender would not likely have financed the Sale,

c. failed to disclose to Plaintiff the actual amount of Defendants' commissions,

d. lured Plaintiff into the Sale with the intent to subsequently alter the terms, to Plaintiff's detriment,

e. failed to give Plaintiff a Seller Financing Disclosure Statement, and

f. intentionally induced Plaintiff to lend money to Buyer on terms that were highly risky to Plaintiff without informing Plaintiff of the risks.

35. Plaintiff is informed and believes and on that basis alleges that Defendants, and each of them, did the acts herein alleged with the intent to deceive and defraud Plaintiff.

36. Plaintiff in fact placed confidence and reliance on Defendants and was not aware of any facts making Plaintiff suspicious of the veracity of Defendants' representations or the danger to Plaintiff's interests until or about _ _[*date*]_ _, when Plaintiff discovered that Defendants had failed to disclose material facts concerning

the Sale, had asserted their own and others' pecuniary interests above those of Plaintiff, and had failed to properly represent Plaintiff in the manner alleged.

37. As a result of the breach of fiduciary duty by Defendants Brokerage, Qualifying Broker, and Agent, and Does 1 through 5, and each of them, as alleged, Plaintiff has been damaged in an amount presently unknown to Plaintiff, in an amount according to proof, but at least in the sum of $_ _[*dollar amount*]_ _. Damages include the amount of the unpaid monetary loans made to Buyer, the excessive commissions paid to said Defendants, closing costs, escrow fees, title fees, moving expenses, payments of principal and interest on the first purchase money loan, and other pecuniary losses and out of pocket expenses, according to proof at trial.

38. Plaintiff is informed and believes and on that basis alleges that in doing the things alleged in this complaint, said Defendants and each of them acted with oppression, fraud, and malice, and that said acts were approved and/or ratified by each remaining Defendant. Plaintiff is therefore entitled to punitive damages in an amount according to proof.

WHEREFORE, Plaintiff prays judgment as set forth below.

SECOND CAUSE OF ACTION
(Breach of Covenant of Good Faith and Fair Dealing;
by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s)
_ _[*name(s)*]_ _ and Does 1 through 5)

39. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 31 of the General Allegations, Paragraphs 33 through 37 of the First Cause of Action, and Paragraphs 54 through 56 of the Fourth Cause of Action, inclusive, as if fully set forth.

40. The Listing Agreement described in paragraph 10, above, contains an implied covenant of good faith and fair dealing that required Defendants Brokerage, Qualifying Broker, and Agent, and each of them, to do all things necessary and proper in procuring a purchaser for Plaintiff's property.

41. By virtue of the foregoing conduct, as alleged, including their failure to disclose material facts concerning the Sale and their assertion of their own and others' pecuniary interests above those of Plaintiff, said Defendants, and each of them, breached that implied covenant of good faith and fair dealing.

42. Plaintiff has performed all conditions, covenants, and promises required to be performed, except those acts excused by the breach of Defendants.

43. As a result of said Defendants' breach, Plaintiff has suffered damages, including but not limited to pecuniary loss and other damages as described in Paragraph 37, in an amount according to proof, but at least in the sum of $_ _[*dollar amount*]_ _.

44. The Listing Agreement provides that in the event of litigation, the prevailing party shall be entitled to reasonable attorney fees and costs. Consequently, if Plaintiff prevails on this Cause of Action, Plaintiff will be entitled to reasonable attorney fees and costs in an amount according to proof.

WHEREFORE, Plaintiff prays judgment as set forth below.

THIRD CAUSE OF ACTION
(Negligent Misrepresentation; by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 5)

45. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 31 of the General Allegations and Paragraphs 33 through 37 of the First Cause of Action, inclusive, as if fully set forth.

46. Plaintiff is informed and believes and on that basis alleges that Defendants Brokerage, Qualifying Broker, and Agent, and each of them, falsely represented to Plaintiff both orally and in written materials that Defendant Agent was a knowledgeable, professional, experienced, and caring realtor, and that she would put Plaintiff's real estate needs first. Plaintiff is informed and believes and on that basis alleges that said Defendants falsely represented to Plaintiff that (a) the primary lender on the Sale deemed that the terms of the transactions were

acceptable to said lender; (b) Plaintiff would pay only 3 percent in commissions on the Sale; (c) the financing and other terms of the Sale were beneficial to and held minimal risks for Plaintiff; and (d) Plaintiff would benefit from paying money to Buyer in exchange for a Grant Deed in lieu of foreclosure on the Property.

47. Plaintiff is informed and believes and on that basis alleges that the representations made by said Defendants were in fact false. Plaintiff is informed and believes and on that basis alleges that the true facts were that (a) the primary lender, had it known the true terms of the Sale, would not have agreed to finance said Sale; (b) Defendants put their own needs and the needs of others before those of Plaintiff; (c) Defendants caused Plaintiff unknowingly to pay excessive commissions for the Sale; (d) Defendants deliberately concealed the terms of the Sale from the primary lender; (e) Defendants deliberately concealed the risks Plaintiff incurred by accepting from Buyer the Note and Second Deed of Trust; and (f) Defendant Agent knew that Buyer was in default on the senior note on the Property and accordingly Plaintiff would not benefit from any payment to Buyer.

48. Defendants made these representations with no reasonable ground for believing them to be true, in that Defendants knew or should have known that lenders generally require a purchaser to make a cash down payment on a residential real property sale and require the purchaser to meet other qualifications for financing a sale, that the Buyer on the Sale of Plaintiff's property did not qualify for the loan actually received from the Lender, that Defendants had entered into a listing agreement with Plaintiff that provided for a 3 percent commission to be paid on the Sale, and that the seller-financing terms requiring Plaintiff to hold a second deed of trust on the Property would involve considerable risk for Plaintiff, especially because Buyer would have little or no equity in the Property.

49. These representations were made by said Defendants with the intent to induce Plaintiff to act in the manner herein alleged.

50. Plaintiff, at the time these representations were made by said Defendants, and at the time Plaintiff took the actions herein alleged, was ignorant of the falsity of Defendants' representations and believed them to be true. In reliance on these representations, Plaintiff was induced to and did enter into the Amended Purchase Contract for the Sale, make a loan of $_ _[*dollar amount*]_ _ to Buyer in exchange for a Note and Second Deed of Trust on the Property, close the Sale and move out of state, pay more money to Buyer to induce him to vacate the Property, and relist the Property with Defendant Agent on _ _[*date*]_ _.

51. Plaintiff is informed and believes and on that basis alleges that Plaintiff's' reliance on said Defendants' statements was justified because of Plaintiff's lack of experience and knowledge of real estate transactions and because Defendants Brokerage and Qualifying Broker, and Does 1 through 5, and each of them, through Defendant Agent, repeatedly reassured Plaintiff that the transactions were lawful, proper, and in Plaintiff's best interest.

52. As a proximate result of Defendants' negligent misrepresentation, Plaintiff was damaged in an amount presently unknown to Plaintiff, in an amount according to proof. The damage allegations of Paragraph 37 are incorporated by reference and for purposes of this Third Cause of Action shall refer to acts that constitute Negligent Misrepresentation.

WHEREFORE, Plaintiff prays judgment as set forth below.

FOURTH CAUSE OF ACTION
(Negligent Failure to Supervise; by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 5)

53. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 31 of the General Allegations, Paragraphs 33 through 37 of the First Cause of Action, and Paragraphs 46 through 52 of the Third Cause of Action, inclusive, as if fully set forth.

54. Plaintiff is informed and believes and on that basis alleges that Defendants Brokerage and Qualifying Broker, and each of them, hired Defendant Agent to act as a real estate agent on their behalf, and that Defendant Agent, at all relevant times acted in this representative capacity in dealing with Plaintiff.

55. As a proximate result of Defendant Agent's actions performed in the course and scope of her employment by said Defendants, Plaintiff has been damaged in an amount according to proof. The damage

allegations of Paragraph 37 are incorporated by reference and for purposes of this Fourth Cause of Action shall refer to acts that constitute Negligent Failure to Supervise.

56. Defendants Brokerage and Qualifying Broker, and each of them, have a duty to ensure that their agents perform their duties to clients in real estate transactions in a legal and ethical manner, which duty may not be delegated to any other person under contract or otherwise. Said Defendants, and each of them, are therefore liable for the acts of Defendant Agent and Plaintiff's damages.

WHEREFORE, Plaintiff prays judgment as set forth below.

FIFTH CAUSE OF ACTION
(Fraud in the Inducement by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 5)

57. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 31 of the General Allegations, Paragraphs 33 through 38 of the First Cause of Action, and Paragraphs 46 through 52 of the Third Cause of Action (except Paragraph 48), inclusive, as if fully set forth.

58. Defendants Brokerage and Qualifying Broker, and Does 1 through 5, and each of them, through Defendant Agent falsely represented to Plaintiff that the Property could be sold on the terms required by Plaintiff. Plaintiff had faith and confidence in Defendants because they were duly licensed real estate brokers and agents, and in reliance listed and sold the Property through Defendants.

59. Defendant Agent further represented to Plaintiff that she had a purchaser for the Property on the terms required by Plaintiff; in reliance on that statement, Plaintiff agreed to sell the Property after repeated assurances from Defendant Agent that Buyer was a ready, willing, and financially able buyer. Defendant Agent fraudulently prevailed on Plaintiff to sign certain documents that were not at that time explained to Plaintiff but that later were shown to be addenda to the agreement for the Sale and other documents related to the Sale. The true nature of these documents was not revealed to Plaintiff but was concealed from Plaintiff by Defendant Agent. Defendant Agent also made the false representations alleged in Paragraph 46.

60. Defendants Brokerage and Qualifying Broker, and Does 1 through 5, and each of them, through Defendant Agent made these representations knowing that they were false, in that said Defendants knew that lenders generally require a purchaser to make a cash down payment on a residential real property sale and require the purchaser to meet other qualifications for financing a sale, that the Buyer on the Sale of Plaintiff's property did not qualify for the loan actually received from the Lender, that Defendants had entered into a listing agreement with Plaintiff that provided only for a 3 percent commission to be paid on the Sale, and that the seller-financing terms requiring Plaintiff to hold a second deed of trust on the Property would involve considerable risk for Plaintiff, especially because Buyer would have little or no equity in the Property.

61. These representations were made by said Defendants with the intent to induce Plaintiff to act in the manner alleged. Plaintiff relied on the statements made by Defendant Agent that she was selling the real property for Plaintiff on the terms required by Plaintiff; these representations and statements by Defendant Agent were false and fraudulent; Plaintiff would not have sold the Property or taken back a note and deed of trust had Plaintiff known that the statements were false and fraudulent; Plaintiff was damaged on account of the conduct of said Defendants in an amount according to proof, as alleged in Paragraph 37.

62. Defendants Brokerage, Qualifying Broker, and Agent, and Does 1 through 5, and each of them, were paid and received commissions from Plaintiff on account of the Sale, and Plaintiff is informed and believes and on that basis alleges that Plaintiff paid excessive commissions to said Defendants.

63. In doing the foregoing acts, said Defendants, and each of them, acted maliciously, fraudulently, and willfully, and the acts constituted a fraudulent scheme on the part of Defendants to sell Plaintiff's Property and extract excessive commissions from Plaintiff on the Sale by means of fraud, trickery, and deliberate falsehood; by reason of which Plaintiff seeks exemplary and punitive damages against said Defendants. Plaintiff is informed and believes and on that basis alleges that Defendants Brokerage and Qualifying Broker, and Does 1 through 5, and each of them, consented to, knowingly received the benefits of, and/or ratified the fraudulent conduct of Defendant Agent.

WHEREFORE, Plaintiff prays judgment as set forth below.

SIXTH CAUSE OF ACTION
(Breach of Contract; by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 5)

64. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 31 of the General Allegations, Paragraphs 33 through 37 of the First Cause of Action, and Paragraphs 40 through 44 of the Second Cause of Action, inclusive, as if fully set forth.

65. The Listing Agreement described in Paragraph 10, above, states that as compensation to Defendants Brokerage, Qualifying Broker, and Agent, and each of them, for doing all things necessary to procure a purchaser for Plaintiff's property, Plaintiff would pay Defendants a commission of 3 percent.

66. By virtue of the Defendants' conduct, as alleged, including their taking excess commissions from the proceeds of the Sale, their failure to disclose material facts concerning the Sale, and their assertion of their own and others' pecuniary interests above those of Plaintiff, said Defendants and each of them, breached the Listing Agreement.

67. Plaintiff has performed all conditions, covenants, and promises required to be performed under the Agreement, except those acts excused by the breach of Defendants.

68. As a result of said Defendants' breach, Plaintiff has suffered damages, including but not limited to pecuniary loss and other damages as described in Paragraph 37, in an amount according to proof, but at least in the sum of $_ _[*dollar amount*]_ _.

69. The Listing Agreement provides that in the event of litigation, the prevailing party shall be entitled to reasonable attorney fees and costs. Consequently, if Plaintiff prevails on this Cause of Action, Plaintiff will be entitled to reasonable attorney fees and costs in an amount according to proof.

WHEREFORE, Plaintiff prays judgment as follows:

1. For compensatory damages in an amount according to proof;

2. For special and consequential damages in an amount according to proof;

3. For punitive damages in an amount according to proof;

4. For reasonable attorney fees on the Second and Sixth Causes of Action in an amount according to proof;

5. For costs of suit; and

6. For such other and further relief that the Court considers just and proper.

Date: _ _ _ _ _ _ _ _[*Name of firm*]_ _

By: __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for Plaintiff

Copies: Original (filed with court clerk); copies for service (one for each defendant who is to be served); office copies.

Comment: See Comment in §3.91. This complaint is primarily directed against real estate agents. For a discussion of the split in authority on the proper measure of damages in fiduciary fraud actions, see §§3.57-3.57B. For a thorough discussion of the formal aspects of drafting a complaint, see California Civil Procedure Before Trial §§15.3-15.13 (4th ed Cal CEB 2004). See generally Cal Rules of Ct 2.100-2.119.

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4

Damages for Breach of Seller-Buyer Contracts

David B. Dimitruk
Jane L. O'Hara Gamp

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Source: Real Property/California Real Property Remedies and Damages/4 Damages for Breach of Seller-Buyer Contracts/§4.1 I. INTRODUCTION

§4.1 I. INTRODUCTION

Traditionally, the purchase of real property is the single most important and expensive transaction most individuals undertake. When a sale transaction goes awry, emotions run high—regardless of whether the damages are significant or minor. The key to a successful purchase and sale transaction is a carefully and thoughtfully drafted contract. For this reason, form contracts are standard in most residential and many commercial purchase and sales, with some regional differences. The forms should be tailored, however, to individual transactions by using clearly worded addendums. A careful practitioner can thus help the client avoid having to implement the remedies discussed in this chapter. For transactional approaches to buying and selling property, see the following book or action guide: California Real Property Sales Transactions (4th ed Cal CEB 2007); Handling Real Property Sales Transactions (Cal CEB Action Guide March 2009).

This chapter primarily focuses on the remedies for breach of real property purchase and sale agreements, although breach of installment land contracts and breaches in foreclosure sales are also briefly addressed. A careful distinction must be made between these transactions because the available remedies are different. See §§4.64, 4.83-4.90. The nature of the action, jurisdiction, and venue are discussed in §§4.35-4.37, remedies for the seller's breach in §§4.45-4.50, and remedies for the buyer's breach in §§4.64-4.80. Complaint forms for damages for breach of contract are in §§4.91-4.92.

On a practical level, litigation involving the sale of real property frequently involves claims for nondisclosure and misrepresentation; thus careful analysis of these additional tort and statutory causes of action are imperative. These remedies are discussed in chap 3. Note that a nondisclosure or a misrepresentation of a property condition may also be a breach of the contract if the contract addresses the condition expressly or makes an express warranty.

To support a complaint for breach of contract, an enforceable contract must exist. The essentials of formation and content of the purchase and sale agreement are discussed in Real Property Sales, chap 4. In addition, remedies for both lenders and borrowers on the underlying financing of real property sales are discussed in detail in California Mortgages, Deeds of Trust, and Foreclosure Litigation (4th ed Cal CEB 2009).

There is a strong legislative policy toward contract enforcement. See CC §1636. At the end of the 19th century, the courts added weight to their own role as the government's arm of enforcement by explaining that the preference for enforcement was based on the inherent rights of freedom and liberty. See *Baltimore & Ohio Southwestern Ry. Co. v Voight* (1900) 176 US 498, 505, 44 L Ed 560, 20 S Ct 385, ("[T]he right of private contract is no small part of the liberty of the citizen"); *Estate of Garcelon* (1894) 104 C 570, 591, 38 P 414 ("Therefore, you have this paramount public policy to consider—that you are not lightly to interfere with this freedom of contract").

This policy is continuously cited in the modern cases despite the imperfections in contracts that might have previously resulted in their invalidation. See, *e.g., Bank of the West v Superior Court* (1992) 2 C4th 1254, 1264, 10 CR2d 538; *Founding Members of the Newport Beach Country Club v Newport Beach Country Club, Inc.* (2003) 109 CA4th 944, 955, 135 CR2d 505. It readily appears that the courts prefer to support the efforts of parties who have engaged in a legally sufficient effort to make a contract. See *Okun v Morton* (1988) 203 CA3d 805, 817, 250 CR 220. Despite this enforcement policy, there are numerous reasons why contractual efforts should not be enforced that are equally important. As illustrated in this chapter, the friction between the policy of enforcement and the reasons advanced against enforcement is often resolved by the application of the rules of interpretation, the implied duty of good faith and fair dealing, or the parol evidence rule.

This chapter seeks to isolate certain aspects of contract law and explain how they may apply to a real property damages action. Not all contract law, however, is based on contracts involving real property and where appropriate, cases and statutes are cited outside the context of real property contracts as support for how real property contracts might be affected by such other precedents. Further, this chapter is not intended as a comprehensive review of contract law. For a more comprehensive work on contract law, see generally California Law of Contracts (Cal CEB 2007).

PRACTICE NOTE: When an action is equitable in nature, courts of equity may hold the parties to the "usual and reasonable conditions" of a contract for the sale of real property. *King v Stanley* (1948) 32 C2d 584, 588, 197 P2d

321, disapproved on other grounds in *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366; *Hutton v Gliksberg* (1982) 128 CA3d 240, 245, 180 CR 141. This may require proof of what the "custom" is, such as through testimony from an escrow officer or real estate agent. See *King,* 32 C2d at 588; *Hutton,* 128 CA3d at 245. On the other hand, courts of equity may not create new substantive contractual rights under the guise of doing equity. *Wal-Noon Corp. v Hill* (1975) 45 CA3d 605, 613, 119 CR 646.

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II. CONTRACT FORMATION

§4.2 A. Elements to a Contract Claim

A claim for breach of contract involves the following *basic pleading* elements: (1) the contract; (2) the plaintiff's performance or excuse for nonperformance; (3) the defendant's breach; and (4) the resulting damages to the plaintiff. *Careau & Co. v Security Pac. Bus. Credit, Inc*. (1990) 222 CA3d 1371, 1388, 272 CR 387. In some circumstances, the law demands more, such as in the case of (1) the statute of frauds, which requires a sufficient memorandum that at least identifies the parties, the price, and the property (see §§4.11, 4.14-4.18); (2) consideration, which must exist to support the contract and which may consist of duties implied by the law (see §4.19); and (3) the effect of ambiguous contract terms, the interpretation of which must be pleaded (see §§4.11-4.26).

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Source: Real Property/California Real Property Remedies and Damages/4 Damages for Breach of Seller-Buyer Contracts/§4.3 B. Legality, Validity, and Enforceability

§4.3 B. Legality, Validity, and Enforceability

Ordinarily, the question of whether a contract is legal, valid, or enforceable is thought of as a defense to a contract action and would be treated toward the end of a work rather than at its beginning. The question of whether a contract is legal, however, is fundamental to jurisprudence itself because courts have an *independent duty* to determine whether the contract or some part of it is illegal.

A contract is valid if it is a legal contract and it is invalid and void if it is illegal. See CC §§1596, 1598-1599, 1608, 1667; *Morey v Paladini* (1922) 187 C 727, 733, 203 P 760 (contracts "against public policy or against the mandate of the statute, may not be made the foundation of any action either in law or equity"); *Copeland v Baskin Robbins U.S.A.* (2002) 96 CA4th 1251, 1257, 117 CR2d 875 ("Persons are free to contract to do just about anything that is not illegal or immoral.").

So important is the issue of the legality of a contract, however, that courts have an independent duty to inquire into whether a contract is legal and they are not constrained by the pleadings or other contract rules, like the parol evidence rule, in testing a contract for its legality. See, *e.g., Lewis & Queen v N.M. Ball Sons* (1957) 48 C2d 141, 147, 308 P2d 713. A court has "the power and duty to ascertain the true facts in order that it may not unwittingly lend its assistance to the consummation or encouragement of what public policy forbids." 48 C2d at 148.

However, "[t]he illegality of contracts constitutes a vast, confusing and rather mysterious area of the law." *McIntosh v Mills* (2004) 121 CA4th 333, 344, 17 CR3d 66. Finding illegality in a real property contract is not generally likely but, although there is nothing statutorily illegal about the sale and purchase of real property, real property contracts may contain provisions that call into question their legality. The very nature of the transaction or the presence of some clauses may implicate other fields of law that may serve as a ground for invalidating either part or all of a real property agreement because of the "degree" of illegality (see below) of the clause in question. See, *e.g.*, *Longway v Newbery* (1939) 13 C2d 603, 608, 91 P2d 110; *Smith v Bach* (1920) 183 C 259, 262, 191 P 14; *Colby v Title Ins. & Trust Co*. (1911) 160 C 632, 640, 117 P 913; *Timney v Lin* (2003) 106 CA4th 1121, 1126, 131 CR2d 387 (liquidated damages clause in settlement agreement held to be illegal despite fact that it was part of agreement reached to resolve lawsuit involving transfer of real property). In *Longway* and *Smith v Bach*, a buyer had entered into a contract to buy land which contract referred to an unrecorded map. The court held in *Smith v Bach* that the contract was in violation of the statute and was void and allowed the purchaser to recover the money that was paid. 183 C at 262. The court also allowed the buyer to recover in the *Longway* case, not, however, on voidness grounds (because of the lapse of the applicable statute of limitations) but on fraud grounds. 13 C2d at 608.

PRACTICE NOTE: The Subdivision Map Act (Govt C §§66410-66499.37) now governs such matters. Government Code §66499.31 criminalizes a violation of the Act, and Govt C §66499.30 requires compliance with the Act as a condition to a sale. On the Subdivision Map Act, see generally *Van't Rood v County of Santa Clara* (2003) 113 CA4th 549, 563, 6 CR3d 746; California Real Property Sales Transactions, chaps 1, 4, 9 (4th ed Cal CEB 2007); California Subdivision Map Act and the Development Process (2d ed Cal CEB 2001).

The "degree" of illegality involved in a contract also implicates the fields of contract law involving culpability (*i.e.,* the rules applicable to whether one party was in pari delicto with the other) and severability. Thus, when both parties share in the culpability in some similar form, *i.e.,* they are in pari delicto, the courts do not enforce the agreements at all but when one party is more culpable than another, the courts tend to find ways to somehow protect the less culpable party. Compare *Stenger v Anderson* (1967) 66 C2d 970, 977, 59 CR 844 (less culpable party entitled to relief in form of rescission of real estate contract and cancellation of deed) with *Owens v Haslett* (1950) 98 CA2d 829, 833, 221 P2d 252 (less culpable party not entitled to relief). Also, when a contract contains an "illegal" clause, some courts will sever that portion that is illegal from the remainder of the contract as a means of avoiding the harsh results that would otherwise occur. See *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 121, 99 CR2d 745 (entire agreement unenforceable); *Robertson v Hyde* (1943) 58 CA2d 667, 671, 137 P2d 703 (sale agreement enforced despite illegality of collateral agreement).

Occasionally, a real property contract is permeated by illegality. See *Colby v Title Ins. & Trust Co*. (1911) 160 C 632, 117 P 913. Although *Colby*'s relevance to most real property transactions may seem remote, its fundamental nature is not limited to its unique facts because (1) generally speaking, contracts that have for their object an exemption from the violation of law are treated as being void (CC §1668); (2) several statutes may make conduct that is a part of why a contract is formed also criminal (Pen C §§154 (fraudulent transfers of property), 518 (extortion)); and (3) courts have found that contracts contain illegal provisions on a wide variety of grounds. Thus, *some* transfers of property to defraud creditors are said to be void transfers. See CC §§3439-3439.12; Pen C §154; *Severance v Knight-Counihan Co*. (1947) 29 C2d 561, 568, 177 P2d 4.

The courts also say in some circumstances that the illegal portion of a contract taints or infects the whole contract so as to render it void. See *Westman v Dye* (1931) 214 C 28, 38, 4 P2d 134 (original taint of usury attaches to whole family of consecutive obligations); *Maze v Sycamore Homes, Inc*. (1964) 230 CA2d 746, 755, 41 CR 338 (same); *Whittemore Homes, Inc. v Fleishman* (1961) 190 CA2d 554, 560, 12 CR 235 (same); *Tevis v Blanchard* (1954) 122 CA2d 731, 738, 266 P2d 85 (element of illegality infected note and rendered it void).

Other types of clauses may taint or infect a real property contract. Many standard form residential real estate contracts, for example, contain optional arbitration clauses (*i.e.,* clauses that may be agreed upon or not). The enforceability of this type of clause is extensively discussed in chap 14. The presence of such a clause may, like other provisions, permeate, and therefore contaminate, the contract to such an extent that the entire real property contract is thereby invalidated. Although there are no real property contract cases directly on the point of whether an arbitration agreement invalidates a real property contract (see, however, *Gravillis v Coldwell Banker Residential Brokerage Co*. (2006) 143 CA4th 761, 766, 49 CR3d 531, in which an arbitration clause was *enforced*), the employment cases may establish a basis for examining the legality of arbitration provisions in a real property agreement. See *Armendariz v Foundation Health Psychcare Servs., Inc. (*2000) 24 C4th 83, 121, 99 CR2d 745; *Sanchez v Western Pizza Enters., Inc*. (2009) 172 CA4th 154, 90 CR3d 818 (arbitration agreement could not be enforced because permeated with unlawful purpose by class action waiver and arbitration selection provisions); *Fitz v NCR Corp*. (2004) 118 CA4th 702, 711, 13 CR3d 88; *Abramson v Juniper Networks, Inc*. (2004) 115 CA4th 638, 651, 9 CR3d 422. See also CC §1668 (contracts that exempt anyone from liability for fraud, willful injury to person or property, or willful or negligent violation of law are against public policy). See generally California Law of Contracts §§9.30-9.53 (Cal CEB 2007).

Other contractual clauses, like those that have impermissible liquidated damages provisions (see CC §1671(b)), may have a similar invalidating effect. Compare *Ridgley v Topa Thrift & Loan Ass'n* (1998) 17 C4th 970, 976, 73 CR2d 378 (prepayment penalty an unenforceable liquidated damages clause) with *Allen v Smith* (2002) 94 CA4th 1270, 1282, 114 CR2d 898 (3 percent of purchase price liquidated damages clause in residential real estate contract upheld). Consideration should be given to whether, in an action for damages for breach of a real property contract, the contract contains some other provision that might invalidate some or all of the contract because of illegality. For example, the violation of any "act of Congress" may invalidate a contract. *Morey v Paladini* (1922) 187 C 727, 734, 203 P 760; *LaFortune v Ebie* (1972) 26 CA3d 72, 75, 102 CR 588 (breach of federal or state antitrust laws). See also Bus & P C §16600.

PRACTICE NOTE: There is a relationship between the conduct necessary to invalidate a contract on legality grounds and some types of conduct that qualify as duress, which is a separate ground on which to invalidate a contract. See §§4.51-4.57.

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§4.4 C. Negotiations, Offers, and Acceptances

With regard to the first element in a contract claim, which is the establishment of the contract, contracts for the sale of real property are occasionally based on a wide variety of informal writings, such as the exchange of correspondence (see *King v Stanley* (1948) 32 C2d 584, 588, 197 P2d 321, disapproved on other grounds in *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366), or some handwritten notes (see *Sterling v Taylor* (2007) 40 C4th 757, 55 CR3d 116). The requirements that must be met for an agreement to be an enforceable real property contract are few (see §§4.14-4.18) and because of this, such informal writings should also be evaluated under certain foundational contract rules applicable to them. See §§4.5-4.10.

Informal writings may include the minimum elements necessary for a real property contract and yet require the court to imply other provisions necessary to implement the agreement. *King v Stanley, supra* (usual, reasonable, and customary provisions apply). See also *Hutton v Gliksberg* (1982) 128 CA3d 240, 245, 180 CR 141.

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§4.5 1. Question of Degree

Whether negotiations reach the stage of or qualify as a contract for the sale of real property is a question of degree. *Ontario Downs, Inc. v Lauppe* (1961) 192 CA2d 697, 703, 13 CR 782. In some cases, negotiations never reach the stage where a contract has been formed. See, *e.g., Racine & Laramie, Ltd. v Department of Parks & Recreation* (1992) 11 CA4th 1026, 1034, 14 CR2d 335; *Kruse v Bank of America* (1988) 202 CA3d 38, 59, 248 CR 217. In other cases, negotiations have formed the basis for the conclusion that a contract was made as a result of such negotiations. See, *e.g., Brant v California Dairies, Inc*. (1935) 4 C2d 128, 130, 48 P2d 13; *Copeland v Baskin Robbins U.S.A.* (2002) 96 CA4th 1251, 1253, 117 CR2d 875. The courts must independently examine the exchange of communications to determine whether a contract has been made because sufficiency of the negotiations on the essential elements for an enforceable contract is viewed as a threshold legal issue for the court to decide. See, *e.g., Winet v Price* (1992) 4 CA4th 1159, 1166, 6 CR2d 554.

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§4.6 2. Correspondence and Letters of Intent

An "exchange of letters or telegrams or both" may serve as sufficient memorandums to qualify as a binding contract for the sale of real property. *King v Stanley* (1948) 32 C2d 584, 588, 197 P2d 321, disapproved on other grounds in *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366. Of course, e-mails have replaced telegrams and their use only underscores the greater likelihood that, in the current electronic world, contracts will be formed before parties actually realize. See §4.9 regarding offers and acceptances.

Litigation frequently involves parties who have exchanged correspondence and letters of intent, one of the parties believing that a contract would not arise therefrom and the other party reaching the opposite conclusion. See, *e.g., Simon v San Paolo U.S. Holding Co*. (2005) 35 C4th 1159, 1170, 29 CR3d 379 (promissory fraud claim sustained even though no contract formed); *Sole Energy Co. v Petrominerals Corp*. (2005) 128 CA4th 212, 238, 26 CR3d 798 (interference with contract claim disallowed because no contract formed); *JEM Enters. v Washington Mut. Bank* (2002) 99 CA4th 638, 646, 121 CR2d 458 (subsequent letter of intent did not supersede prior express agreement); *Shuwa Invs. Corp. v County of Los Angeles* (1991) 1 CA4th 1635, 1651, 2 CR2d 783 (letter of intent used as evidence of intent in applying the step transaction rule). See also *Racine & Laramie, Ltd. v Department of Parks & Recreation* (1992) 11 CA4th 1026, 1035, 14 CR2d 335 (dicta that a letter of intent may give rise to a duty of good faith for the purpose of reaching an agreement).

PRACTICE TIP: Attorneys who either draft or advise their clients to use letters of intent carry a heavy burden to express such letters in ways that negate the formation of a contract if that is the intent and, at the same time, avoid a subsequent charge of promissory fraud for not intending what was said to have been intended in the letter. See generally California Real Property Sales Transactions, chap 4 (4th ed Cal CEB 2007). The risk of not carrying that burden suggests a policy of not using letters of intent and assuring that correspondence cannot be understood to be an offer that might be accepted.

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§4.7 3. Illusory Promises and Agreements to Agree

The area of contract law involving the question of whether a contract is illusory is like the question of whether it is illegal. If a contract is sufficiently indefinite, it will not be enforced and the rest of the contractual provisions may not matter.

A real property contract may not be enforceable if it contains provisions that amount to an agreement to agree, also known as illusory promises. The courts have used different expressions in response to arguments about illusory contracts and agreements to agree in the future. The supreme court appears to have adopted the manner in which scholars define illusory contracts by explaining "what they are not." See *Asmus v Pacific Bell* (2000) 23 C4th 1, 15, 96 CR2d 179. Thus, if a promise is made on a condition the parties know cannot occur, no promise has been made. 23 C4th at 15. A promise to perform "if I want to" and promises that confer "an unqualified right to modify or terminate the contract" are similarly treated. 23 C4th at 15.

Of key importance to real property agreements is the possibility that promises are conditioned on a fact or event completely within the promisor's control and the decision to bring about such fact or event is *also* left wholly to the promisor's will and discretion. Such promises may also be illusory. 23 C4th at 15. Many real property contracts contain termination, approval, satisfaction, or discretionary clauses, as they are sometime referred to, and the presence of such clauses subjects the contract to an illusory promise analysis. The words that are used and equitable considerations become vitally important in this determination. See §§4.12, 4.21, 4.29, 4.54.

EXAMPLE: A real property purchase contract that gives the buying party total discretion about whether to close the sale may be illusory, but its enforceability may turn on whether the court regards it as a bilateral contract subject to a contingency or as an irrevocable option supported by part performance. See *Steiner v Thexton* (2010) 48 C4th 411, 106 CR3d 252, discussed in §§4.54, 5.8 (buyers' immediate, substantial efforts and expenditures to obtain bargained-for parcel split that would directly benefit seller cured initially illusory nature of promise and rendered real property option irrevocable).

Some courts treat agreements to agree as being too uncertain to be enforceable. See *Ablett v Clauson* (1954) 43 C2d 280, 284, 272 P2d 753; *Roberts v Adams* (1958) 164 CA2d 312, 330 P2d 900 (agreement to pay $85,000 for real property "payable as mutually agreed by both parties" held too uncertain to enforce). But see *Okun v Morton* (1988) 203 CA3d 805, 816, 250 CR 220 (contract provisions for future joint business ventures "on a mutually agreeable basis" were either sufficiently certain on their face or were made sufficiently certain by extrinsic evidence). Some courts hold that there is no remedy for a breach of such an agreement. See *Autry v Republic Prods., Inc*. (1947) 30 C2d 144, 151, 180 P2d 888; *Burgess v Rodom* (1953) 121 CA2d 71, 73, 262 P2d 335. Other courts occasionally characterize the effect of uncertainty as rendering the contract "void from its inception." See *Yackey v Pacifica Dev. Co*. (1979) 99 CA3d 776, 783, 160 CR 430 (dictum).

While an agreement may have the appearance of an unenforceable agreement to agree, the analysis of such provisions does not end at that point. In *Yackey*, the court concluded that the lack of certainty did not preclude an action for damages because the uncertainty did not render the contract void or voidable. 99 CA3d at 784. Courts ask whether the subject matters on which no agreement was reached might be fixed by another process, such as by arbitration (see *Glenn v Bacon* (1927) 86 CA 58, 69, 260 P 559), or by interpretation by the court (see *City of Los Angeles v Superior Court* (1959) 51 C2d 423, 433, 333 P2d 745; *Ablett v Clauson* (1954) 43 C2d 280, 286, 272 P2d 753). In the latter group of cases, the courts effectively interpret the contract in such a way as to draw a line between essential terms (which must be agreed upon) and unessential terms. See *City of Los Angeles*, 51 C2d at 433. Whether a contractual right is essential is a matter of degree. *Metropolitan Water Dist. v Marquardt* (1963) 59 C2d 159, 194, 28 CR 724; *Mabee v Nurseryland Garden Ctrs., Inc*. (1978) 84 CA3d 968, 972, 149 CR 105; *Pacific Hills Corp. v Duggan* (1962) 199 CA2d 806, 809, 19 CR 291. See §4.14.

Whether a provision is an illusory agreement to agree is also examined from the perspective of the rules requiring the certainty of essential terms. In *City of Los Angeles v Superior Court* (1959) 51 C2d 423, 433, 333 P2d 745, the

location of an oil drilling site and the nature or size of a recreational site (Dodger Stadium) were left to future agreement of the parties. Despite the absence of an agreement on such matters, the supreme court viewed those as "matters which should not be treated as rendering the contract void." 51 C2d at 433. In *Ablett v Clauson* (1954) 43 C2d 280, 286, 272 P2d 753, there was no agreement reached as to many features of a lease that was to arise from the exercise of an option, and the supreme court held that the option terms were "too uncertain to make it enforceable as a contract right." Compare *City of Los Angeles* and *Ablett* with *Bleecher v Conte* (1981) 29 C3d 345, 348, 213 CR 852 (agreement to "do everything in their power to expedite the recordation of the final map and [to] proceed with diligence" in development of real property was enforceable), *King v Stanley* (1948) 32 C2d 584, 588, 197 P2d 321, disapproved on other grounds in *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366 (usual and reasonable conditions of real property contract are part of contract; in absence of express conditions, custom determines incidental matters), and *Burrow v Timmsen* (1963) 223 CA2d 283, 288, 35 CR 668 (absence of agreement on variety of matters was capable of being cured by resorting to evidence of similar contracts, inferences drawn from the writing itself, "external facts …, and custom and usage" provided they did not alter or vary terms of contract) with *Pacific Hills Corp. v Duggan* (1962) 199 CA2d 806, 811, 19 CR 291 (provision that certain sum of money was "to be used by the parties for the purpose of developing and improving the property for sale" held to be too uncertain to be enforceable).

PRACTICE NOTE: Parties may treat a contract as a contract at the time of trial even though the contract may be subject to rules like whether it is an agreement to agree. When the parties treat the contract as binding, it is probable the courts will too. See *Auerbach v Great W. Bank* (1999) 74 CA4th 1172, 1190, 88 CR2d 718.

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§4.8 4. The Duty to Negotiate

Before 2002, it was generally held that preliminary negotiations could not serve as a basis for concluding that a contract was formed merely because of the negotiations. See, *e.g.*, *Racine & Laramie, Ltd. v Department of Parks & Recreation* (1992) 11 CA4th 1026, 1031, 14 CR2d 335. In some cases, however, preliminary negotiations (either written or oral) resulted in the formation of a contract provided that all of the terms necessary were definite and had been agreed upon. *Louis Lesser Enters. v Roeder* (1962) 209 CA2d 401, 404, 25 CR 917 (no agreement made because multiple provisions not agreed upon). In *Copeland v Baskin Robbins U.S.A.* (2002) 96 CA4th 1251, 117 CR2d 875, the court addressed "an unsettled question in California" of whether a contract *to negotiate* is enforceable or merely an agreement to agree. The court held that "a contract to negotiate an agreement is distinguishable from a so-called 'agreement to agree' *and can be formed and breached just like any other contract*." (Emphasis added.) 96 CA4th at 1253.

The duty of good faith and fair dealing would appear to apply to any case predicated on a contract to negotiate but may not be analyzed in the same manner as good faith issues in ordinary contracts. Compare *Pasadena Live, LLC v City of Pasadena* (2004) 114 CA4th 1089, 1091, 8 CR3d 233 (complaint included allegations that defendant "breached its obligations to [the plaintiff] by not negotiating in good faith, by not dealing fairly") with *Racine & Laramie, Ltd. v Department of Parks & Recreation* (1992) 11 CA4th 1026, 1031, 1033, n4, 14 CR2d 335 (implied covenant cannot apply to negotiations that were not expressly required by contract). Not all negotiations, however, ripen into a contract if material terms are left unsettled. See, *e.g.*, *Bustamante v Intuit, Inc*. (2006) 141 CA4th 199, 215, 45 CR3d 692.

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§4.9 5. Offers and Acceptances

Offers and acceptances establish consent and consent is absolutely necessary to the existence of a contract. CC §1550; *Roth v Malson* (1998) 67 CA4th 552, 557, 79 CR2d 226. Some real property contracts are formed as a result of preliminary negotiations and some are formed as a result of negotiating the provisions of a complete agreement. Some real property contracts are formed through the exchange of offers, counteroffers, and acceptances. In each case, the issue of whether a contract has been formed is essentially one of "mutual assent." CC §§1565-1566; *King v Stanley* (1948) 32 C2d 584, 591, 197 P2d 321, disapproved on other grounds in *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366; *Russell v Union Oil Co*. (1970) 7 CA3d 110, 114, 86 CR 424; *Kessinger v Organic Fertilizers, Inc*. (1957) 151 CA2d 741, 750, 312 P2d 345.

An offer must be certain and definite. *Apablasa v Merrit & Co*. (1959) 176 CA2d 719, 723, 1 CR 500. An acceptance must meet an offer "exactly, precisely and unequivocally" to create a contract. 176 CA2d at 726. See also CC §1585; *King,* 32 C2d at 588 ("The offer must be unequivocally accepted in order to be binding."); *Landberg v Landberg* (1972) 24 CA3d 742, 750, 101 CR 335 ("a valid acceptance must be absolute and unqualified," citing CC §1585); *Smith v Holmwood* (1965) 231 CA2d 549, 552, 41 CR 907 (acceptance of counteroffer to buy real property did not meet counteroffer and no contract was formed). Thus, a qualified acceptance constitutes a counteroffer and is a new proposal. *Smith,* 231 CA2d at 553. Further, a proposal to accept an offer to sell real property on terms that vary from the offer itself constitutes a rejection of the offer "and puts an end to it." *Niles v Hancock* (1903) 140 C 157, 161, 73 P 840. On the other hand, an acceptance may be a "grumbling one" and result in the formation of a contract. *Guzman v Visalia Community Bank* (1999) 71 CA4th 1370, 1376, 84 CR2d 581. Whether it constitutes an acceptance is a question of fact. 71 CA4th at 1376.

The purpose of these rules is to require sufficient assurance that a contract was made, that minds met. See *Krasley v Superior Court* (1980) 101 CA3d 425, 431, 161 CR 629 (no meeting of minds reached in exchange of offers and counteroffers); *Apablasa v Merrit & Co*. (1959) 176 CA2d 719, 726, 1 CR 500. See also *Harper v Goldschmidt* (1909) 156 C 245, 249, 104 P 451 ("As an essential of every contract there must be an agreement and meeting of the minds."); *Banner Entertainment, Inc. v Superior Court* (1998) 62 CA4th 348, 357, 72 CR2d 598; *Dillingham v Dahlgren* (1921) 52 CA 322, 329, 198 P 832. When a party merely "accepts" an offer to sell real property, the acceptance is construed to mean that the offeree has agreed *to perform* the terms of the offer. *Patty v Berryman* (1949) 95 CA2d 159, 166, 212 P2d 937.

The actual title of the document and how it is structured or arranged may be dispositive of whether a contract has been formed. In *Roth v Malson* (1998) 67 CA4th 552, 79 CR2d 226, the plaintiff made a written offer to buy real property. The seller made a written counteroffer which contained a line for a signature to accept and a line for a signature to make a counteroffer to the counteroffer. The plaintiff signed the part entitled "Counter to Counter Offer" and wrote in terms that, it was eventually determined, did not vary the terms of the offer.

The court, following the decision in *Krasley v Superior Court* (1980) 101 CA3d 425, 161 CR 629 and over a strong dissent, held that although the terms were not varied, no contract had been formed, explaining *in part* that there "is no reason to put the parties or the courts in the position of comparing and contrasting terms (described as "Changes/Amendments") to determine whether there is any material variance when a response to a counteroffer is on its face presented as a counter-counteroffer." *Roth*, 67 CA4th at 559.

The part of the reasoning quoted above from *Roth* is questionable although the result might nevertheless be right. The fact that it may take "effort" for one of the parties or the court to compare an offer to a purported acceptance should not govern whether a contract was formed. Whether the purported acceptance is an acceptance under the law is the question and, as with all such matters, it is a question of intent. Discerning intent should depend on ascertaining what the parties meant by what they said and did and not on the effort it takes to figure that out. Moreover, as when courts are sometimes called upon to ignore the "grumbles" in an acceptance to ascertain whether an acceptance is a consent, so too should they be able to peer through other words that do not affect the quality of the acceptance. In *Roth*, however, the plaintiff's actions were not a grumbling acceptance. They were actions that communicated a

counteroffer to the counteroffer.

The court also reasoned, however, that the title on the document, which identified the document as a counter to the counteroffer, was implicitly inconsistent with an acceptance and "called for a response from the seller before a contract would be formed." 67 CA4th at 558. This latter part of its reasoning is persuasive because if the seller truly sought an acceptance from the buyer, which acceptance was the indicated result by the buyer's choice of the counter to counteroffer portion of the document, the outward manifestation of intent indicated that the terms included meant something different from what was actually said on the document.

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§4.10 D. Writings and the Statute of Frauds

Most contracts for the sale or purchase of real property are in writing because the Statute of Frauds requires that they be. See CC §1624(a)(3). The Statute of Frauds is raised as a defense in contract enforcement actions. In a very limited number of cases, an oral agreement regarding real property has been enforced, based on exceptions to the rule. See §§4.15-4.18, 4.53.

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§4.11 III. CONTRACT ESSENTIALS AND INTERPRETATION

Most cases involving real property disputes involve a written contract that is more than a memorandum of the type that satisfies the Statute of Frauds. See §4.53. In real property transactions, the basic rule, however, is that "it is not necessary that there be a formal contract, drawn up with technical exactness." *Breckenridge v Crocker* (1889) 78 C 529, 534, 21 P 179; *Founding Members of the Newport Beach Country Club v Newport Beach Country Club, Inc.* (2003) 109 CA4th 944, 955, 135 CR2d 505. Certain minimum elements must be stated but if those elements are set forth, the contract will generally be enforced unless some other contract rule precludes enforcement. Sections 4.12-4.83 are a summary of those rules as they may affect a real property contract.

PRACTICE NOTE: Many real property contracts expressly provide that the execution of the contract supersedes all prior negotiations or stipulations concerning the subject matter of the contract, and this rule is applied to all contracts in any event by virtue of CC §1625. Despite this *superseding* effect, evidence of the prior negotiations may be admissible to shed light on the *meaning* of an ambiguous term or for other purposes, under the parol evidence rule. See §§4.24, 5.10. Also, parties may exclude whatever they wish from the ambit of their agreements and such exclusions are interpreted in accordance with their terms. *San Jose Parking, Inc. v Superior Court* (2003) 110 CA4th 1321, 1331, 2 CR3d 505.

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§4.12 A. Intent and Interpretation

The parties' intent is to be discerned first and only from the contract itself, if that is possible. If the contract is clear and explicit, it governs. *Bank of the West v Superior Court* (1992) 2 C4th 1254, 1264, 10 CR2d 538; *WYDA Assocs. v Merner* (1996) 42 CA4th 1702, 1709, 50 CR2d 323. How the contract is labeled is not dispositive. See *Steiner v Thexton* (2010) 48 C4th 411, 106 CR3d 252, discussed in §§4.54, 5.8 (although agreement was labeled as real estate purchase contract, court found intent of parties was to create option to purchase property).

If the contract is not clear and explicit, which is more often the case, the court next considers other outward manifestations exhibited by the parties. This may involve an interpretation of the contract provisions together with evidence of the surrounding circumstances, which may involve communications and conduct. *Winet v Price* (1992) 4 CA4th 1159, 1166, 6 CR2d 554. See also *Sterling v Taylor* (2007) 40 C4th 757, 767, 55 CR3d 116; *Roth v Malson* (1998) 67 CA4th 552, 557, 79 CR2d 226; *Meyer v Benko* (1976) 55 CA3d 937, 942, 127 CR 846; *Guntert v City of Stockton* (1974) 43 CA3d 203, 211, 117 CR 601. Such evidence may also pertain to the parties' *subsequent* conduct which may shed light on the parties' contractual intent. *Armstrong Petroleum Corp. v Tri-Valley Oil & Gas Co*. (2004) 116 CA4th 1375, 1389, 11 CR3d 412. However, evidence of the subjective intentions of a party to a contract, typically offered in the form of oral testimony, is generally treated as immaterial and incompetent evidence. See *Brant v California Dairies, Inc*. (1935) 4 C2d 128, 133, 48 P2d 13.

Questions of intent are, for the most part, ordinarily treated as questions of fact. *Redke v Silvertrust* (1971) 6 C3d 94, 103, 98 CR 293. However, in contract law there are two rules that qualify this generalization. "The interpretation of a written instrument … is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect." *Parsons v Bristol Dev. Co*. (1965) 62 C2d 861, 865, 44 CR 767; *Meyer v Benko* (1976) 55 CA3d 937, 942, 127 CR 846. Where there is no conflict in the evidence or in extrinsic evidence allowed to aid in the interpretation of the instrument, interpretation is exclusively a judicial function. *Parsons*, 62 C2d at 865; *Meyer*, 55 CA3d at 942. Where there is a conflict in the evidence, the interpretation is for the trier of fact at trial. *Morey v Vannucci* (1998) 64 CA4th 904, 912, 75 CR2d 573.

Disputes over the meaning of words and clauses are often the basis of cases calling for the application of contract interpretation rules. One thing seems to be *sure*, but of little solace to courts, attorneys, and parties alike, which is that the words used in a contract may not be precise enough to express the intentions of the parties. *PG&E v G.W. Thomas Drayage Co*. (1968) 69 C2d 33, 38, 69 CR 561 (meaning of particular words or groups of words varies with verbal context and surrounding circumstances and purposes in view of linguistic education and experience of writers and hearers or readers, not excluding judges); *Pearson v State Social Welfare Bd.* (1960) 54 C2d 184, 195, 5 CR 553 (words have no arbitrary and fixed meaning like symbols of algebra or chemistry); *Universal Sales Corp. v California Press Mfg. Co*. (1942) 20 C2d 751, 771, 128 P2d 665 ("A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."). Because our language is incapable of mathematical certainty, there is a possibility that an ambiguity exists in every contract.

Thus, although a word or other provision in a contract may appear to be unambiguous on its face, a "latent ambiguity" may nonetheless exist as exposed by the admission of parol evidence that reveals another possible meaning. *Wolf v Superior Court* (2004) 114 CA4th 1343, 1351, 8 CR3d 649; *Morey v Vannucci* (1998) 64 CA4th 904, 912, 75 CR2d 573; *FPI Dev., Inc. v Nakashima* (1991) 231 CA3d 367, 389, 282 CR 508. Whether a contract provision is ambiguous is a threshold question of law for courts to determine. Such parol evidence is provisionally received by the court in order to determine whether the contract is reasonably susceptible to the interpretation urged by a party. *Founding Members of the Newport Beach Country Club v Newport Beach Country Club, Inc*. (2003) 109 CA4th 944, 955, 135 CR2d 505; *Morey v Vannucci* (1998) 64 CA4th 904, 912, 75 CR2d 573; *WYDA Assocs. v Merner* (1996) 42 CA4th 1702, 1709, 50 CR2d 323; *Winet v Price* (1992) 4 CA4th 1159, 1165, 6 CR2d 554. After the evidence is received, it may be rejected and the refusal to admit such evidence may constitute reversible error. *Founding Members of the Newport Beach Country Club v Newport Beach Country Club, Inc*. (2003) 109 CA4th 944, 955, 135 CR2d 505.

The basic rules of contract interpretation are set forth in CC §§1635-1663. The overarching rule of contract interpretation seems to be embodied in CC §1636: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." *Safeco Ins. Co. v Robert S*. (2001) 26 C4th 758, 763, 110 CR2d 844; *PG&E v G.W. Thomas Drayage Co*. (1968) 69 C2d 33, 38, 69 CR 561; *Morey v Vannucci* (1998) 64 CA4th 904, 912, 75 CR2d 573. The supreme court called this rule the "fundamental goal of contract interpretation" in *Bank of the West v Superior Court* (1992) 2 C4th 1254, 1264, 10 CR2d 538 and the "paramount rule" in *Signal Cos. v Harbor Ins. Co.* (1980) 27 C3d 359, 375, 165 CR 799. When this leading rule is then coupled with others, there is a noticeable judicial policy (see §4.1) toward enforcing the contractual efforts of the parties despite various mistakes and imperfections in expressing the contract. *Hess v Ford Motor Co*. (2002) 27 C4th 516, 524, 117 CR2d 220 (parol evidence of mutual mistake regarding whether release provision included entity not expressly identified in it); *Signal Cos. v Harbor Ins. Co.* (1980) 27 C3d 359, 376, 165 CR 799 (specific provisions in a contract prevailed over inconsistent general provisions); *Parsons v Bristol Dev. Co*. (1965) 62 C2d 861, 866, 44 CR 767 (effect given to each clause helping to interpret the other).

Apart from the "paramount rule" embodied in CC §1636 and the CC §§1638-1639 requirement to determine the intent first from the written contract, there does not appear to be any other particular priority among the other rules of interpretation, with the exception that the CC §1654 rule to interpret an uncertainty against the party who caused it is typically applied last. *Signal Cos. v Harbor Ins. Co.* (1980) 27 C3d 359, 375, 165 CR 799. On the other hand, when a contract is the result of negotiations, courts have refused to apply the rule of CC §1654 automatically. *County of San Joaquin v WCAB* (2004) 117 CA4th 1180, 1186, 12 CR3d 406.

Although courts may, in some circumstances, supply missing terms as a means to enforcing an agreement, they do so only when the reasonable intentions of the parties are ascertainable. *Copeland v Baskin Robbins U.S.A.* (2002) 96 CA4th 1251, 1255, 117 CR2d 875. Therefore, courts are not at liberty to revise an agreement under the guise of interpreting it because the courts should refrain from making a contract for the parties that they did not themselves make. *Jacobson v Simmons Real Estate* (1994) 23 CA4th 1285, 1294, 28 CR2d 699; *Hinckley v Bechtel Corp*. (1974) 41 CA3d 206, 211, 116 CR 33.

PRACTICE NOTE: It may be necessary to evaluate the constituent parts of a contract under different rules of interpretation. Thus, if the issue involves the *meaning of a word or other provision*, the parol evidence rules affect how the word or provision should be interpreted. See §4.24. On the other hand, if the provision in question involves a promise, the meaning of the promise may be established first by the written language itself and if that rule does not yield an understanding, then the meaning is that which *the promisor believed the promisee understood the meaning to be*. *Bank of the West v Superior Court* (1992) 2 C4th 1254, 1264, 10 CR2d 538. This rule may be crucial in any case because it effectively confers on one party the right to testify about what that party believed about the understanding of the other party, which implicitly requires some conduct by or some communications from the other party on which testimony must be based to be admissible. In addition, if a contract is claimed by one party to be ambiguous, that party must plead the nature of the ambiguity and the proper construction of the contract. *San Bernardino Valley Water Dev. Co. v San Bernardino Valley Mun. Water Dist*. (1965) 236 CA2d 238, 266, 45 CR 793. Also, in answering Interrogatory 50.6 on Judicial Council Form DISC-001, the responding party has an affirmative duty to disclose all ambiguities that may affect the contract. On the other hand, other discovery may lead to the exposure of a "latent ambiguity." *Morey v Vannucci* (1998) 64 CA4th 904, 912, 75 CR2d 573.

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§4.13 B. The Laws Are a Part of Contracts

As a general proposition, all laws in existence when an agreement is made and which apply to the transaction necessarily form a part of that contract. *Swenson v File* (1970) 3 C3d 389, 393, 90 CR 580; *Dameshghi v Texaco Refining & Mktg., Inc*. (1992) 3 CA4th 1262, 1279, 6 CR2d 515. See also CC §1646. Laws enacted after the formation of an agreement are not incorporated into it unless the parties express a contrary intent. *Swenson*, 3 C3d at 393.

The implications of these rules are profound when the expanse of innumerable laws are taken into account and *how each might affect* any real property contract. Many real property contracts contain a provision to the effect that one or more parties must comply with all laws. In the case of *Brown v Green* (1994) 8 C4th 812, 35 CR2d 598, such a clause in a lease was construed to require the tenant to pay for the costs to remediate asbestos in a building which the tenant occupied. However, a similar clause was held not to require the tenant to pay costs of seismically retrofitting a building as required by a municipal ordinance in *Hadian v Schwartz* (1994) 8 C4th 812, 35 CR2d 589. There were complex reasons for reaching the divergent results. The cases are instructive, however, as to how an otherwise unobjectionable clause (who would not agree to comply with the law?) may increase the risk to any party in any real property contract.

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Source: Real Property/California Real Property Remedies and Damages/4 Damages for Breach of Seller-Buyer Contracts/§4.14 C. Sales Contract Essential Elements

§4.14 C. Sales Contract Essential Elements

"An action for damages for breach of contract for the purchase or sale of real property will not lie unless the writing contains *the essential terms and material elements* of such an agreement without recourse to parol evidence of the intention of the parties." *Burgess v Rodom* (1953) 121 CA2d 71, 73, 262 P2d 335. (Emphasis added.)

The minimum elements necessary for the enforcement of a real property contract are the price, the property, and the parties. See §§4.15-4.17. Time and manner of payment may also be crucial parts of a contract. See §4.18. Another group of cases suggest that there may be a host of other points that are as essential depending on the circumstances.

The *Burgess* formulation was set forth in the context of a case that primarily involved the question of whether a contract was certain enough with regard to the manner in which the balance of a purchase price for real property was to be paid. The parol evidence formulation that previously applied to statute of frauds cases was similarly worded. See, *e.g., Zellner v Wassman* (1920) 184 C 80, 85, 193 P 84. However, *Sterling v Taylor* (2007) 40 C4th 757, 769, 55 CR3d 116 disapproved the ruling in cases like *Zellner*: "To clarify the law on this point, we disapprove the statements in California cases barring consideration of extrinsic evidence to determine the sufficiency of a memorandum under the statute of frauds." 40 C4th at 770. *Sterling* did not identify other cases that use the same formulation but its context seems to have extended to cases like *Burgess because there is no fundamental difference between the two formulations.* Nonetheless, the first part of the *Burgess* formulation appears to remain as good law because *Sterling* effectively makes the same point: an action for damages must be based on a writing that contains *the essential elements* for such a claim. 40 C4th at 772.

The *minimum elements* necessary for an enforceable agreement concerning the sale of real property are (1) the identification of the buyer and the seller; (2) the price to be paid; and (3) some description of the property. *Sterling,* 40 C4th at 772. See §§4.15-4.17. Additional "elements" may be essential in a case depending on a variety of factors. See, *e.g., Blackburn v Charnley* (2004) 117 CA4th 758, 766, 11 CR3d 885. What is an essential element may not lend itself to the kind of discrete list as appears in *Sterling* because the expression "'essential terms and conditions' is itself a term of considerable flexibility." *Sterling*, 40 C4th at 770.

CAUTION: In light of other expressions from other cases, it also now appears necessary to differentiate between the identity of required *elements* and *essential terms*. Thus, the required elements of parties, price, and property (and perhaps time and manner of payment) must be agreed on in all real property contracts. All other terms may be classified in at least two other groups: (1) terms that are, like the required elements, essential and require proof that they were in fact agreed on, and (2) terms that can be supplied by resort to a court deciding the reasonableness of the term. *City of Los Angeles v Superior Court* (1959) 51 C2d 423, 433, 333 P2d 745. In the first group, the proof appears to include parol evidence to establish the importance of the term in question (unlike the required elements, which must be in writing). In the second group, the proof may consist of parol evidence or evidence of custom.

With regard to whether *another* term is essential, the question is one of degree. *City of Los Angeles v Superior Court* (1959) 51 C2d 423, 433, 333 P2d 745; *Mabee v Nurseryland Garden Ctrs., Inc*. (1978) 84 CA3d 968, 972, 149 CR 105. See also *House of Prayer v Evangelical Ass'n for India* (2003) 113 CA4th 48, 53, 7 CR3d 24. If the inability to "enforce that promise strictly according to its terms would make unfair the enforcement of the remainder of the agreement," the provision is essential. *City of Los Angeles,* 51 C2d at 433; *Mabee*, 84 CA3d at 972. Thus, when matters that are left to future agreement are unessential, the court may adopt its own view of what is reasonable under the circumstances in order to enforce the contract. *City of Los Angeles,* 51 C2d at 433.

One test applied in the construction context when there was no agreement on the price for a change in the scope of work and a change order was submitted is to ascertain whether the change was "minor" or "of great magnitude." *Coleman Eng'g Co. v North Am. Aviation, Inc*. (1966) 65 C2d 396, 406, 55 CR 1. When such changes are of "great magnitude," the parties must then negotiate in good faith to resolve the matter. 65 C2d at 406. When they negotiate in good faith and are still unable to reach an agreement, neither is required to perform further, as a general rule. 65 C2d

at 406. This rule has not yet been considered in a real property contract context. In addition, the way in which parties act and write their contracts may result in the conclusion that *other terms were also essential*. *Ablett v Clauson* (1954) 43 C2d 280, 286, 272 P2d 753 (too many terms left unsettled). See also *Armstrong Petroleum Corp. v Tri-Valley Oil & Gas Co*. (2004) 116 CA4th 1375, 1389, 11 CR3d 412 ("Intent can … be shown by the parties' subsequent acts and conduct."); *Okun v Morton* (1988) 203 CA3d 805, 819, 250 CR 220 (subsequent conduct may shed light on what parties intended by their contract when matters were left unsettled).

In *Burgess v Rodom* (1953) 121 CA2d 71, 262 P2d 335, the only "essential feature" that was incomplete, and that was important enough to refuse enforcing the contract, was "the terms upon which the balance of the purchase price [was] to be paid." 121 CA2d at 73. Compare *Burgess* (involving third-party financing uncertainties) with *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366 (not involving financing provisions for purchase). In *House of Prayer v Evangelical Ass'n for India* (2003) 113 CA4th 48, 53, 7 CR3d 24, the court implied a reasonable time for payment, thereby satisfying the statute of frauds. In *Schomaker v Osborne* (1967) 250 CA2d 887, 58 CR 827, on the other hand, a tenant attempted to exercise an option to buy real property pursuant to a lease that left several matters unsettled in an action for specific performance. The court held that "The necessity of future agreement on limited phases of the transaction does not prevent birth of a binding contract upon acceptance since, if the parties cannot agree on those phases, each may force the other to accept the determination of a court of equity." 250 CA2d at 893. In *Belcher v Williams* (1957) 151 CA2d 615, 619, 311 P2d 861, the lack of specificity about the furniture and equipment in a building being sold did not preclude enforcement of the agreement because such matters were not essential to the sale of real property. The apparent distinction that was once made between law and equity with regard to the certainty required appears to have been effectively eliminated. *Okun v Morton* (1988) 203 CA3d 805, 818, 250 CR 220 ("neither law nor equity requires that every term and condition be set forth in the contract."). Incidental terms, such as the opening of an escrow, furnishing deeds and title insurance, and proration of taxes may be based on customary practice. *King v Stanley* (1948) 32 C2d 584, 197 P2d 321, disapproved on other grounds in *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366.

NOTE: Because real property agreements tend to cover many topics, the range of disputes about whether one or more topics is essential to the contract in question is as wide as the number of topics covered in the contract itself. When the ability of a court to imply other terms is considered, the range is appreciably wider. On the one hand, cases like *Sterling v Taylor* (2007) 40 C4th 757, 55 CR3d 116 (price), which state that the required elements must appear on the face of the contract, tend to be easier to understand from the perspective of the courts not enforcing the contracts involved. On the other hand, when a term is not an element and is also not essential, the rules that favor the enforcement of contracts should result in the courts using the reasonableness standard of *Patel v Liebermensch, supra* and *City of Los Angeles v Superior Court* (1959) 51 C2d 423, 433, 333 P2d 745 to resolve all disputes about such nonessential terms.

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§4.15 1. Parties

It is necessary to identify each party to the contract in the contract. *Sterling v Taylor* (2007) 40 C4th 757, 772, 55 CR3d 116. In the *Sterling* case, the memorandum did not specifically identify the seller. However, the memorandum referred to the seller's agent which reference was considered as a sufficient identification because the parties did not dispute that the agent was in fact an authorized agent for the seller. Still, not all circumstances yield the same result. In *Breckenridge v Crocker* (1889) 78 C 529, 536, 21 P 179, the identity of the buyer was not established by the exchange of telegrams and this failure was held to defeat an action for a breach of contract to convey real property.

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§4.16 2. Price

One of the elements necessary for an enforceable purchase agreement concerning real property is the price to be paid. *Sterling v Taylor* (2007) 40 C4th 757, 55 CR3d 116 (ruling that parties had not agreed on price, which resulted in incomplete and unenforceable agreement). When a contract, however, contains some type of formula for the determination of a price, parol evidence may be allowed to show what the price was. *Sterling*, 40 C4th at 774; *California Lettuce Growers, Inc. v Union Sugar Co*. (1955) 45 C2d 474, 482, 289 P2d 785. If price is left to a subsequent agreement the contract is "merely an agreement to agree and therefore *nudum pactum* until the price is fixed or agreed upon." 45 C2d at 481.

A provision that the sellers were to receive a "net figure of not less than $700,000" was considered sufficiently definite to enforce the sale of an apartment building. *Hutton v Gliksberg* (1982) 128 CA3d 240, 180 CR 141. *Hutton* is a good example of the extent to which the courts will go to uphold a contract. For example, it also held that the financing terms were sufficiently certain when the buyers' procurement of a loan was to be at the "current rate," which was a verifiable external standard, with the second loan to bear ¼ percent more interest than the first. (The *Hutton* decision did not decide whether financing is a required *element* or an *essential term*.)

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§4.17 3. Property

An agreement for the sale of real property is sufficiently certain if it furnishes the means to ascertain the property's description and location. *Leider v Evans* (1962) 209 CA2d 696, 26 CR 123 (test for sufficiency of legal description is degree of difficulty that competent surveyor would have in locating land and establishing its boundaries); *McKinley v Lagae* (1962) 207 CA2d 284, 24 CR 454.

A street address was a sufficient description of the property in *Sterling v Taylor* (2007) 40 C4th 757, 773, 55 CR3d 116. Like the identity of parties issue, the supreme court noted that the parties did not display confusion about the identity of the property, perhaps implying that such descriptions might be insufficient in a different context. Because parol evidence was allowable and was consistent with the address, the court held that the memorandum satisfied this part of the test for an enforceable contract. In *Beverage v Canton Placer Mining Co*. (1955) 43 C2d 769, 774, 278 P2d 694, the supreme court held in a similar way that although a memorandum may not contain a property description that is by itself definite and certain, it satisfies the requirement "if it furnishes the 'means or key' by which the description may be made certain and identified with its location on the ground." Other types of property descriptions of far less certainty have nonetheless been held adequate. See, *e.g., Alameda Belt Line v City of Alameda* (2003) 113 CA4th 15, 5 CR3d 879. On the other hand, the description "the next contiguous thirty acres" has been held to be insufficient. *Ganiats Constr., Inc. v Hesse* (1960) 180 CA2d 377, 384, 4 CR 706.

In close cases, if a competent surveyor is able to locate the land and establish its boundaries based on the description in the memorandum and the parol evidence, then the description will be held to be sufficient. *Beverage v Canton Placer Mining Co*. (1955) 43 C2d 769, 776, 278 P2d 694; *Ganiats Constr., Inc. v Hesse* (1960) 180 CA2d 377, 384, 4 CR 706; *Blume v MacGregor* (1944) 64 CA2d 244, 251, 148 P2d 656. See also *Breckenridge v Crocker* (1889) 78 C 529, 536, 21 P 179 (parol evidence failed to show that parties' minds met on expression "balance of Merced town property").

NOTE: The role of parol evidence to clarify a property description in a memorandum or contract is well established. *Marriner v Dennison* (1889) 78 C 202, 207, 20 P 386; *Stanley v Green* (1859) 12 C 148, 162. A study of the cases involving the use of parol evidence to clarify unclear property descriptions is helpful in seeing how the parol evidence rule applies in other contract contexts.

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§4.18 4. Time and Manner of Payment

The question of whether time and manner of performance is material and must be specified in the purchase agreement was unresolved for several decades, but the court in *Hennefer v Butcher* (1986) 182 CA3d 492, 501, 227 CR 318, had affirmed the use of parol evidence to explain the meaning of a "hotly contested phrase" and other ambiguities pertaining to time and manner of payment. In *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366, a suit for specific performance of a real estate option contract, the court of appeal reversed a judgment for the plaintiff on a contract that lacked the terms of time and manner of payment. The California Supreme Court unanimously reversed that decision, holding that reasonable terms may be implied for both. In the absence of a specified time of payment, a reasonable period is allowed under CC §1657. 45 C4th at 352.

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§4.19 D. Consideration

Although not usually listed as an element to a real property contract in the way that the cases speak about "elements" (see, *e.g., Sterling v Taylor* (2007) 40 C4th 757, 772, 55 CR3d 116), consideration must exist for a contract to be enforceable as a contract. CC §§1550(4), 1605. Consideration exists when two requirements are met (*Steiner v Thexton* (2010) 48 C4th 411, 420, 106 CR3d 252):

- The promisee must confer (or agree to confer) a benefit on the promisor or must suffer (or agree to suffer) prejudice; either alone is sufficient to constitute consideration.
- The benefit or prejudice must be bargained for; in other words, the benefit or prejudice must have induced the promisor's promise.

For the exchange of promises as the consideration to qualify, the promises must be mutual in obligation. *Mattei v Hopper* (1958) 51 C2d 119, 122, 330 P2d 625; *Simmons v California Inst. of Technol.* (1949) 34 C2d 264, 272, 209 P2d 581. The obligations do not have to be balanced or evenly weighted to be mutual, there simply has to be a legal obligation undertaken—promised—by both parties. *Mattei*, 51 C2d at 122. A single consideration may be bargained for and given as the agreed equivalent of one or more promises. *Foley v Interactive Data Corp*. (1988) 47 C3d 654, 679, 254 CR 211.

The proper time for testing the adequacy of consideration is as of the contract's formation. *Meyer v Benko* (1976) 55 CA3d 937, 945, 127 CR 846. Past consideration is, however, no consideration. *Dugan v Pettijohn* (1955) 134 CA2d 133, 138, 285 P2d 339. Consideration established at the formation of a contract may be used to support subsequent changes to an agreement. See *Kuish v Smith* (2010) 181 CA4th 1419, 1430, 105 CR3d 475.

PRACTICE TIP: The implied duty of good faith and fair dealing may be used to add muscle to the bones of a contract clause that does not address all aspects of performance implicated by some provision in the contract. For example, in *Bleecher v Conte* (1981) 29 C3d 345, 350, 213 CR 852, the seller of real property sought to cancel a contract she made with the buyers, arguing that a clause in the contract that obligated the buyers to "do everything in their power to expedite the recordation of the final map" and to proceed with diligence" was illusory. The supreme court explained that the rules in *Mattei v Hopper*, *supra,* were subject to the implied covenant of good faith and fair dealing that neither party will do anything that injures the right of the other party to receive the benefits of the agreement. 29 C3d at 350. The *combination* of the express and the implied duties were sufficient to conclude that the buyers had legal obligations that were sufficient to support the mutuality required by *Mattei*. 29 C3d at 352. The use of the implied duty to find mutuality must be distinguished from how the implied duty relates to performance issues. See §4.27. The role of the implied duty in *Bleecher* relates to the issue of consideration, like *Mattei*, and is slightly different from how the implied duty affects the issue of evaluating performance under that duty. When the implied duty is utilized to find consideration and thereby avoid claims of illusory promises, it is still incumbent on the parties to adduce evidence of how the performance of the implied duties affects whether there was a breach of contract. See §4.27.

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§4.20 1. Promissory Estoppel

Promissory estoppel may serve as a substitute for consideration when detrimental reliance, although not bargained for, has occurred. *Kajima/Ray Wilson v Los Angeles County Metro. Transp. Auth.* (2000) 23 C4th 305, 310, 96 CR2d 747; *C&K Eng'g Contractors v Amber Steel Co*. (1978) 23 C3d 1, 6, 151 CR 323; *Raedeke v Gibraltar Sav. & Loan Ass'n* (1974) 10 C3d 665, 672, 111 CR 693. The doctrine, however, rarely arises in a real property case. See, however, *Hilltop Props., Inc. v State* (1965) 233 CA2d 349, 362, 43 CR 605. See also *Garcia v World Savs. Bank* (2010) 183 CA4th 1031, ___ CR3d ___ (lender's broken promise to extend trustee sale date for another week during telephone calls with loan broker, who was assisting borrower in obtaining refinancing on other real property to cure default, supported promissory estoppel as basis for quasi-contract action against lender).

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Source: Real Property/California Real Property Remedies and Damages/4 Damages for Breach of Seller-Buyer Contracts/§4.21 2. Illusory Promises

§4.21 2. Illusory Promises

When a contract lacks mutuality of obligation, which is that *both parties* to a contract must have some legal obligations, the agreement lacks consideration and is unenforceable. *Mattei v Hopper* (1958) 51 C2d 119, 122, 330 P2d 625. In its simplest form, mutuality exists where the vendor has *promised* to convey title to real property to a vendee who *promises* to pay for the real property. Real property contracts are generally not simple in form, however, and the *conditions to the performance* of one party (see §4.40) may subject such performance to the appearance that it is illusory because of the manner in which performance is conditioned. In an effort to take advantage of the rule requiring mutuality of obligations as a means of avoiding the performance part of an agreement, the argument is frequently made that a particular promise is "illusory" because it is qualified in some manner. See, *e.g., Bleecher v Conte* (1981) 29 C3d 345, 213 CR 852 (provision to "do everything in their power to expedite the recordation of the final map" and to "proceed with diligence" did not render promise illusory); *Moreland Dev. Co. v Gladstone Holmes, Inc*. (1982) 135 CA3d 973, 977, 186 CR 6 (provision subjecting sale to the approval of the board of directors did not render promise illusory).

In the *Mattei* case, the parties entered into a contract in which the defendant agreed to sell real property to the plaintiff which was expressly made subject to a real estate broker "obtaining leases satisfactory to the purchaser." 51 C2d at 121. This clause raised "the basic question whether the consideration supporting the contract was thereby vitiated." 51 C2d at 122. When a contract contains a provision that "leaves a party free to perform or to withdraw from the agreement at his own unrestricted pleasure, the promise is deemed illusory and it provides no consideration." 51 C2d at 122. It does not matter whether the question is presented in an argument about whether mutuality of obligation exists or whether the argument is made that the promise in question is illusory, "the issue is the same—consideration." 51 C2d at 122.

As illustrated below, clauses like the one involved in *Mattei* have been divided into two groups and are evaluated by the courts, not for purposes of whether *consideration* is present, but for purposes of evaluating *performance*, in accordance with two different standards, the reasonable person standard and the good faith standard. 51 C2d at 122; see §4.27. Neither standard operates in a per se treatment of the *condition* as rendering the *promise* illusory for consideration purposes. Instead, the courts are more prone to find a promise to be illusory when one party has an unfettered right to either withdraw from or cancel a contract. See *Naify v Pacific Indem. Co*. (1938) 11 C2d 5, 11, 76 P2d 663; *Cox v Hollywood Film Enters., Inc*. (1952) 109 CA2d 320, 325, 240 P2d 713; *Shortell v Evans-Ferguson Corp*. (1929) 98 CA 650, 660, 277 P 519 (contract that included provision reserving right of owner of real property to cancel was lacking in mutuality and consideration). However, when the contract clause in question involves the satisfaction or approval by one party (*Rodriguez v Barnett* (1959) 52 C2d 154, 160, 338 P2d 907; *Mattei v Hopper, supra*) or a promise that implies some other type of performance (*Pease v Brown* (1960) 186 CA2d 425, 431, 8 CR 917), the courts have little trouble concluding that consideration is present. The courts might find in these cases that performance is shown or lacking, but they do not conclude there is no consideration. Thus, the actual wording of the promise or the condition on which the promise is based is crucial because the presence or absence of a few words can render the promise illusory or qualify it as sufficient consideration subject to how the two standards apply to the evidence of performance.

An agreement that is otherwise illusory may become enforceable if one party renders at least part performance. See *Steiner v Thexton* (2010) 48 C4th 411, 423, 106 CR3d 252 (buyers' immediate and substantial efforts and expenditures to obtain bargained-for parcel split that would directly benefit seller cured initially illusory nature of promise and rendered real property option irrevocable). For further discussion and analysis of *Steiner*, see §§4.54, 5.8.

PRACTICE TIP: Because real property agreements are often complex in their nature, involving many conditions and promises, consideration may be present in many other forms even though one promise may actually be illusory. When a contract is supported by *other consideration*, *i.e.,* other enforceable promises, the presence of one illusory promise is insufficient to establish a lack of consideration. *Third Story Music, Inc. v Waits* (1995) 41 CA4th 798, 808, 48 CR2d 747. Even though a contract may be supported by other such consideration, *the performance* of the asserted illusory promise may still be evaluated under either the reasonable person test or the good faith test,

depending on the nature of the asserted illusory promise involved, to determine whether a breach occurred. See §4.27.

For further discussion of illusory terms in real property contracts, see §§4.7, 4.54.

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Source: Real Property/California Real Property Remedies and Damages/4 Damages for Breach of Seller-Buyer Contracts/§4.22 E. Certainty and Ambiguity

§4.22 E. Certainty and Ambiguity

The law's demand for contract certainty is usually limited to those contractual elements it treats as being absolutely necessary to the formation of a contract. Civil Code §1598 provides in relevant part: "Where a contract … [is] so vaguely expressed as to be wholly unascertainable, the entire contract is void." The courts have said in consistent terms, "Where a contract is so uncertain and indefinite that the intention of the parties in material particulars cannot be ascertained, the contract is void and unenforceable." *California Lettuce Growers, Inc. v Union Sugar Co*. (1955) 45 C2d 474, 481, 289 P2d 785. See also *Hennefer v Butcher* (1986) 182 CA3d 492, 500 n4, 227 CR 318.

The required elements for a real property contract must be sufficiently certain to enable a court to enforce them (*Sterling v Taylor* (2007) 40 C4th 757, 771 n12, 55 CR3d 116; see also *Coleman Eng'g Co. v North Am. Aviation, Inc*. (1966) 65 C2d 396, 405, 55 CR 1; *Okun v Morton* (1988) 203 CA3d 805, 817, 250 CR 220), and in some specific performance cases (see CC §3390(5); *Pascoe v Morrison* (1933) 219 C 54, 58, 25 P2d 9; *White Point Co. v Herrington* (1968) 268 CA2d 458, 465, 73 CR 885; *Mueller v Chandler* (1963) 217 CA2d 521, 524, 31 CR 646; *Dickey v Pattison* (1949) 92 CA2d 659, 662, 207 P2d 1081). Even so, in some cases involving the required elements of a real property contract and where specific performance is sought, other courts have relaxed the demand for certainty through (1) the admission of parol evidence to make comprehensible that which is uncertain (see *Sterling v Taylor* (2007) 40 C4th 757, 770, 55 CR3d 116 (parol evidence contradicted what was written resulting in ruling that price term was too uncertain to enforce); *Blackburn v Charnley* (2004) 117 CA4th 758, 766, 11 CR3d 885; *Hennefer v Butcher* (1986) 182 CA3d 492, 501, 227 CR 318; *Larwin-Southern Cal., Inc. v JGB Inv. Co*. (1979) 101 CA3d 626, 645, 162 CR 52; *Crescenta Valley Moose Lodge No. 808 v Bunt* (1970) 8 CA3d 682, 688, 87 CR 428); (2) the use of other provisions in the contract establishing an objective way to resolve the uncertainty (*Larwin*, 101 CA3d at 641); (3) applying the rules applicable to the implied covenant of good faith and fair dealing (*Mitchell v Exhibition Foods, Inc*. (1986) 184 CA3d 1033, 229 CR 535); and (4) ultimately filling in gaps left by the parties (*Ersa Grae Corp. v Fluor Corp*. (1991) 1 CA4th 613, 623, 2 CR2d 288).

Some contracts involving real property have been found to be too uncertain to enforce. *Buckmaster v Bertram* (1921) 186 C 673, 676, 200 P 610 (although contract specified a price of $1000 for real property, the *other* provisions calling for the payment of that price were too indefinite and uncertain to enforce); *Mason v Woodland Sav. & Loan Ass'n* (1967) 254 CA2d 41, 44, 61 CR 740 (agreement to loan money to "construct a residential dwelling on each parcel" too uncertain to enforce); *Louis Lesser Enters. v Roeder* (1962) 209 CA2d 401, 409, 25 CR 917 (multiple uncertainties found including a lack of agreement about "the kind of improvements, type or number of buildings to be constructed, proposed cost, or the nature of the development"); *Pacific Hills Corp. v Duggan* (1962) 199 CA2d 806, 814, 19 CR 291 (joint venture for "the purpose of developing and improving said property for sale" held too uncertain).

Other contracts containing *arguably* uncertain provisions have been enforced. *Ersa Grae Corp. v Fluor Corp*. (1991) 1 CA4th 613, 623, 2 CR2d 288 (contract will be enforced if it is sufficiently definite for court to ascertain parties' obligations); *Yackey v Pacifica Dev. Co*. (1979) 99 CA3d 776, 783, 160 CR 430 (release clause was not fatally uncertain); *Eldridge v Burns* (1978) 76 CA3d 396, 422, 142 CR 845 (uncertain release clause was not bar to action for damages); *Boyd v Bevilacqua* (1966) 247 CA2d 272, 284, 288, 55 CR 610 (contract that called for plans for development of commercial property to be generated in future was not bar to damages action because breach of agreement did not require certainty on that point); *Eastwood Homes, Inc. v Hudson* (1958) 161 CA2d 532, 540, 327 P2d 29 (contract that called for payment of money from sale of homes but did not require construction of such homes or specify type of homes to be built or cost thereof was not uncertain because by agreeing to pay from certain fund, plaintiff "obligated itself to do those acts which would bring the fund into existence.").

Some courts speak of contract provisions in terms of being uncertain and ambiguous as though uncertainty and ambiguity involve the same principles. See *Larwin-Southern Cal., Inc. v JGB Inv. Co*. (1979) 101 CA3d 626, 645, 162 CR 52; *Crescenta Valley Moose Lodge No. 808 v Bunt* (1970) 8 CA3d 682, 689, 87 CR 428. Although there are similarities between them, there are also differences. As illustrated above, uncertainty may result in the contract being treated as void or unenforceable. The nature of ambiguity is that some word, clause, or other provision has two or more

possible meanings. See *Morey v Vannucci* (1998) 64 CA4th 904, 914, 75 CR2d 573; *Crescenta*, 8 CA3d at 687. Unlike uncertainty problems, which may result in the unenforceability of the contract, ambiguity problems are often resolved by the application of the parol evidence rule (see §4.24) and result in the enforcement of the contract when the trier of fact accepts one party's explanation of the meaning of the contract over the other party's. See *Morey*, 64 CA4th at 914; *Crescenta*, 8 CA3d at 687. In addition, the nature of an ambiguous word, clause, or provision differs from an uncertain word, clause, or provision in that the latter is either not present in the contract at all (see *Louis Lesser Enters. v Roeder* (1962) 209 CA2d 401, 408, 25 CR 917) or, more often, is present in some form that is, however, too indefinite to enforce (see *Sterling v Taylor* (2007) 40 C4th 757, 774, 55 CR3d 116 (price term)).

The law has evolved to the point that the courts endeavor to enforce the efforts of parties who have exhibited a sufficient effort to make a contract. See §§4.1, 4.12. "The governing principle is: 'That is certain which can be made certain'" (*Sterling v Taylor* (2007) 40 C4th 757, 771, 55 CR3d 116; see also CC §3538), which appears to mean that courts have the power to make unclear contractual provisions clear through the dual judicial functions of allowing competent evidence relevant to what was meant to be admitted and then interpreting an agreement in the light of the admissible evidence. The corollary is that contractual precision, although desirable, is not required. See *Sterling*, 40 C4th at 766. See §4.11. Whether a provision is either uncertain or ambiguous is a threshold legal issue to be resolved by a court. *Brant v California Dairies, Inc*. (1935) 4 C2d 128, 133, 48 P2d 13; *Winet v Price* (1992) 4 CA4th 1159, 1165, 6 CR2d 554. Whether certainty can thus be judicially "made" (CC §3538) depends principally on (1) whether the contract contains the essential terms, even if unclear or ambiguously expressed; (2) whether a proffered interpretation is inconsistent with what was said in the contract; and (3) whether extrinsic evidence is in conflict with other extrinsic evidence.

There is a difference between the certainty required for the remedy of specific performance and that required for the remedy for breach of contract. *Ehrler v Ehrler* (1981) 126 CA3d 147, 155, 178 CR 642; *Lawrence v Shutt* (1969) 269 CA2d 749, 763, 75 CR 533. See also CC §3390; *White Point Co. v Herrington* (1968) 268 CA2d 458, 465, 73 CR 885. The specific performance remedy generally requires certainty regarding all material points and uncertainty cannot be waived. See, *e.g., White Point*, 268 CA2d at 469. Other cases hold, however, that not every term must be certain. See *Schomaker v Osborne* (1967) 250 CA2d 887, 893, 58 CR 827; *Burrow v Timmsen* (1963) 223 CA2d 283, 287, 35 CR 668. Some specific performance cases appeal to the contract rule favoring the enforcement of contracts as some basis for relaxing the certainty requirement. See *Schomaker*, 250 CA2d at 893; *Burrow*, 223 CA2d at 288.

NOTE: There is less of a need for certainty in an action for damages as opposed to an action for specific performance. *Boyd v Bevilacqua* (1966) 247 CA2d 272, 287, 55 CR 610. This is because an action for damages is founded on a mere nonperformance and that "negative conclusion can often be established without determining all the terms of the agreement with exactness," which specific performance actions generally require. 247 CA2d at 288. See §§5.9-5.14. Finally, if a contract is uncertain, that uncertainty may be the basis for a demurrer to a complaint. *Martin v Bank of San Jose* (1929) 98 CA 390, 399, 277 P 197.

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Source: Real Property/California Real Property Remedies and Damages/4 Damages for Breach of Seller-Buyer Contracts/§4.23 F. Covenants and Conditions

§4.23 F. Covenants and Conditions

In many instances, whether a contractual provision is a covenant (a promise) or a condition will be readily apparent. The Restatement (Second) of Contracts §2(1) (1981) defines a promise as follows: "A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made." The cases also refer to such promises as covenants. See, *e.g., Hunt v United Bank & Trust Co*. (1930) 210 C 108, 115, 291 P 184 ("The essential feature of a contract is the promise, and … it amounts to a covenant"). Promises may be conditional on an event or the performance of some other duty. *Mattei*, 51 C2d at 122; *Platt Pac., Inc. v Andelson* (1993) 6 C4th 307, 313, 24 CR2d 597. If a time for performance is not specified, a reasonable time is implied by the law. CC §1657.

A condition, on the other hand, "is an event, not certain to occur, which must occur, unless its non-occurrence is excused, before performance under a contract becomes due." *Beverly Way Assocs. v Barham* (1990) 226 CA3d 49, 54, 276 CR 240 (quoting from Restatement §224). See also CC §1434. Conditions are often identified by the words "subject to." *Rubin v Fuchs* (1969) 1 C3d 50, 54, 81 CR 373. See also *Abrams v Motter* (1970) 3 CA3d 828, 834, 83 CR 855. The supreme court has effectively equated a condition precedent with the Restatement §224 definition: "Thus, a condition precedent is either an act of a party that must be performed or an uncertain event that must happen before the contractual right accrues or the contractual duty arises." *Platt Pac., Inc. v Andelson* (1993) 6 C4th 307, 313, 24 CR2d 597. See also CC §1436; *Realmuto v Gagnard* (2003) 110 CA4th 193, 199, 1 CR3d 569. The existence of a condition precedent normally depends on the intent of the parties as determined from the words they have used in the contract. *Realmuto*, 110 CA4th at 199. Some conditions precedent are required by statute, such as the duty to provide a disclosure statement in the sale of a residence, and if not given may bar an action for damages and specific performance. 110 CA4th at 202. Some conditions precedent may be implied by the courts. *Wal-Noon Corp. v Hill* (1975) 45 CA3d 605, 612, 119 CR 646 (notice from one party to another implied as "an indispensable condition precedent to defendants' duty to perform").

Ordinarily, whether a particular matter is a condition precedent depends on the intent of the parties. *Realmuto v Gagnard* (2003) 110 CA4th 193, 199, 1 CR3d 569. In residential real property transactions, however, there is an *implied condition precedent* that the seller provide the disclosures required by CC §§1102-1102.17. 110 CA4th at 199. The right to this disclosure cannot be waived. 110 CA4th at 203.

NOTE: The ruling in *Realmuto* applied only to disclosures in §§1102-1102.17. Whether the disclosures regarding water-conserving plumbing in CC §§1101.1-1101.9, 1102.155, or the general disclosures in CC §§1103-1134, are considered to be a condition precedent in a residential sale is uncertain.

Other conditions, however, may be waived. *Doryon v Salant* (1977) 75 CA3d 706, 712, 142 CR 378. In *WYDA Assocs. v Merner* (1996) 42 CA4th 1702, 1713, 50 CR2d 323, the court first held that a real property contract containing a "subject to" provision was ambiguous and overruled a trial court's grant of a summary judgment because of conflicting parol evidence as to the meaning of the provision. The court also held that the financing condition could not be waived by the buyer because of its effect on the seller's rights as expressed in the contract. 42 CA4th at 1714.

Conditions concurrent are different in their legal effect from conditions precedent. "Conditions concurrent are those which are mutually dependent, and are to be performed at the same time." CC §1437. The delivery of the deed and the payment of the purchase price usually are dependent and concurrent conditions. *King v Stanley* (1948) 32 C2d 584, 590, 197 P2d 321, disapproved on other grounds in *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366. Courts will not generally construe provisions in a contract as conditions precedent in the absence of language plainly requiring such a construction. *Rubin v Fuchs* (1969) 1 C3d 50, 53, 81 CR 373.

When the contract calls for the concurrent performance of obligations, neither party may place the other in default unless such party is fully able to perform or make a tender of the promised performance. 1 C3d at 54. Wherever possible, the courts will construe promises in a bilateral contract as being mutually dependent and concurrent. 1 C3d at 54. Thus, it is generally held that the duty to deposit funds into an escrow is an obligation that is concurrent with the

duty to deposit a deed into escrow. *Kossler v Palm Springs Devs., Ltd*. (1980) 101 CA3d 88, 98, 161 CR 423.

In a contract with concurrent conditions, "the buyer and seller cannot keep saying to one another, 'No, you first.'" *Pittman v Canham* (1992) 2 CA4th 556, 560, 3 CR2d 340. The failure of both parties to perform concurrent conditions does not leave the contract open for an indefinite period so that either party can tender performance at their leisure. 2 CA4th at 559. The failure to perform concurrent conditions during the time for performance results in a discharge of *both* parties' duty to perform. 2 CA4th at 560. But see *Galdjie v Darwish* (2003) 113 CA4th 1331, 1340, 7 CR3d 178 (distinguishing *Pittman* case); *Ninety Nine Invs. v Overseas Courier Serv. (Singapore) Private, Ltd.* (2003) 113 CA4th 1118, 1132, 6 CR3d 891 (same).

When conditions are concurrent, it is necessary to tender performance before placing the other party in breach. See §4.41. Not all contractual provisions, however, are clearly covenants, on the one hand, or conditions, on the other hand, and in many cases, whether a condition is a condition precedent or concurrent may also be unclear. Tender of performance, therefore, can be as crucial to an action for breach of contract as the breach itself because of that uncertainty. A tender must be (1) with the requisite intent to extinguish the obligation (CC §1485); (2) of complete performance (CC §1486); (3) communicated by the promisee or someone acting on the promisor's behalf (CC §1487); (4) to the promisee (CC §1488); (5) at a place designated for performance (CC §1489); (6) timely made (CC §§1490-1492); (7) in good faith (CC §1493); (8) generally unconditional (CC §§1494, 1498-1499); and (9) with the ability and willingness to perform (CC §§1495-1497, 1500, 1502-1504). A promisee may object to a tender (CC §1501) or retain the performance under certain conditions (CC §1505). When obligations are concurrent in their nature, "neither party can place the other in default without first performing or tendering his own performance with the ability to perform." *Kossler v Palm Springs Devs., Ltd*. (1980) 101 CA3d 88, 99, 161 CR 423. See also *Rubin v Fuchs* (1969) 1 C3d 50, 54, 81 CR 373; *Fogarty v Saathoff* (1982) 128 CA3d 780, 785, 180 CR 484; *Katemis v Westerlind* (1953) 120 CA2d 537, 546, 261 P2d 553. The failure to tender may effectively defeat an otherwise good breach of contract claim when the conditions to performance are concurrent.

Proof of *ability to perform* may be troublesome to either a seller or a buyer depending on the nature of the obligations of each. Buyers frequently depend on financing from a lender or other third party and, therefore, their claims are subject to the evidence controlled by and the credibility of such third parties. For example, if financing is a condition to further performance, the subsequent discovery of hazardous materials in the real property may relieve a buyer from further performance. *WYDA Assocs. v Merner* (1996) 42 CA4th 1702, 1716, 50 CR2d 323. Sellers often subject themselves to the performance by third parties as well and their positions are subject to similar uncertainties about the performance by such third parties. In *Fogarty v Saathoff* (1982) 128 CA3d 780, 786, 180 CR 484, the court concluded that the obligation to provide title insurance and a termite clearance were not concurrent conditions and the failure to provide either did not amount to an anticipatory breach of contract based on how such provisions related to other provisions regarding the buyer's obligations to acquire a loan.

Although a plaintiff may *generally plead* that the plaintiff performed the required contract conditions to state a cause of action adequately for breach of contract, that rule is qualified by two other rules. The first is that "where the condition is an event, as distinguished from an act to be performed by the plaintiff, a *specific* allegation of the happening of the condition is a necessary part of pleading the defendant's breach." (Emphasis added.) *Careau & Co. v Security Pac. Bus. Credit, Inc*. (1990) 222 CA3d 1371, 1389, 272 CR 387. The second qualification is, because general allegations are controlled by specific allegations, if there is no specific allegation when one is required or if the specific allegation contradicts the general allegation, the general allegation of performance of conditions will not suffice. 222 CA3d at 1389. Also, the party seeking to enforce the contract must still *adduce proof of ability to perform* in a breach of contract case (*Ersa Grae Corp. v Fluor Corp*. (1991) 1 CA4th 613, 625, 2 CR2d 288; *Kossler v Palm Springs Devs., Ltd*. (1980) 101 CA3d 88, 99, 161 CR 423) as well as in a specific performance case (*C. Robert Nattress & Assocs. v CIDCO* (1986) 184 CA3d 55, 64, 229 CR 33; *Stratton v Tejani* (1982) 139 CA3d 204, 211, 187 CR 231; *Am-Cal Inv. Co. v Sharlyn Estates, Inc.* (1967) 255 CA2d 526, 539, 63 CR 518). On the other hand, a condition need not be established if it was properly waived. On waiver of conditions, see §4.40. The contractual right to terminate may also be waived. *Galdjie v Darwish* (2003) 113 CA4th 1331, 1340, 7 CR3d 178; *Doryon v Salant* (1977) 75 CA3d 706, 712, 142 CR 378; *Crescenta Valley Moose Lodge No. 808 v Bunt* (1970) 8 CA3d 682, 687, 87 CR 428.

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§4.24 G. Parol Evidence Rule

The parol evidence rule may potentially be involved in every word, phrase, clause, sentence and paragraph of a real property contract. As sophisticated as real property contracts have become, it is not reasonably foreseeable that they will reach the point where the parol evidence rule will not be applicable in some way to a real property contract.

Parol evidence is classified in two ways. Some parol evidence (also called extrinsic evidence) is offered to explain the meaning of some contractual word or provision that is either unclear or is ambiguous and other parol evidence consists of a separate collateral oral agreement that was made near the time the written contract was formed that is not in the contract. See generally, California Law of Contracts §§5.33-5.43 (Cal CEB 2007). The courts generally approach a parol evidence issue as involving a "two-part analysis." The court first determines whether the writing was intended to be an integrated agreement and second, it determines whether the agreement is reasonably susceptible to the meaning urged by the party offering the evidence. *EPA Real Estate Partnership v Kang* (1992) 12 CA4th 171, 176, 15 CR2d 209. See also *WYDA Assocs. v Merner* (1996) 42 CA4th 1702, 1709, 50 CR2d 323.

The parol evidence rule is codified in CC §§1625, 1639 and CCP §1856 and is treated as a rule of substantive contract law. *Casa Herrera, Inc. v Beydoun* (2004) 32 C4th 336, 343, 9 CR3d 97; *Tahoe Nat'l Bank v Phillips* (1971) 4 C3d 11, 22, 92 CR 704. As a rule of substantive contract law, it is not subject to waiver at trial. *Tahoe*, 4 C3d at 22; *Morey v Vannucci* (1998) 64 CA4th 904, 912, 75 CR2d 573.

PRACTICE TIP: Although it is a rule of substantive law, it also has a procedural feature. Parol evidence, it is said, is conditionally "admitted" so that the trial court may decide whether it passes the test of relevancy. The purpose of conditionally allowing such evidence is that the trial court may not yet be in a position to determine its admissibility or its ultimate relevancy. *Gribaldo, Jacobs, Jones & Assocs. v Agrippina Versicherunges AG* (1970) 3 C3d 434, 443 n6, 91 CR 6; *PG&E v G.W. Thomas Drayage Co*. (1968) 69 C2d 33, 40 n7, 69 CR 561; *Morey v Vannucci* (1998) 64 CA4th 904, 912, 75 CR2d 573. In jury trials, it may be necessary to take such evidence out of the presence of the jury first pursuant to Evid C §402. See also Evid C §403. When the interpretation of the contract turns on a question of credibility of conflicting extrinsic evidence, the question is for the jury. *Morey*, 64 CA4th at 912.

The parol evidence rule has several applications to contracts involving the sale of real property including (1) whether the contract contains a provision that is ambiguous or unclear and in need of parol evidence to aid in its interpretation; (2) whether a collateral oral agreement is inconsistent with the provisions of the written agreement; (3) whether a memorandum is sufficient for purposes of the statute of frauds; and (4) whether a contract is an integrated agreement.

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Source: Real Property/California Real Property Remedies and Damages/4 Damages for Breach of Seller-Buyer Contracts/§4.25 H. Standard Form Real Property Contracts

§4.25 H. Standard Form Real Property Contracts

Except in a couple of instances, there are no requirements that contracts for the sale of residential real property be in any specific form or that they be standardized. The two instances that qualify this are (1) the law implies in all residential real estate contracts a duty to provide the disclosures required by CC §§1102-1102.17 (*Realmuto v Gagnard* (2003) 110 CA4th 193, 1 CR3d 569; see §4.23), and (2) if the residence is in foreclosure, then certain notices must be included in the contract (see §4.26).

There is a prevailing practice among residential real estate agents, on the other hand, to use standardized form real estate contracts, which gives the appearance that such contracts are appropriate. See *Gravillis v Coldwell Banker Residential Brokerage Co*. (2006) 143 CA4th 761, 768, 49 CR3d 531 (over 750,000 standard form contracts sold in 2003); *Hedges v Carrigan* (2004) 117 CA4th 578, 11 CR3d 787; *Realmuto v Gagnard* (2003) 110 CA4th 193, 197, 1 CR3d 569. The use of such standardized contracts has been common for several decades. See, *e.g., Mattei v Hopper* (1958) 51 C2d 119, 121, 330 P2d 625. For the most part, the use of standardized forms does not involve contract rules that are any different from those applicable to handwritten agreements or tailor-made agreements, but if the forms contain one-sided or unconscionable provisions, a judge may decide that they are unenforceable. See, *e.g*., §§14.38-14.38D, 14.42-14.42E.

One court said that the real estate industry's development of standardized forms for use by the general public was wise. *Roth v Malson* (1998) 67 CA4th 552, 559, 79 CR2d 226 (offer, acceptance, and counteroffer forms). However, another court recently criticized the manner in which such form contracts are composed because they sometimes result in a "morass." *Behniwal v Mix* (2005) 133 CA4th 1027, 1038 n12, 35 CR3d 320.

The use of standardized real property contracts involves a risk that such contracts, or a provision in them, may involve the practice of law and if so, the further risk that the contract, or some provision in it, may be illegal. Business and Professions Code §6125 provides: "No person shall practice law in California unless the person is an active member of the State Bar." It is a misdemeanor to practice law without a license. Bus & P C §6126. On the other hand, a real estate broker is expressly authorized to negotiate the purchase, sale, or exchange of real property. Bus & P C §10131(a). Where the business of negotiating ends and drafting of the agreement begins will be clear in some cases and difficult to determine in others. The courts have not yet decided how these two sets of restrictions and rights interrelate with each other.

While it has become common for buyers and sellers to use standardized real estate contracts in the residential, industrial, and commercial real estate marketplaces, the use of such contracts may involve the unlawful practice of law depending on the extent to which an unlicensed person (most often a real estate agent) composes contractual language and also depending on how a court might look at the preprinted provisions themselves. The result is, of course, that if there is sufficient unlawful involvement by a person not licensed to practice law in the composition of the contractual terms, the contract might be declared void in whole or in part. Arguably, the reasoning in reported cases on the activities of other unlicensed professionals applies. See, *e.g*., *Lindenstadt v Staff Builders, Inc.* (1997) 55 CA4th 882, 892, 64 CR2d 484 (unlicensed real estate broker); *Hoar v Tuley* (1970) 12 CA3d 344, 348, 90 CR 559 (same).

The supreme court held in *People v Merchants Protective Corp*. (1922) 189 C 531, 535, 209 P 363 that despite the apparent absence of a definition for the words "practice law," the phrase is generally understood to include "legal advice and counsel and *the preparation of legal instruments and contracts* by which legal rights are secured although such matter may or may not be depending in a court." (Emphasis added.) The courts have continuously adopted this basic definition of the practice of law. *Morgan v State Bar* (1990) 51 C3d 598, 604, 274 CR 8, 797 P2d 1186 (negotiations and preparation of declarations and court forms); *People v Landlords Prof. Servs.* (1989) 215 CA3d 1599, 1604, 264 CR 548 (eviction services); *Mickel v Murphy* (1957) 147 CA2d 718, 721, 305 P2d 993 (preparation of will), overruled on other grounds in *Biakanja v Irving* (1958) 49 C2d 647, 651, 320 P2d 16; *People v Ring* (1937) 26 CA2d Supp 768, 771, 70 P2d 281 (rendering advice), disapproved on other grounds in *Birbower, Montalbano, Condon & Frank v Superior Court* (1998) 17 C4th 119, 129, 70 CR2d 304. The prohibition extends to those who aid and abet in the unlawful practice of law. *Crawford v State Bar* (1960) 54 C2d 659, 667, 7 CR 746 (handling of escrow, among other

things).

PRACTICE NOTE: The services of a law clerk may involve the practice of law if they exceed the "line of demarcation" which "cannot always be drawn with absolute distinction or accuracy." *Crawford*, 64 C2d at 668. The use of a standardized real estate contract, which usually contains blanks that are *completed* by real estate agents, may be short of that "line of demarcation," such as filling in the names of a buyer or seller, or cross the line, such as in the case of actually crafting some important term of the contract itself. See *People v Sipper* (1943) 61 CA2d Supp 844, 846, 142 P2d 960, overruled on other grounds in *Murgia v Municipal Court* (1975) 15 C3d 286, 301 n11, 124 CR 204, 540 P2d 44.

The supreme court has also said that it may be a formidable endeavor to ascertain whether an act constitutes the practice of law. *Baron v City of Los Angeles* (1970) 2 C3d 535, 543, 86 CR 673. In close cases and when safeguarding the public is involved, such close questions will be resolved in favor of finding a questionable act to constitute the practice of law. 2 C3d at 5543. In *People v Sipper* (1943) 61 CA2d Supp 844, 845, 142 P2d 960, overruled on other grounds in *Murgia v Municipal Court* (1975) 15 C3d 286, 301 n11, 124 CR 204, 540 P2d 44, a real estate broker was found guilty of practicing law because he prepared a mortgage after a trust deed he prepared for borrowers was rejected by a county recorder. Although the borrowers specified the terms, they did not know the type of instrument that should be used. The court reasoned that selection of the instrument involved "something more than the mere clerical work of typing in certain furnished information in a blank form." 61 CA2d Supp at 846. See, however, *People v Landlords Prof. Servs.* (1989) 215 CA3d 1599, 1605, 264 CR 548, in which the court said, in dicta, that *the sale* of legal forms does not constitute the practice of law.

The implications from these principles and the use of standardized real estate contracts include the argument that such contracts may be void and their use may be restrained. See *Estate of Butler* (1947) 29 C2d 644, 177 P2d 16 ("heir-hunter's" business of soliciting beneficiaries and arranging for their legal representation constituted unlawful practice of law). An agreement involving the violation of Bus & P C §6125 may be illegal, in which case the court may invalidate either the entire contract or that part of it that the court determines is severable. *Birbower, Montalbano, Condon & Frank v Superior Court* (1998) 17 C4th 119, 138, 70 CR2d 304. See generally, *McIntosh v Mills* (2004) 121 CA4th 333, 344, 17 CR3d 66.

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§4.26 I. The Home Equity Sales Contract Act

In 1979, the legislature enacted the Home Equity Sales Contract Act (CC §§1695-1695.17), which requires, among other things, that all contracts for the purchase or sale of residential real property in a foreclosure proceeding contain certain notices and cancellation provisions. Thus, contracts must be written in at least 10-point *bold* type, in the same language principally used by the buyer and seller to negotiate the sale of the residence in foreclosure, and must be completed and signed by the buyer and seller before any conveyance is made. CC §1695.2. The contract must also include a specific type of notice of cancellation rights, among other items of information. CC §1695.3. The buyer must also provide the seller with an additional copy each of the contract and the attached notice of cancellation document. CC §1695.5(c). Contracts that do not contain such clauses subject purchasers of such residences to a wide variety of remedies, including punitive damages or civil penalties. For specified violations, the court is required to order at least treble damages. CC §1695.7. See §§1.22, 1.59, 4.63 for how damages are determined under the Act.

PRACTICE NOTE: The Mortgage Foreclosure Consultant Act (CC §§2945-2945.11) contains similar provisions to the Home Equity Sales Contract Act but is aimed at consultants rather than buyers. For further discussion, see California Mortgages, Deeds of Trust, and Foreclosure Litigation (4th ed Cal CEB 2009).

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§4.27 IV. IMPLIED DUTY OF GOOD FAITH AND FAIR DEALING

In addition to using the implied duty of good faith and fair dealing as a means for concluding that consideration is present to support a contract (see §§4.19, 4.21), the courts have also (1) implied obligations where the contract does not expressly provide for one but such an obligation is appropriate to carry out other contractual terms (*e.g.*, *Tanner v Title Ins. & Trust Co*. (1942) 20 C2d 814, 824, 129 P2d 383; *Abrams v Motter* (1970) 3 CA3d 828, 837, 83 CR 855), and (2) used the implied duty to measure the performance by a party of some express or implied obligation. *Guntert v City of Stockton* (1974) 43 CA3d 203, 211, 117 CR 601. Whether the implied duty is applied depends, of course, on the nature of the provisions in the contract itself and the courts generally require the existence of some contract before implying any duty of good faith. *Racine & Laramie, Ltd. v Department of Parks & Recreation* (1992) 11 CA4th 1026, 1032, 14 CR2d 335. Such implied duties, however, may not contradict or be inconsistent with an express provision in the contract. *Carma Developers (Cal.), Inc. v Marathon Dev. Cal., Inc.* (1992) 2 C4th 342, 374, 6 CR2d 467, 826 P2d 710. Also, where a contract is intentionally silent about a subject matter, the covenant will also not be implied. *Foley v Euless* (1931) 214 C 506, 511, 6 P2d 956. Matters that are intentionally omitted from a contract may not be implied under the guise of interpretation. CC §1648; *A.B.C. Distrib. Co. v Distillers Distr. Corp.* (1957) 154 CA2d 175, 185, 316 P2d 71.

There have been several ways in which the courts have expressed the implied covenant and the "differences" are not differences, but examples of its scope. In *Universal Sales Corp. v California Press Mfg. Co*. (1942) 20 C2d 751, 771, 128 P2d 665, the Supreme Court said that every contract includes "an implied covenant that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract, which means that in every contract there exists an implied covenant of good faith and fair dealing." See also *Harm v Frasher* (1960) 181 CA2d 405, 417, 5 CR 367.

Some courts say that they are to proceed cautiously before implying a provision which the parties have omitted from their written contracts. See, *e.g., United States Bldg. & Loan Ass'n v Salisbury* (1932) 217 C 35, 39, 17 P2d 140. Some courts have governed themselves to carefully apply the elements that have been said to be necessary for the imposition of the implied duty. Those elements are: (1) the implication must arise from the language used or it must be indispensable to effectuate the intention of the parties; (2) it must appear from the language used that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it; (3) implied covenants can only be justified on the grounds of legal necessity; (4) a promise can be implied only where it can be rightfully assumed that it would have been made if attention had been called to it; and (5) there can be no implied covenant where the subject is completely covered by the contract. *Lippman v Sears, Roebuck & Co.* (1955) 44 C2d 136, 142, 280 P2d 136; *Third Story Music, Inc. v Waits* (1995) 41 CA4th 798, 804, 48 CR2d 747.

Many real property contracts have provisions that empower a party to disapprove documentation, some condition or other feature involved in the transaction as a condition to further performance to which the implied duty applies. See, *e.g., Bleecher v Conte* (1981) 29 C3d 345, 213 CR 852 (requiring buyers approval of documentation); *WYDA Assocs. v Merner* (1996) 42 CA4th 1702, 50 CR2d 323 (contract contingent on buyer obtaining financing and approving inspections); *Beverly Way Assocs. v Barham* (1990) 226 CA3d 49, 55, 276 CR 240 (contract contingent on buyer approving inspections). The clauses are written in a variety of ways and use concepts of investigation, evaluation, approval, satisfaction, and judgment. Some of these clauses are written in such a way as to confer a right to one party to also terminate or cancel further performance under the contract because of that party's disapproval. See *Guntert v City of Stockton* (1974) 43 CA3d 203, 117 CR 601. The courts have adopted two standards by which to measure a party's *performance* of such provisions which have been referred to as the reasonable person test and the good faith test. *Storek & Storek, Inc. v Citicorp Real Estate, Inc*. (2002) 100 CA4th 44, 58, 122 CR2d 267; *Guntert*, 43 CA3d at 209.

Some cases suggest that one of the features of the implied *covenant* of good faith and fair dealing is that parties to a contract must take steps that are *reasonably* geared *toward performance rather than against it even though the contract does not contain an express provision for the party to perform such efforts. Doryon v Salant* (1977) 75 CA3d 706, 711,

142 CR 378 (buyer had duty to use due diligence to procure financing); *San Bernardino Valley Water Dev. Co. v San Bernardino Valley Mun. Water Dist*. (1965) 236 CA2d 238, 258, 45 CR 793 (parties cannot act arbitrarily, capriciously, or feign dissatisfaction); *Fry v George Elkins Co*. (1958) 162 CA2d 256, 260, 327 P2d 905 (implied duty to apply for a loan with an institution based on the possibility that financing could be secured). The failure to *perform* in accordance with the implied duty constitutes a breach of contract. 162 CA2d at 261.

Contractual provisions that either require a party to take steps that are then not taken or to approve some feature that is then disapproved (which is not functionally different from contractual provisions calling for satisfaction) call for an evaluation of the mental judgment process of the contracting parties regarding the provisions that confer a right to determine some aspect of a transaction. See *Mattei v Hopper* (1958) 51 C2d 119, 124, 330 P2d 625. The implications of the "judgment" aspect of how a contracting party exercises the right of evaluating matters are as varied as the clauses on which they are based. For example, some contracts for the sale of real property, like those in *Mattei*, contractually allow a party to evaluate *contract rights*. 51 C2d at 123. Some clauses allow a contracting party to evaluate the performance of the other party. See *Rodriguez v Barnett* (1959) 52 C2d 154, 157, 338 P2d 907; *San Bernardino Valley Water Dev. Co. v San Bernardino Valley Mun. Water Dist*. (1965) 236 CA2d 238, 258, 45 CR 793. Contracts also include clauses that allow one of the parties to evaluate the *conditions* of the real property. *Beverly Way Assocs. v Barham* (1990) 226 CA3d 49, 53, 276 CR 240; *Larwin-Southern Cal., Inc. v JGB Inv. Co*. (1979) 101 CA3d 626, 637, 162 CR 52. Contracts include clauses that allow one of the parties to evaluate *information* contained in reports. *Storek & Storek, Inc. v Citicorp Real Estate, Inc*. (2002) 100 CA4th 44, 62, 122 CR2d 267; *Beverly Way Associates*, 226 CA3d at 53; *Larwin*, 101 CA3d at 637. Others allow a contracting party to evaluate the *economic feasibility*, *use, value, title, utility, financeability,* or *marketability* of the real property. *Beverly Way Assocs. v Barham*, *supra*; *Larwin-Southern Cal., Inc. v JGB Inv. Co.*, *supra; Guntert v City of Stockton* (1974) 43 CA3d 203, 207 n2, 117 CR 601.

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V. PERFORMANCE AND BREACH

§4.28 A. Determining Breach

The elements of performance and breach are as important to a contract claim as are the elements of the formation of the contract and causation of damages. Although the law applicable to performance, breach, and discharge is inextricably intertwined, the nuances of them should be segregated. The failure or extent of performance determines whether a breach has occurred, and whether a breach has occurred determines the parties' rights to terminate further performance and recover damages. Although full performance discharges an obligation (CC §1473), the statutes applicable to contractual performance (CC §§1473-1479) do not require full performance by a party as a precondition to bringing an action for the other party's breach. On defining breach of contract in the context of an action for damages, see §4.38.

In cases not involving real property sales, the general rule is that partial performance of a contractual obligation may not always be as severe enough as a total breach to justify termination; however, it may affect the amount of recoverable damages. See, *e.g*., *Coughlin v Blair* (1953) 41 C2d 587, 598, 262 P2d 305; *Superior Motels, Inc. v Rinn Motor Hotels, Inc*. (1987) 195 CA3d 1032, 1051, 241 CR 487; *Sackett v Spindler* (1967) 248 CA2d 220, 229, 56 CR 435. When the courts have considered whether a breach was total or partial, they have held that the breach must be classified as "material," "substantial," or "total" before the contract may be terminated by the non-breaching party. *Superior Motels*, 195 CA3d at 1051. It is still unsettled as to whether full performance of all contractual obligations is required in the context of a real property sale case or whether the rules applicable to a total or partial breach affect the outcome. Whether a breach is total or partial is a question of fact. 195 CA3d at 1051. See *Kossler v Palm Springs Devs., Ltd*. (1980) 101 CA3d 88, 101, 161 CR 423 (doctrine of substantial performance applicable to seller who was also contractor who agreed to build home).

PRACTICE NOTE: At least one court has recognized that the implied duty of good faith and fair dealing imposes an obligation to inform the other party of the reason why some matter was disapproved so that the other party could cure it. *San Bernardino Valley Water Dev. Co. v San Bernardino Valley Mun. Water Dist*. (1965) 236 CA2d 238, 257, 45 CR 793. In light of the focus the cases have placed on other features of the implied duty, it appears that this disclosure aspect is often overlooked as a breach. A party may also breach the implied duty of good faith and fair dealing. The courts have not yet decided if the rules applicable to determining whether such a breach is total or partial also apply to the implied duty. See also *Ninety Nine Invs. v Overseas Courier Serv. (Singapore) Private, Ltd.* (2003) 113 CA4th 1118, 1131, 6 CR3d 891 on how the implied duty relates to a time-is-of-the-essence provision, cited in §4.30.

Most real property sales contracts expressly require payment of the purchase price and delivery of the deed to occur concurrently. See, *e.g., Kossler v Palm Springs Devs., Ltd*. (1980) 101 CA3d 88, 98, 161 CR 423. Even when the contract does not say so in express terms, these two duties are generally deemed to be concurrent responsibilities. *Rubin v Fuchs* (1969) 1 C3d 50, 54, 81 CR 373. The reason is that the courts prefer to interpret contracts as bilateral contracts instead of unilateral, with the promises made by each party to be mutually dependent and concurrent with each other, unless the terms expressly provide otherwise. 1 C3d at 53. See §4.23. Consequently, where the issue involves the concurrent performance of promises or the concurrent fulfillment of conditions, "neither party can place the other in default unless he is fully able to perform or make a tender of the promised performance." 1 C3d at 54. The latter rule is one of the most significant rules in a real property contractual dispute. These principles have considerable legal effect on (1) how a court interprets the various types of other express *and* implied provisions in a real property contract and whether such other provisions are promises or conditions precedent, concurrent or subsequent to the "mutually dependent and concurrent promises," and (2) how a court measures (at the pleading and trial stages) the performance of such other provisions.

For example, in *Consolidated World Invs. v Lido Preferred Ltd*. (1992) 9 CA4th 373, 11 CR2d 524, a buyer entered into a contract with the seller to purchase real property. The contract provided that the escrow "shall be opened upon

Buyer's request." 9 CA4th at 377. Escrow was supposed to be an estimated 60 days and time was declared to be of the essence. 9 CA4th at 377. The buyer failed to open escrow and more than 60 days after the contract was signed, the seller notified the buyer that the seller terminated the agreement. 9 CA4th at 377. The court of appeal affirmed a nonsuit against the buyer because the plaintiff buyer was unable to prove that it performed all conditions on its part to be performed, which included the one detail of opening escrow. 9 CA4th at 380. Although the obligations to pay for the property and deliver the deed were most likely mutually dependent and concurrent, the condition of opening escrow was treated as a condition precedent to all other obligations of the seller. Because it was the buyer's obligation to request escrow to be opened and the buyer failed to sufficiently show in its opening statement that it made such a request, the buyer could not satisfy the key element of performing all covenants and conditions on its part to be performed in order to place the seller in default. 9 CA4th at 380.

PRACTICE NOTE: How each provision in a contract affects another provision may have a bearing on the *ability* feature of the performance and breach elements. Proof of the *ability* to perform as of some date in the process of fulfilling a real property contract may be problematic to a seller or a buyer if additional time is needed to perform.

A breach of contract does not terminate a contract as a matter of course but serves as a ground for termination at the option of the injured party. *Whitney Inv. Co. v Westview Dev. Co.* (1969) 273 CA2d 594, 602, 78 CR 302. However, a minor breach of contract by one party does not justify the other party's terminating the contract or completely refusing to perform. *Durrell v Sharp Healthcare* (2010) 183 CA4th 1350, 1369, ___ CR3d ___.

A breach may consist of the failure to perform a promise or a condition, the repudiation or renunciation of the contract or some part thereof, or a wrongful termination of an express or implied duty, obligation, promise or covenant of the contract. *Consolidated World Invs. v Lido Preferred Ltd*. (1992) 9 CA4th 373, 380, 11 CR2d 524 (failure to perform condition); *Fox v Dehn* (1974) 42 CA3d 165, 173, 116 CR 786 (termination); *Sosin v Richardson* (1962) 210 CA2d 258, 265, 26 CR 610 (failure to perform promise); *Robinson v Racquet* (1934) 1 CA2d 533, 542, 36 P2d 821 (repudiation and renunciation).

Whether a *breach* of contract exists and may serve as a basis for a breach of contract action involves three additional questions: (1) a determination of what the date of breach was for purposes of ascertaining when the statute of limitations begins; (2) a determination of whether the breach is actual or anticipatory, which gives rise to an election (see §§4.32, 4.42); and (3) a determination of whether the other party is able to perform and is relieved from further performance or must tender performance.

Breach can also arise in the context of a nonjudicial foreclosure sale. In *California Golf, LLC v Cooper* (2008) 163 CA4th 1053, 78 CR3d 153, after paying with cashier's checks at a foreclosure sale, the purchasers had buyer's remorse. They then induced the bank to stop payment on the cashier's checks by submitting to the bank affidavits that falsely stated that the cashier's checks had been lost before endorsement. The court of appeal concluded that the statutory scheme for nonjudicial foreclosure (CC §§2924-2924h) was not exclusive and that the foreclosing beneficiary of the sale could seek other remedies for the breach of the purchasers, including damages for fraud and breach of warranty and criminal penalties. For further discussion of Cooper, see §4.90A.

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§4.29 B. Termination and Cancellation

Parties often assert a right to terminate or cancel further performance under a contract when they contend the other party breached the contract first. See §4.28. In other cases, contracts contain provisions that empower one or both parties to terminate the agreement on the occurrence or nonoccurrence of some event or act. These provisions have generally been upheld. See, *e.g.*, *Fogarty v Saathoff* (1982) 128 CA3d 780, 787, 180 CR 484; *Weisberg v Ashcraft* (1963) 223 CA2d 793, 795, 36 CR 188; *Petre v Roegner* (1963) 219 CA2d 288, 291, 33 CR 82; *Moss v Minor Props., Inc*. (1968) 262 CA2d 847, 853, 69 CR 341. These provisions, however, are unenforceable if they have the characteristics of illusory promises. See, *e.g.*, *Asmus v Pacific Bell* (2000) 23 C4th 1, 15, 96 CR2d 179, cited in §4.7.

It does not appear that these and other cases like them have been evaluated pursuant to the implied duty of good faith and fair dealing. Even if they are subjected to the application of the implied duty, one of its facets is that the implied duty cannot contradict an express term of a contract and these cases involve an express term that allows for a termination of a contract. On the other hand, if there is an express provision enabling a party to cancel or terminate a contract because of the disapproval or lack of satisfaction, the right to terminate most likely would be analyzed under the implied duty rules. See §4.27.

CAUTION: The *contractual* right to cancel a contract should be distinguished from the *remedy* to cancel an instrument (see CC §3412; chap 6) and the act or *remedy* of rescission (see CC §§1688-1693; chap 1). *Fireman's Fund Am. Ins. Co. v Escobedo* (1978) 80 CA3d 610, 619, 145 CR 785 (rescission is retroactive and cancellation is prospective); *Mamula v McCulloch* (1969) 275 CA2d 184, 197, 79 CR 571 (cancellation means to abrogate so much of contract as remains unperformed and rescission entails restoration of parties to their former position). The contractual right to terminate may also be waived. *Galdjie v Darwish* (2003) 113 CA4th 1331, 1340, 7 CR3d 178.

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Source: Real Property/California Real Property Remedies and Damages/4 Damages for Breach of Seller-Buyer Contracts/§4.30 C. Time of the Essence

§4.30 C. Time of the Essence

Many standard form and negotiated contracts contain a provision that makes the time for performance to be of the essence of the contract. These clauses range from boilerplate expressions like "time is of the essence" to slightly more enhanced expressions. Such provisions should be distinguished from provisions that call for performance within some time period and other clauses that prescribe a specific day by which performance is due because the courts have interpreted them differently. *Fowler v Ross* (1983) 142 CA3d 472, 479, 191 CR 183. Although provisions that state that time is of the essence may be present in a contract, the courts do not always view them as requiring the time for performance to be so rigidly enforced. *Stratton v Tejani* (1982) 139 CA3d 204, 211, 187 CR 231.

Time is not ordinarily of the essence in a contract unless it has been made so by the *express terms* of the contract *or* by the *nature of the contract*. *Katemis v Westerlind* (1953) 120 CA2d 537, 543, 261 P2d 553. The express terms must also be "clearly, unequivocally and unmistakably" set forth. 120 CA2d at 543. When a contract includes provisions that are inconsistent with time being of the essence, such as provisions allowing for the extension of time for performance, a "time is of the essence" provision yields to the policy of enforcing contracts. *Stratton v Tejani* (1982) 139 CA3d 204, 211, 187 CR 231. When time is not of the essence, a reasonable time for performance is allowed. 139 CA3d at 211. In *Kossler v Palm Springs Devs., Ltd*. (1980) 101 CA3d 88, 161 CR 423, although the contract had a clause that read, "Time is of the essence of this contract" (101 CA3d at 92), the court held such provision "could not conceivably have been intended by the parties to apply to" a time limitation for the closing of an escrow that was "subject to written extensions" (101 CA3d at 96).

Two court of appeal cases reached results that are arguably opposite to each other. The courts interpreted differently the effects of the time-of-the-essence clauses with regard to the obligations of each party that are ordinarily treated as concurrent obligations. In *Pittman v Canham* (1992) 2 CA4th 556, 3 CR2d 340, in which the seller's and buyer's performances were treated as being concurrent conditions, the court regarded the time-is-of-the-essence provision as effectively discharging both parties from their respective performances because neither party had performed by the time performance was due, and because neither party had tendered performance. 2 CA4th at 559. The court did not analyze the contractual provisions before it, which at least demonstrated an inconsistency between the time-of-the-essence feature and the part of the contract that instructed "to close this escrow when the principals have complied with the escrow instructions." In contrast, the court in *Kossler* treated provisions inherently inconsistent with a time-of-the-essence clause as negating the effects of it. *Kossler*, 101 CA3d at 97.

In the second case, *Ninety Nine Invs. v Overseas Courier Serv. (Singapore) Private, Ltd.* (2003) 113 CA4th 1118, 1132, 6 CR3d 891, the court first invoked the implied covenant of good faith and fair dealing to hold that neither party could frustrate the other party's right to receive the benefits of the contract to take advantage of a "time is of the essence" provision. The court said that the defendant did not have the right to unilaterally cancel the escrows when it did. 113 CA4th at 1132. The court then distinguished the *Pittman* decision by stating it was factually different. 113 CA4th at 1132. The focus of the *Ninety Nine* case was the effect of the defendant's failure to perform that which was expressly required to be performed in order for the concurrent conditions to be enforced. The court recognized, for example, that the complex escrows "required performance of a number of steps, some necessarily in a particular sequence, to permit the escrows to be in a position for the simultaneous final concurrent exchange of deed for consideration." 113 CA4th at 1134. Among those "steps" were the obligations to supply various reports, which the defendant had failed to supply. 113 CA4th at 1127. The key, therefore, to the *Ninety Nine* decision was how such failures operated as material breaches of the contract affecting the balance of the performance that was due.

Time for performance can also be waived by continuing to deal with the other party as if the contact were in effect or performing after the date (*Galdjie v Darwish* (2003) 113 CA4th 1331, 1337, 7 CR3d 178) or by accepting performance after the date (*Chin Ott Wong v Title Insurance and Trust Company* (1948) 89 CA2d 183, 186, 200 P2d 541; see also *Chan v Title Ins. & Trust Co.* (1952) 39 C2d 253, 246 P2d 632).

NOTE: If the agreement does not have a specific provision for the time for performance, a court has the authority to imply a reasonable time pursuant to CC §1657, but that only assists the party seeking the extension if there is no

specific language on time for performance, irrespective of "time is of the essence" language. See also *Bleecher v Conte* (1981) 29 C3d 345, 353, 213 CR 852 for authority that implying such a term does not constitute a remaking of the contract.

On enforcing time-of-the-essence provisions and their exceptions, see §4.39.

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§4.31 D. Date of Breach

There can be no actual breach of contract until the time for performance arrives. *Taylor v Johnston* (1975) 15 C3d 130, 137, 123 CR 641. When a breach has occurred, the statute of limitations begins to run on that date. *Romano v Rockwell Int'l, Inc*. (1996) 14 C4th 479, 488, 59 CR2d 20. Whether the time for performance has arrived depends on the terms of the contract (see, *e.g., Gold Mining & Water Co. v Swinerton* (1943) 23 C2d 19, 25, 142 P2d 22), and if those terms are silent about such a time, the law implies a reasonable time (CC §1657). When a party is injured by an anticipatory repudiation and elects the remedy of treating the contract as still in force (see §§4.32, 4.42), the statute of limitations does not begin to run until the performance is actually due. *Romano,* 14 C4th at 489. The determination of whether the time for performance has arrived is a question of interpretation, which may or may not be a legal or factual issue. See §§4.12, 4.30, 4.39. Determining the date of a breach may present difficult pleading and proof problems when the time is not expressly specified in a real property contract. See §4.39.

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§4.32 E. Anticipatory Breach

Although an actual breach of contract cannot occur until the time for performance arrives, an anticipatory repudiation of the contract occurs before performance is due and results in a total breach. *County of Solano v Vallejo Redev. Agency* (1999) 75 CA4th 1262, 1275, 90 CR2d 41. An anticipatory breach occurs when a contracting party positively repudiates the contract by acts or statements indicating that he or she will not perform or cannot substantially perform the essential terms of the contract. *Guerrieri v Severini* (1958) 51 C2d 12, 18, 330 P2d 635. By definition, therefore, if a term is "unessential," and a party refuses to perform such a term, the doctrine of anticipatory breach should not apply. On what is an essential term, see §§4.14-4.18.

Repudiation may be express or implied. *Taylor v Johnston* (1975) 15 C3d 130, 137, 123 CR 641. An express repudiation is one that is a "clear, positive, unequivocal refusal to perform," and an implied repudiation is one that "results from conduct where the promisor puts it out of his power to perform so as to make substantial performance of his promise impossible." 15 C3d at 137. Implied repudiation cannot be based on conduct or acts that merely give the appearance that performance has become more difficult. It appears that impossibility is the true test. 15 C3d at 139.

Judging whether the infinite variety of acts and statements arise to a clear case of anticipatory repudiation is, by its very nature, factual in nature. The facts supporting a claimed repudiation may be clear (as the test requires), debatable, or clearly insufficient. The tough cases are those that do not "neatly" fit into either end of the spectrum. Thus, a "mere threat not to perform" or dialogue that has an equivocal nature to it may not qualify as an anticipatory repudiation. *Whitney Inv. Co. v Westview Dev. Co.* (1969) 273 CA2d 594, 603, 78 CR 302; *Thornton v Victor Meat Co*. (1968) 260 CA2d 452, 476, 67 CR 887; *Salot v Wershow* (1958) 157 CA2d 352, 357, 320 P2d 926. Likewise, a good faith dispute about contract terms may be insufficient. *Golden W. Baseball Co. v City of Anaheim* (1994) 25 CA4th 11, 49 n43, 31 CR2d 378. However, a party may not, through "negotiations" or otherwise, seek to impose new terms or conditions on the other party. *Steelduct Co. v Henger-Seltzer Co*. (1945) 26 C2d 634, 646, 160 P2d 804 ("Annexing an unwarranted condition to an offer of performance is a refusal to perform."); *Pichignau v City of Paris* (1968) 264 CA2d 138, 142, 70 CR 147.

After one party repudiates the contract, the injured party may (1) treat the repudiation as an anticipatory breach and immediately seek damages for a breach of contract (which has the legal effect of terminating the contractual relation between the parties); or (2) treat the repudiation as an empty threat, wait until the time for performance arrives and exercise the remedies for an actual breach if a breach in fact occurs at such time. *Taylor v Johnston* (1975) 15 C3d 130, 137, 123 CR 641. If the injured party "disregards the repudiation and treats the contract as still in force, and the repudiation is retracted prior to the time of performance, the repudiation is nullified and the injured party is left with his remedies, if any, invocable at the time of performance." 15 C3d at 137. See also *Whitney Inv. Co. v Westview Dev. Co.* (1969) 273 CA2d 594, 603, 78 CR 302 (acceptance of performance with the knowledge of a breach constitutes a waiver). On the other hand, if the promisee relies to its detriment, a retraction may not nullify the effect of a repudiation. *Guerrieri v Severini* (1958) 51 C2d 12, 19, 330 P2d 635; *Freedman v The Rector* (1951) 37 C2d 16, 19, 230 P2d 629.

PRACTICE NOTE: Statements and conduct *by the promisee* manifesting an intent to allow the promisor to perform despite a repudiation does not nullify the effect of a repudiation as a breach. *Guerrieri*, 51 C2d at 20. Statements and conduct by the promisee must be, however, as carefully diagnosed as equivocal statements and conduct by the promisor. While the courts do not seem to have expressly related the overarching principle to enforce contracts to this branch of contract law, parties may find that such rules affect whether repudiation, retraction, prejudicial reliance, and implications of further performance are found.

On alleging and proving anticipatory breach, see §4.42.

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§4.33 F. Ability to Perform and Tender of Performance

Breach of contract actions must be separated between those that involve concurrent conditions and those that involve independent contractual duties or conditions. In the former group, a plaintiff must establish that it had the ability to perform and that it tendered further performance before placing the other party in default for the failure to perform a concurrent duty or condition. *Rubin v Fuchs* (1969) 1 C3d 50, 54, 81 CR 373. See §4.41. In the latter group of contracts, the failure to perform constitutes a breach of contract entitling the other party to file suit *without* having to prove ability or to make a tender of performance. *Jeppi v Brockman Holding Co*. (1949) 34 C2d 11, 18, 206 P2d 847.

The *Rubin* case demonstrates that the rules of ability to perform and tender are not applied if the case does not involve concurrent conditions. In *Rubin,* the buyer agreed to pay a total of $50,000 for real property on or before October 28, 1963. The terms included the payment of $30,000 at the close of escrow and the execution of a note and deed of trust for $20,000. The seller was required to arrange for the recordation of a subdivision map during escrow. The buyer did not tender the full consideration by October 28, 1963 because the map had not been recorded. The map approval was conditioned on the posting of a bond by the sellers who did not post the bond. The sellers sold the property to another buyer and the buyer sued. The trial court entered judgment in favor of the sellers, concluding that the contract required the buyer to deposit $30,000 by October 28, 1963 and it did not, which it treated as a failure of a condition precedent.

The supreme court reversed because the buyer's ability to execute the deed of trust was dependent on the recordation of the map and the recordation was therefore a condition precedent to the payment obligations. 34 C2d at 54. The court also theorized that even if the promises were treated instead as being concurrent, the mere fact that the sellers gave *assurances* that they were ready to file the bond and able to record the map did not constitute ability to perform because such assurances "did not constitute the official approvals or provide the official certificates required by the Subdivision Map Act before recordation of the map." 34 C2d at 55. Thus, despite the contract language that "required" the buyer to make the payment by a specific date, the buyer was relieved from doing so by the failure of the seller to perform that which was a necessary predicate to the buyer's performance.

In contrast, in *Brant v Bigler* (1949) 92 CA2d 730, 208 P2d 47, a seller sued a buyer for declaratory relief that the seller was entitled to retain a deposit the buyer made toward the purchase of real property. The contract called for the buyer to pay money into escrow by a certain date, but the buyer instead notified the escrow company that the buyer was canceling the escrow. The seller did not have title to the property but was engaged in a separate transaction to acquire it. The trial court entered judgment in favor of the buyer. Citing the rule that precludes a party from placing the other in default unless a tender is made, the court of appeal affirmed; the "seller" failed to prove that he was able to tender performance because the buyer had not agreed to allow the seller to use the funds that were supposed to come from the buyer to assist the seller in acquiring title.

When a tender is necessary, it must conform to the rules governing an effective tender. See §§4.23, 4.33. On the ability to perform, see §4.33. For further discussion of covenants and conditions, see §4.23. On practical methods of tendering performance in purchase contracts and strategies to effect tender, see §4.41.

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§4.34 G. Causation

Real property cases have not involved the question of the relationship between a breach and the causation of damages. A breach of contract, however, must cause damage for a claim to subsist. A plaintiff's total injury may be caused by several sources. *Bruckman v Parliament Escrow Corp*. (1987) 190 CA3d 1051, 1063, 235 CR 813. However, under *Bruckman*, the plaintiff has no obligation to show the proportion of each possible cause, and it is sufficient that the plaintiff show that the breach was a substantial factor in causing the damages. "The test for causation in a breach of contract (or promissory estoppel) action is whether the breach was a substantial factor in causing the damages." *US Ecology, Inc. v State of California* (2005) 129 CA4th 887, 909, 28 CR3d 894. The causation must also be reasonably certain. 129 CA4th at 909. "The term 'substantial factor' has no precise definition, but 'it seems to be something which is more than a slight, trivial, negligible, or theoretical factor in producing a particular result.'" 129 CA4th at 909.

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VI. BRINGING A DAMAGES ACTION

A. Nature of Action; Jurisdiction; Venue

§4.35 1. Legal or Equitable Nature of the Action

In the initial evaluation of a potential litigation, one must consider whether the action will be cast as legal or equitable in nature. This characterization will establish whether the party is entitled to a jury trial. Usually, if the action seeks only equitable relief, there is no right to a jury. *C&K Eng'g Contractors v Amber Steel Co.* (1978) 23 C3d 1, 151 CR 323; *Interactive Multimedia Artists, Inc. v Superior Court* (1998) 62 CA4th 1546, 73 CR2d 462. If the action seeks only a legal remedy, such as damages, the right to a jury is clear. *Paularena v Superior Court* (1965) 231 CA2d 906, 42 CR 366; *Medeiros v Medeiros* (1960) 177 CA2d 69, 1 CR 696. Note, however, that the prayer of the complaint is not conclusive on whether the action is legal or equitable. *Interactive Multimedia Artists, Inc. v Superior Court, supra*.

Many real property transactions involve a combination of legal and equitable causes of action, such as fraud (see chap 3), specific performance (see chap 5), rescission (see chap 1), or quiet title (see chap 7). When equitable and legal claims are combined, the parties are entitled to a jury trial on the legal issues and a court trial on the equitable issues unless, in the discretion of the court, a jury is allowed on the equitable issues. *Thomson v Thomson* (1936) 7 C2d 671, 62 P2d 358; *Unilogic, Inc. v Burroughs Corp.* (1992) 10 CA4th 612, 12 CR2d 741; *Medeiros v Medeiros, supra*.

PRACTICE TIP: Either pretrial conferences or motions in limine are used to set the order and procedure for hearing combined claims. Even if the parties wish to bifurcate, the court may decide to proceed with both a trial on the bench and jury issues simultaneously as the most efficient use of court resources as well as avoiding duplication of witness testimony and other evidence.

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§4.36 2. Jurisdiction

In a pure action for damages, subject matter jurisdiction is governed by the jurisdictional limits of the various divisions of the superior court. If the amount in controversy exceeds $25,000, the action is designated as an "unlimited" civil case in the superior court. See CCP §§85, 88. Below this amount, it is filed as a "limited" civil case. CCP §86(a). Matters below $5000 are filed as limited civil cases in the small claims division. CCP §§87, 116.220. The dollar amount may be greater or lower for small claims actions against guarantors. See CCP §116.220(c). If the plaintiff is a natural person, the small claims division has jurisdiction over demands less than or equal to $7500. CCP §116.221. Code of Civil Procedure §86 provides a list of civil cases and proceedings that are limited civil cases—including some equitable matters. The consistent criterion for limited jurisdiction is the $25,000 amount in controversy. On determining the amount in controversy, see California Civil Procedure Before Trial §§6.12-6.16 (4th ed Cal CEB 2004).

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§4.37 3. Venue

Venue in an action for breach of a real property purchase and sale agreement is subject either to CCP §392(a)(1), governing actions for recovery of an estate or interest in real property (local), or to CCP §395(a), governing actions for breach of contract (transitory). If it is the former, the action must be tried in the county in which the real property is located; if the latter, in the county of the defendant's residence or in which the obligation is to be performed.

Venue in a damages action based on a real property transaction is determined by application of the "main relief rule." See California Civil Procedure Before Trial §§8.49-8.51 (4th ed Cal CEB 2004). Thus, if the principal relief sought concerns rights in the property, and damages are only incidental, the action will be considered local; if the main relief sought affects only personal rights, the action is transitory. This rule may be difficult to put into practice in a given action for damages, and counsel must be careful to draft the complaint in such a way as to support the preferred venue. See Civ Proc Before Trial §§8.49-8.51.

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B. Strategies for Establishing Breach

§4.38 1. Breach Defined

A breach of contract occurs when there is a wrongful failure to perform a contract or a material promise or covenant in a contract. *Woodard v Glenwood Lumber Co.* (1915) 171 C 513, 153 P 951; *Sterling v Gregory* (1906) 149 C 117, 85 P 305. A failure to perform that is legally excused or justified is not wrongful and is thus not a breach. *Goudal v Cecil B. DeMille Pictures Corp.* (1931) 118 CA 407, 5 P2d 432. Nonperformance or nonoccurrence of a condition is a breach, unless it is excused. It excuses further performance and does not give rise to damages. *Britschgi v McCall* (1953) 41 C2d 138, 257 P2d 977.

A true breach of contract, whether partial or total, can entitle the injured party to damages. CC §3300. A total breach will excuse further performance by the nonbreaching party. In a partial breach, only a *material* partial breach will excuse performance. See *Axis Petroleum Co. v Taylor* (1941) 42 CA2d 389, 108 P2d 978; *Karz v Department of Prof. & Vocational Standards* (1936) 11 CA2d 554, 54 P2d 35. On determining whether a breach has occurred and the parties' rights to terminate further performance and recover damages, see §§4.28-4.34, 4.38.

An anticipatory breach occurs if a party expressly or impliedly repudiates the contract and can provide the basis for excusing further performance by the nonbreaching party. See §§4.32, 4.42.

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§4.39 2. Enforcing Time for Performance

Because of the importance attached to security, finality, and avoiding forfeitures in real estate transactions, public policy favors upholding a reasonable time for performance of purchase and sale contracts. Thus, a boilerplate "time-is-of-the-essence" clause, especially in a form contract, cannot be relied on to establish a breach merely because a party fails to perform on a specified date. See §4.30. See also California Real Property Sales Transactions §4.152 (4th ed Cal CEB 2007).

PRACTICE TIP: If timely performance is a material issue in the dispute, counsel should review the contract documents and any separate contract addendum for specific language beyond a boilerplate time-is-of-the-essence clause (1) reciting why time is of the essence; and (2) specifying a procedure for the automatic termination of escrow and return of funds. These provisions might have been repeated or stated exclusively in the escrow instructions. The party seeking to enforce timely performance should also notify the other party shortly before the performance date (and in communications afterward) of his or her intent to rely on the time provisions.

Civil Code §3275 allows for relief from an obligation that would result in a forfeiture, except for grossly negligent, willful, or fraudulent breach of duty. Courts have created exceptions to the rule that time-is-of-the-essence clauses in all situations require the buyer to deposit the purchase price by the specified date. See, *e.g., Pothast v Kind* (1933) 218 C 192, 24 P2d 771; *Weisberg v Ashcraft* (1963) 223 CA2d 793, 36 CR 188. See also *Chan v Title Ins. & Trust Co.* (1952) 39 C2d 253, 246 P2d 632 (waiver if seller does not object after passing of specified date); *Galdjie v Darwish* (2003) 113 CA4th 1331, 7 CR3d 178; *Williams Plumbing Co. v Sinsley* (1975) 53 CA3d 1027, 126 CR 345 (avoidance of forfeiture); *MacFadden v Walker* (1971) 5 C3d 809, 97 CR 537 (similar result in installment land contract); *McCown v Spencer* (1970) 8 CA3d 216, 87 CR 213; *Andover Land Co. v Hoffman* (1968) 264 CA2d 87, 70 CR 38 (waiver if seller does not cancel escrow). See also cases cited in §5.15.

If the seller is also the builder, the completed structure must be consistent with the original plans in order for the seller to invoke the time-is-of-the-essence clause to defeat the buyer's specific performance action. *Kossler v Palm Springs Devs., Ltd.* (1980) 101 CA3d 88, 161 CR 423.

PRACTICE TIP: Inclusion of a specific, nonboilerplate, time-is-of-the-essence clause permits a party to reject late performance after making a tender and demanding timely performance. Some older deposit receipt forms contained a clause allowing for an extension of escrow; a party wanting timely performance should have deleted any such clause. Similarly, the party seeking to enforce timely performance should carefully avoid any conduct or making any statements that would provide the basis for a claim of waiver. See §§4.30, 4.40. Current public policy is to avoid forfeitures. Consistent and persistent conduct is needed to ensure that a time-is-of-the-essence requirement is enforceable.

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§4.40 3. Satisfying or Waiving Conditions

The majority of purchase and sale contracts contain conditions, typically regarding financing, inspections, or the sale/purchase of another property. Conditions can be sequential, concurrent, or both in a single contract. Conditions can be for the benefit of one or both parties to the transaction. The failure of a material condition can excuse performance by all parties. See, *e.g., Weneda Corp. v Dispalatro* (1964) 225 CA2d 187, 37 CR 267; *Pease v Brown* (1960) 186 CA2d 425, 8 CR 917. At the same time, an unfulfilled condition can be waived by the party for whose benefit it was inserted in the contract. *Crescenta Valley Moose Lodge No.* 808 *v Bunt* (1970) 8 CA3d 682, 87 CR 428; *Wesley N. Taylor Co. v Russell* (1961) 194 CA2d 816, 15 CR 357. See *Reeder v Longo* (1982) 131 CA3d 291, 182 CR 287. Thus, a buyer could waive a condition that benefited only himself or herself—*e.g.,* an invalid subordination provision—and compel the seller's performance. Many conditions are inserted to protect the buyer, but if the buyer waives that protection, the failure of the condition will not provide a legal excuse for the seller's refusal to perform. *Weneda Corp. v Dispalatro, supra; Wesley N. Taylor Co. v Russell, supra*. On whether a contractual provision is a covenant or a condition, see §4.23.

PRACTICE TIP: Most form purchase and sale contracts state the time for completion of conditions, such as inspections and approval of inspections. Conditions not formally or completely stated in the main body of a form contract must be specified in an addendum. Examples include: (1) The buyer should promptly notify the seller of the satisfaction or waiver of any financing, inspection, or approval conditions in the agreement; and (2) the seller should promptly notify the buyer of the satisfaction of any conditions such as subdivision or lot-split approvals or removal of unacceptable title conditions.

Counsel should make sure that the contract language is clear and unambiguous about whether a party must actively give notice of the removal (or satisfaction) of a condition, or whether the condition is deemed satisfied if no objection is received within a specified time. See, *e.g.,* conditions in form reprinted in California Real Property Sales Transactions §6.24 (4th ed Cal CEB 2007).

EXAMPLE: The buyer's obligation to purchase is conditioned on the buyer's inspection and approval of the condition of the property. The contract should clearly state whether the buyer must give the seller written notice of approval within the specified time period, or whether the condition is automatically satisfied if the buyer does not object in writing within the specified time period. Ambiguity as to whether the conditions require "active" notice, or are "passively" removed if there is no objection can lead to later disputes about whether the buyer had an obligation to purchase or whether the seller had an obligation to sell.

Some conditions are statutory rather than contractual. For example, in residential transactions, the seller must deliver a transfer disclosure form required by CC §§1102-1102.18 to a prospective buyer (see §3.30), and delivery is a nonwaivable condition precedent to the buyer's duty to perform. *Realmuto v Gagnard* (2003) 110 CA4th 193, 1 CR3d 569. Consequently, if the seller fails to deliver the disclosure form, the buyer may either rescind the contract before the close of escrow (see CC §1102.3) or complete the sale and sue for damages (see CC §1102.13). If the buyer does not complete the sale, the seller may not obtain either specific performance or damages. *Realmuto v Gagnard, supra*.

Neither party's obligation to complete performance under a purchase and sale agreement arises until all conditions have been fulfilled or waived. A condition that benefits *both* parties to the contract cannot be waived by only one party. Thus, the failure of a mutually beneficial condition will excuse performance by both parties. *Britschgi v McCall* (1953) 41 C2d 138, 257 P2d 977 (defective title could expose seller to personal liability); *Spangler v Castello* (1956) 147 CA2d 49, 304 P2d 752 (financing condition to obtain FHA and VA approval benefited both buyer and seller); *Isaacson v G. D. Robertson & Co.* (1948) 85 CA2d 71, 192 P2d 486 (rezoning benefited seller, who owned other property nearby).

If an offer to sell is accepted after the time set for acceptance by the seller, the seller may refuse to perform. If the acceptance is late, however, the seller may waive that right by treating it as a timely acceptance. Once the seller has waived the deadline for acceptance, the buyer may enforce the contract. *Sabo v Fasano* (1984) 154 CA3d 502, 201

CR 270.

PRACTICE TIP: Maintaining good communication during a transaction frequently prevents delays regarding conditions from souring a transaction. Any extension of time to fulfill a condition should be clearly spelled out in an addendum that reiterates the parties' rights if the condition is not met by the new date.

For further discussion of waiver of conditions making time of the essence, see §§4.30, 4.39.

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§4.41 4. Tendering Performance in Sales Contracts

Payment of the purchase price by the buyer and conveyance of good title by the seller are usually concurrent conditions (see §4.23), and one party cannot place the other into default without performing or tendering performance. CC §§1437, 1439; *Pittman v Canham* (1992) 2 CA4th 556, 3 CR2d 340; *Alfinito v Sater* (1966) 246 CA2d 362, 54 CR 636 (title need only be marketable at time of final payment); *Diamond v Huenergardt* (1959) 175 CA2d 214, 346 P2d 37. See §§4.33, 4.38-4.39. One of the few exceptions to this rule occurs when one party commits an anticipatory breach. See §4.32, 4.42. Other exceptions arise when purchase contracts have complex precedent conditions. See examples cited in §§4.23, 4.33.

As the court in *Pittman v Canham, supra,* noted, buyers have a natural reluctance to act first by placing money into escrow, and, in fact, nearly all lenders require that escrow documents be signed and other conditions be fulfilled before allowing the final transfer of funds. When the buyer is not able to close escrow by the required date because the seller did not perform its escrow obligations, the buyer's performance is essentially excused, and the seller may not unilaterally rescind the purchase contract. *Ninety Nine Invs. v Overseas Courier Serv. (Singapore) Private, Ltd.* (2003) 113 CA4th 1118, 6 CR3d 891 (seller's failure to submit certain documents into escrow prevented buyer's lender from depositing purchase funds by anticipated closing date).

CAUTION: Regardless of the "law" on the issue, many escrow companies will not cancel an escrow and return documents or deposited funds in any event until they receive signed instructions from *both* parties or a court order.

A seller can be somewhat protected by depositing the deed, accompanied by escrow instructions limiting delivery and recordation of the deed until after the buyer's performance. Even if an escrow agent refuses to return a deed, the seller's ability to use or remarket the property can remain unaffected, especially before a subsequent litigation is filed accompanied by a lis pendens. Not all sales involve disclosure forms that inquire about disputes and litigation. In contrast, a buyer who deposits funds in escrow may not be able to recover them from the escrow holder. Buyers should take care to demand that all escrow funds be placed in an interest-bearing account. Buyers can try to avoid having their funds tied up in escrow during litigation by making tender of the purchase price conditional on the seller's delivery of a valid deed. See also *Groobman v Kirk* (1958) 159 CA2d 117, 323 P2d 867.

A buyer may be able to avoid this situation by use of a conditional tender, which is an offer to perform if the other party performs. For the tender to be valid, the party conditionally tendering must be both willing to perform and demonstrate a current ability to perform. See CC §§1486, 1495; *Hunt v Mahoney* (1947) 82 CA2d 540, 187 P2d 43. See also *Pittman v Canham, supra* (time to perform is not unlimited); *Weneda Corp. v Dispalatro* (1964) 225 CA2d 187, 37 CR 267. But actually depositing the purchase funds into escrow is not a prerequisite to a valid tender. *Ninety Nine Invs. v Overseas Courier Serv. (Singapore) Private, Ltd., supra*.

The conditional tender must comply with the contract terms and, to be effective, may not impose conditions on its acceptance that the offeror is not entitled to demand. *Riverside Fence Co. v Novak* (1969) 273 CA2d 656, 78 CR 536. Even if the tender is defective, the other party's objections are waived unless they are made promptly and the tenderer is given an opportunity to cure the defect. CC §1501; CCP §2076; *Riverside Fence Co. v Novak, supra; Hunt v Mahoney, supra*.

For additional examples of court rulings on the parties' ability to perform and tendering of performance in real property purchase contracts, see §4.33.

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§4.42 5. Alleging and Proving Anticipatory Breach

An anticipatory repudiation (see §4.32) permits the nonbreaching party to recover damages immediately without performing or offering to perform any conditions precedent. CC §1440; *County of Solano v Vallejo Redev. Agency* (1999) 75 CA4th 1262, 1276, 90 CR2d 41. The nonbreaching party intending to rely on an anticipatory breach in a damages action, however, must plead and prove anticipatory repudiation as the breach of contract (*De Anza Enterprises v Johnson* (2002) 104 CA4th 1307, 1318, 128 CR2d 749) and that the nonbreaching party had the ability to perform (*County of Solano v Vallejo Redev. Agency, supra*). Although the statement repudiating a contract may be oral (*Daum Dev. Corp. v Yuba Plaza, Inc.* (1970) 11 CA3d 65, 74, 89 CR 458, disapproved on other grounds in *Ninety Five Ten v Crain* (1991) 231 CA3d 36, 41, 282 CR 141), repudiation is a question of fact (*Singh v Burkhart* (1963) 218 CA2d 285, 32 CR 639).

PRACTICE TIP: Practically, as with any credibility contest, disputed oral claims are difficult to prove after the fact. If the repudiating party has not put his or her refusal to perform in writing, the nonbreaching party should *immediately* confirm the repudiation, advise the breaching party of reliance on the refusal to perform, and confirm the nonbreaching party's ability to perform. This confirmation should be sent by a communication mode that provides for independent verification of receipt. Alternatively, if the timing is appropriate, the party relying on the repudiation should make a conditional offer of performance. See §§4.33, 4.41.

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§4.43 C. Inadequacy of Remedies

Remedies for a breach of a purchase and sale agreement may be insufficient to avoid or alleviate hardship, even for the party not at fault. When a buyer breaches in an appreciating market, the seller may not be entitled to any damages (see §§4.74-4.86) and may be unable to retain the buyer's deposit (see §§4.67-4.73). When a seller sues for specific performance (see chap 5), the seller will hold the property off the market pending the conclusion of the litigation, and the judgment may be ineffective to compel the buyer's performance in any event. Also, the disputing buyer may have clouded title by filing a lis pendens. See California Real Property Sales Transactions §4.116 (4th ed Cal CEB 2007). See also chap 13.

The "not at fault" buyer may find available remedies equally unsatisfactory. A suit for specific performance usually requires the buyer to perform, which could prevent the buyer from acquiring another property as an independent way to resolve the dispute. See chap 5. The buyer seeking damages as an alternative to specific performance may be caught in a costly contradiction regarding the market value of the property. See §4.43. Even if the buyer is entitled to recover the deposit, an uncooperative seller can make it difficult to recover the deposited funds from the escrow company.

PRACTICE TIP: Unless requested at the time of deposit, escrow funds are generally not placed in an interest-bearing account. If a conflict occurs, the parties (and especially their counsel), usually agree to have the money transferred to an interest-bearing account pending resolution of the dispute, even if only as a mitigation of damages measure.

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§4.44 D. Election of Remedies

Breach of a purchase and sale contract usually entitles the nonbreaching party to either legal or equitable remedies that can be sought and pleaded concurrently in the alternative, even if they are inconsistent with each other. See, *e.g.,* forms in chaps 3, 5. Despite the plaintiff's ability to join alternative remedies, however, specific performance and damages are mutually exclusive remedies for breach of contract. To award both would constitute a double recovery. *Rogers v Davis* (1994) 28 CA4th 1215, 34 CR2d 716 (court also explained that "damages" is a misnomer for monetary recovery accompanying specific performance).

Acts inconsistent with a prospective remedy can result in a waiver and loss of that remedy. Thus, when a default or repudiation occurs, the nondefaulting party should immediately consider all potential remedies and either act consistently with the preferred remedy or act appropriately to maintain options for alternative remedies, with a view toward electing the remedy that is most advantageous after investigation and formal discovery are completed. For example, a buyer seeking damages for breach of contract or specific performance must take care to avoid conduct and statements evidencing intent to rescind. See *Cook v Nordstrand* (1948) 83 CA2d 188, 188 P2d 282 (demand for and receipt of deposit constituted rescission).

A buyer who seeks specific performance after the seller's breach should always record a lis pendens against the property; this action will ensure that any intervening purchaser will have notice of the buyer's claim and thus be required to recognize the buyer's superior claim to title if a judgment for specific performance is obtained. In practice, however, the defendant seller may move to expunge the lis pendens, arguing that posting a bond is sufficient to protect the buyer's claims. The seller's motion to expunge conditioned on an undertaking is likely to succeed unless the property is improved with a single-family dwelling that the buyer intends to occupy, or the buyer can convince the court that the property is unique. See CCP §405.33.

If the lis pendens is expunged and title to the property is then transferred to a third party, the buyer's only recourse will be to bring a motion to amend the complaint to state a course of action for breach of contract seeking damages. In a rising real estate market, this alternative will not be wholly satisfactory to the disappointed buyer.

Pleading in the alternative creates practical problems. To obtain specific performance, the buyer must allege that the contract is fair to both parties and, to recover damages for the breach, allege in the same complaint that the value of the property exceeded the contract price on the date of the breach. If this contradiction is too great, the entire action may fail. See *Baran v Goldberg* (1948) 86 CA2d 506, 194 P2d 765.

PRACTICE TIP: This dilemma can be avoided at the pleading stage by omitting allegations of a specific amount in the damages cause of action and simply alleging on information and belief that the value of the property exceeded the price on the date of the breach. Because the complaint seeks specific relief, it should survive a demurrer based on CCP §425.10(a)(2) for failure to allege damages.

After a buyer's breach, the sellers can find themselves in a vulnerable position if they attempt to resell to a new party. The first buyer, disputing the breach, could file a complaint for specific performance and a concurrent lis pendens. See *Williams Plumbing Co. v Sinsley* (1975) 53 CA3d 1027, 126 CR 345. Regarding lis pendens, see chap 13. See also California Real Property Sales Transactions §4.116 (4th ed Cal CEB 2007). The seller also risks being caught in the crossfire in the form of a suit by the subsequent purchaser to compel performance of the sale. One possible course of action is to return the original defaulting buyer's deposit and reserve the right to recover damages after a resale.

PRACTICE TIP: Although most purchase and sale contracts contain an attorney fee clause, most potential and actual litigation settles before trial—often through successful mediation if there is no arbitration clause. In most settlements, monetary recovery, and especially attorney fees, are compromised.

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VII. SELLER'S BREACH

§4.45 A. Buyer's First Steps After Seller's Breach

To preserve the availability of potential remedies, as soon as a breach occurs or is threatened, the nonbreaching buyer should be counseled on how to act in a manner consistent with the types of remedies desired. The buyer's subsequent action will depend on:

- The nature of the breach (repudiation, inability to perform, or delay);
- The duties that have been performed to date by each party;
- Any outstanding conditions;
- Conduct that was waived or excused;
- The remaining duties; and
- The sequence of performance (who must perform next, or whether another event must occur first).

Typically, the buyer's deposit of the balance of the purchase price is the last step in the transaction. So the question arises whether the buyer should tender payment in the face of a breach or an anticipated or potential breach. Unless the contract provides otherwise, payment and conveyance of title are concurrent conditions that require a party to perform or tender performance in order to put the other party into default. *Diamond v Huenergardt* (1959) 175 CA2d 214, 346 P2d 37. A buyer who fails to act may also lose the ability to enforce a remedy. See *Pittman v Canham* (1992) 2 CA4th 556, 3 CR2d 340 (time to perform is not unlimited).

If the breach consists of the seller's repudiation of the agreement, the buyer need not tender the price. CC §1440; *Beverage v Canton Placer Mining Co.* (1955) 43 C2d 769, 278 P2d 694; *County of Solano v Vallejo Redev. Agency* (1999) 75 CA4th 1262, 90 CR2d 41. The buyer is also excused if the seller is unable to perform, because tender would be an idle act. *Hunt v Mahoney* (1947) 82 CA2d 540, 187 P2d 43. If the price is not yet due under the agreement, the buyer need not tender it. *Lifton v Harshman* (1947) 80 CA2d 422, 430, 182 P2d 222, disapproved on other grounds in *Lee v Gregoriou* (1958) 50 C2d 502, 506, 326 P2d 135. The buyer must tender, however, to claim successfully that the seller has breached by failing to perform by the closing date. Without the buyer's tender and demand for the seller's performance, the seller is not in breach. *Weneda Corp. v Dispalatro* (1964) 225 CA2d 187, 37 CR 267; *Baird v Barton* (1958) 163 CA2d 502, 329 P2d 492. See §§4.30, 4.39 on the effect of a "time-is-of-the-essence" clause.

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B. Buyer's Damages

§4.46 1. General Damages Under CC §3306

When a seller breaches the purchase contract, the buyer can recover the specific measure of damages allowed under CC §3306, which prevails over general contract damages. Section 3306 provides for recovery of:

- The price actually paid;
- Title and escrow expenses;
- The difference between the price agreed on and the value of the property at the time of breach;
- Expenses in preparing to enter the property;
- Consequential damages; and
- Interest.

See *Stevens Group Fund IV v Sobrato Dev. Co.* (1991) 1 CA4th 886, 2 CR2d 460. See also *Crag Lumber Co. v Crofoot* (1956) 144 CA2d 755, 301 P2d 952.

If the breach occurs early on in the contract, the difference in the purchase price and the property's value at the breach may not be great. In a rising real estate market, the property may be worth a great deal more by the time the case goes to trial and reaches judgment. Under CC §3306, the buyer is limited to the difference at the time of the breach regardless of market conditions. *Reese v Wong* (2001) 93 CA4th 51, 112 CR2d 669. See also *Horning v Shilberg* (2005) 130 CA4th 197, 29 CR3d 717 (lost resale profits not allowed under §3306, and plaintiff's failure to produce evidence of value of property on date of breach precluded damages under §3306). In a falling market, the property may be worth less than the selling price at the time of breach and much less by the time the case goes to trial. Monetary damages may thus be an unsatisfactory remedy for a damaged buyer.

PRACTICE TIP: Before starting down the path of costly litigation, counsel should investigate the value of the property at the time of breach and then advise the client on the risks and merits of pursuing litigation on a breach of contract damages claim. This information will also assist counsel in calculating whether to proceed with an unlimited jurisdiction complaint or to elect the more economical limited jurisdiction.

Rents received from leasing the property are not usually an item of consequential damages. *Stevens Group Fund IV v Sobrato Dev. Co., supra*. But if the seller has miscalculated the amount of rent received from a lease of an office building and has represented to the buyer that it is higher than it actually is, the buyer may be able to recover the overstated amounts as damages in a breach of contract action. See *Linden Partners v Wilshire Linden Assocs.* (1998) 62 CA4th 508, 73 CR2d 708.

Breach of contract by repudiation, occurring any time after formation of the agreement and before closing, results in entitlement to damages under CC §3306. Mere inability to convey before the time for performance is not a breach. *Fara v Wells* (1957) 156 CA2d 322, 319 P2d 394; *Lloyd v Locke-Paddon Land Co.* (1935) 5 CA2d 211, 42 P2d 367. A breach can consist of failure to convey title within the time specified in the contract (*Post v Palpar, Inc.* (1960) 184 CA2d 676, 7 CR 823; *Lloyd v Locke-Paddon Land Co., supra*), or it can be a defective conveyance of less than the agreed title (*Levy v Wolff* (1956) 46 C2d 367, 294 P2d 945).

That the seller does not have clear title to the property, however, does not foreclose the buyer from demanding conveyance of whatever interest the seller *does* have in the property and enforcing performance accordingly on reasonable notice of this intent. *Weneda Corp. v Dispalatro* (1964) 225 CA2d 187, 37 CR 267.

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§4.47 2. Damages for Breach Other Than Failure to Convey Title

When the buyer's damages claims are based on other duties or promises and are not the direct result of the promise to convey land, the specific damage limitations of CC §3306 may not apply. For example, damages for breach of warranty or other duties that survive the conveyance of title, and recovery for all damages "proximately caused" by the breach, will be recoverable under CC §3300. Other examples of buyer recoveries include *Coughlin v Blair* (1953) 41 C2d 587, 262 P2d 305 (damages under CC §3300 for seller's breach of covenant to install improvements); *Strebel v Brenlar Invs., Inc.* (2006) 135 CA4th 740, 37 CR3d 699 (tort damages recoverable under CC §§1709 and 3333 when closing failed and dual agent's nondisclosure of lien amounts caused prospective buyer to sell other property in anticipation of closing); *Cory v Villa Props.* (1986) 180 CA3d 592, 598, 225 CR 628 (damages under CC §3343(a) for seller fraud); *Pepitone v Russo* (1976) 64 CA3d 685, 134 CR 709 (damages under CC §§1709 and 3333 for fiduciary fraud), cited with approval in *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 44 CR2d 352; *Christensen v Slawter* (1959) 173 CA2d 325, 343 P2d 341 (damages incurred from work stoppage caused by delay in delivery of deed). For further discussion, see chap 3. See also Caron, *Measure of Damages for Liability in Real Estate Sales*, 23 Cal Real Prop J 13 (Summer 2005).

On covenants of title, see California Real Property Sales Transactions, chap 12 (4th ed Cal CEB 2007).

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§4.48 3. Prejudgment Interest

Recovery of prejudgment interest on the price paid and special damages is expressly authorized by CC §3306. One court went through a lengthy analysis of recoverable interest under §3306, ruling that the statute's brief description of interest should be read as referring to the generally applicable provision of CC §3287 (interest on awarded damages). The court further ruled that, under CC §3287(b), interest should be calculated from the date the lawsuit is filed. *Rifkin v Achermann* (1996) 43 CA4th 391, 50 CR2d 661.

If a seller breaches a sales agreement, prejudgment interest can also be awarded on the amount of the buyer's escrow deposit. *Al-Husry v Nilsen Farms Mini-Market, Inc.* (1994) 25 CA4th 641, 31 CR2d 28. In *Al-Husry,* the court held that there was no inconsistency with the rule that nondefaulting parties are limited to recovery of the benefit of the bargain, because CC §3287(a) did not apply to an award of prejudgment interest on the compensatory damages.

PRACTICE TIP: The *Rifkin* court apparently sought to harmonize earlier decisions by stating that *Al-Husry* did not "provide assistance," because it dealt with the sale of a business with underlying real estate and addressed CC §3287(a) without mentioning subsection (b).

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§4.49 4. Attorney Fees

Although not required, it is standard for purchase and sale contracts to include an attorney fee provision, especially if a preprinted form is used. See, *e.g.,* California Real Property Sales Transactions §§4.153, 6.19, 6.24 (4th ed Cal CEB 2007). Attorney fees are not recoverable unless allowed by a statute or an express or implied provision in the contract. CCP §1021. When the contract does contain a fee clause, it is enforceable under CC §1717.

WARNING: Section 1717 bears careful reading; it provides several "options" under which "reasonable" attorney fees may be awarded.

For comprehensive discussion of CC §1717, see California Attorney Fee Awards (3d ed Cal CEB 2010).

PRACTICE TIP: Many contracts condition an award of fees on a party seeking to arbitrate or mediate a dispute before proceeding to litigation. See chap 14. Failure to comply with this provision can be fatal to an otherwise successful litigant's right to recover attorney fees. See *Leamon v Krajkiewcz* (2003) 107 CA4th 424, 132 CR2d 362. When determining if a contract provides for attorney fees, counsel should carefully review the entire contract.

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§4.49A a. Determining Prevailing Party; Offsets

With an enforceable attorney fee provision and a clear winner on a contract cause of action, the court must award fees under CC §1717. *Hsu v Abbarra* (1995) 9 C4th 863, 39 CR2d 824. In deciding which party is the prevailing party, courts are often guided by CCP §1032, which provides that the prevailing party is:

- The party with the net monetary recovery (which may be either the plaintiff or the defendant);
- The defendant, if the defendant is dismissed from the action;
- The defendant, if neither the plaintiff nor the defendant recovers anything; or
- A defendant as against a plaintiff who does not recover anything against that defendant (*e.g.*, if the plaintiff does not recover any damages against that defendant, but does recover against codefendants).

Under CCP §1032, the trial court has discretion to determine the prevailing party when the case does not fit into any of these classes or categories or when a party recovers something other than monetary relief.

The net monetary recovery requirement in §1032 is generally based on the adjudication of competing claims between the plaintiff and the defendants that go to trial in the action. In determining the net monetary recovery, however, the damage award must be offset by any settlement funds received by the plaintiff from co-obligors under CCP §877. *Goodman v Lozano* (2010) 47 C4th 1327, 104 CR3d 219. If the offset reduces the damages award to zero, the defendant is the prevailing party. 47 C4th at 1338.

Notably, CC §1717(b)(1) gives the court the option of deciding that there is no prevailing party for the purpose of awarding attorney fees. The court usually decides on a noticed motion who is the prevailing party for awarding attorney fees. CC §1717(b)(1). Attorney fees authorized by contract are usually calculated and awarded under a noticed motion or an entry of default, unless the fees are fixed by a predetermined formula (*e.g.,* most courts have established schedules of attorney fees for actions based on contract). CCP §1033.5(c)(5); Cal Rules of Ct 3.1702(a).

Even a party who is found liable for damages on a cause not based on contract, but who *has* prevailed on a contract cause of action, is entitled to an offset of the net recovery of attorney fees under a CC §1717(c) recovery. When a defendant voluntarily deposits with the court the amount tendered to the plaintiff under a contract, alleges this tender in its answer, and then proves that the allegation is true, that defendant is the prevailing party for the purpose of awarding attorney fees under the contract. CC §1717(b)(2). If the action "involves" a contract or is "on a contract," attorney fees may be awarded to the prevailing party even if he or she prevails by successfully arguing the inapplicability, invalidity, unenforceability, or nonexistence of the contract. *Milman v Shukhat* (1994) 22 CA4th 538, 27 CR2d 526.

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§4.49B b. Waiver; Effect of Dismissal

Attorney fees provided for by CC §1717 cannot be waived by the parties, and the fee provision will be construed to apply to the entire contract, unless each party was represented by counsel in the negotiations and in the execution of the contract, and the document specifically represents this fact. CC §1717(a).

At the same time, CC §1717(b)(2) specifically prohibits recovery of attorney fees when a contract cause of action is voluntarily dismissed or dismissed under a settlement. This dismissal bar, however, does not prevent the recovery of fees when a party dismisses other causes of action. For example, a defendant can recover attorney fees after a dismissal of (or successful defense against) a tort claim, as long as the contract or a statute authorizes the award. *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830. For further discussion of fee awards in tort actions, see California Attorney Fee Awards, chap 4 (3d ed Cal CEB 2010).

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§4.49C c. Third-Party Rights to Attorney Fees

Clauses providing for attorney fees in the listing agreement between the seller and the broker, or in the escrow instructions providing for attorney fees between the seller or buyer and the escrow holder, will not support an award of attorney fees in an action between the buyer and the seller. *Citizens Sav. & Loan Ass'n v Khoury* (1978) 84 CA3d 244, 148 CR 529.

PRACTICE TIP: Although most purchase and sale contracts do not include the real estate agent or broker in the attorney fee clause applicable between the buyer and the seller, examine the contract carefully to determine whether the agent or broker might be bound by the fee clause, even with a form contract.

A third-party beneficiary may recover attorney fees if the contract was made for the third-party beneficiary's benefit, if the third-party beneficiary can prove that the losing party would have recovered fees from the third-party beneficiary had the losing party prevailed. Compare *Blickman Turkus, LP v MF Downtown Sunnyvale, LLC* (2008) 162 CA4th 858, 76 CR3d 325 (declined to award fees to landlord who defeated procuring broker's action for commission on lease because broker was not party to listing agreement) with *Loduca v Polyzos* (2007) 153 CA4th 334, 62 CR3d 780 (concluding sufficient nexus existed between property owner and subcontractor, and contract language allowed owner to recover attorney fees in action as beneficiary of contract for work of improvement between contractor and subcontractor).

When considering an attorney fee award in third-party situations, the courts examine the relationship of the parties and the language of the fee clause in the contract to determine its scope and if the third party is either impliedly or expressly covered by the clause. See *Pacific Preferred Props. v Moss* (1999) 71 CA4th 1456, 84 CR2d 500 (attorney fee provision clearly included broker); *Super 7 Motel Assocs. v Wang* (1993) 16 CA4th 541, 20 CR2d 193 (broker not a party to purchase and sale contract). See also *Moallem v Coldwell Banker Commercial Group* (1994) 25 CA4th 1827, 31 CR2d 253; *Lerner v Ward* (1993) 13 CA4th 155, 16 CR2d 486; *Xuereb v Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 5 CR2d 154. In each of these cases, the contract provided that attorney fees would be awarded in any action "arising out of" the agreement.

Like purchase and sale contracts, attorney fee clauses in listing agreements may be drafted for broad or narrow application. A listing agreement providing for attorney fees in an action between the seller and broker "regarding the obligation to pay compensation" under the listing agreement does not support an award of fees for an action concerning a sale "arising from the listing agreement." *Hasler v Howard* (2004) 120 CA4th 1023, 1027, 16 CR3d 217.

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§4.49D d. Attorney Fees as Damages

In some instances, attorney fees can be awarded to a buyer or seller against a broker under the "tort of another" theory recognized in *Prentice v North Am. Title Guar. Corp.* (1963) 59 C2d 618, 620, 30 CR 821. This theory allows attorney fees to be awarded as an element of damages to a party who was required to protect his or her interest by bringing or defending an action against a third party. Examples of real property cases applying the *Prentice* rule are *Earp v Nobmann* (1981) 122 CA3d 270, 293, 175 CR 767, disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 212, 266 CR 638; *Walters v Marler* (1978) 83 CA3d 1, 147 CR 655, disapproved on other grounds in *Gray v Don Miller & Assocs., Inc.* (1984) 35 C3d 498, 507, 198 CR 551. For further discussion, see §3.56. On pleading and proving attorney fees as damages under the third-party tort doctrine, see California Attorney Fee Awards (3d ed Cal CEB 2010).

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§4.49E e. Parties Appearing In Pro Per or In Forma Pauperis; Pro Bono Representation

A nonattorney individual who represents himself or herself is *not* entitled to attorney fees under CC §1717. *Jacobson v Simmons Real Estate* (1994) 23 CA4th 1285, 1290, 28 CR2d 699, disapproved on other grounds in *Trope v Katz* (1995) 11 C4th 274, 292, 45 CR2d 241. Although this prohibition also applies to attorneys who represent themselves (*Trope v Katz* (1995) 11 C4th 274, 45 CR2d 241), they may recover attorney fees incurred for services of other attorneys who assist them in the litigation (*Mix v Tumanjan Dev. Corp.* (2002) 102 CA4th 1318, 126 CR2d 267). See also *Musaelian v Adams* (2009) 45 C4th 512, 87 CR3d 475 (attorney successfully representing himself or herself not entitled to attorney fees under CCP §128.7). A corporation represented by in-house counsel may recover under §1717 when they, unlike pro se litigants, stand in an attorney-client relationship in the litigation. *PLCM Group, Inc. v Drexler* (2000) 22 C4th 1084, 95 CR2d 198. Similarly, employees of a law firm may recover under §1717 when represented on a pro bono basis by the attorneys in the firm for which they work. *Moran v Oso Valley Greenbelt Ass'n* (2004) 117 CA4th 1029, 1036, 12 CR3d 435.

A prevailing party may recover attorney's fees from a party proceeding in forma pauperis (*i.e.*, a party qualified for a waiver of court fees), but the court has a duty to evaluate all elements of a lodestar analysis, including the financial ability of the losing party to pay. In *Garcia v Santana* (2009) 174 CA4th 464, 476, 94 CR3d 299, the court of appeal held that the trial court abused its discretion by denying any fee award to the prevailing party without determining whether the fee award was reasonable and whether a complete lodestar analysis would appropriately increase or decrease the reasonable fee. The court acknowledged that a fee award cannot result in the financial ruin of a party, as that would unduly interfere with that party's right of access to the courts, but held that the trial court must complete a full lodestar analysis. 174 CA4th at 477.

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§4.50 5. Punitive Damages; Emotional Distress

Prevailing on a breach of contract cause of action does not support an award of punitive damages, even if the breach was willful. *Tomaselli v Transamerica Ins. Co.* (1994) 25 CA4th 1269, 31 CR2d 433. Civil Code §3294 provides only for recovery of punitive damages for oppressive, fraudulent, or malicious conduct relating to an obligation "not arising from contract." CC §3294(a).

The facts of the real estate transaction, however, may support other causes of action, making punitive damages available if the requirements for oppressive, fraudulent, or malicious conduct are also met. Some examples are (a) fraud; (b) a promise made without intent to perform as distinguished from mere failure to perform (*Simon v San Paolo U.S. Holding Co.* (2005) 35 C4th 1159, 29 CR3d 379; *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1 CR2d 301); and (c) a breach of fiduciary duty (*Godfrey v Steinpress* (1982) 128 CA3d 154, 180 CR 95 (sellers' broker failed to inform buyers of second termite report showing more damage than shown in first report)). See Imre, *Is* Seaman's *Rising from the Ashes? The Ever-Changing Line Between Contract and Tort Remedies,* 27 CEB Civ LR 96 (June 2005). On punitive damages in fraud actions, see chap 3.

In rare situations, it might be possible to argue that the seller's breach constituted a tort as well as a breach of contract. The implied covenant of good faith and fair dealing, a cause of action sounding in both tort and contract, is well established in insurance situations. *Johansen v California State Auto. Ass'n Inter-Ins. Bureau* (1975) 15 C3d 9, 123 CR 288 (liability insurer's failure to settle within policy limits); *Jarchow v Transamerica Title Ins. Co.* (1975) 48 CA3d 917, 122 CR 470 (title insurer's failure to disclose or clear easement). Breach of the implied covenant of good faith and fair dealing, however, is no longer a favored cause of action when (1) no insurance contract is at issue; and (2) the transaction is not otherwise marked by adhesion, public interest, or fiduciary responsibility. See *Cates Constr., Inc. v Talbot Partners* (1999) 21 C4th 28, 86 CR2d 855 (contracting party's unjustified failure or refusal to perform is breach of contract and cannot be transmuted into tort liability by claiming that breach detrimentally affected promisee's business). Yet, this same cause of action may be available on the proper facts. *R. J. Kuhl Corp. v Sullivan* (1993) 13 CA4th 1589, 17 CR2d 425 (affirming recovery of broker's commission based on seller's good faith obligation to complete purchase).

Courts have also looked unfavorably on attempts to use emotional distress as a springboard for additional recovery, particularly when the plaintiff suffers only economic damage. See, *e.g., Erlich v Menezes* (1999) 21 C4th 543, 87 CR2d 886 (denied recovery for emotional distress for breach of new home construction contract); *Soto v Royal Globe Ins. Corp.* (1986) 184 CA3d 420, 434, 229 CR 192.

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C. Seller's Defenses

§4.51 1. Invalid Contract

The mere existence of a purchase and sale agreement is no guaranty that a legally valid and binding contract has been formed. Consequently, the formation and provisions of the agreement must be analyzed with basic contract principles in mind. Potential defenses to the valid formation of a purchase and sale contract can include:

- Missing or uncertain material terms (see §§4.14-4.18, 4.22, 4.52);
- Failure to comply with the statute of frauds (see §§4.10, 4.53);
- Failure of consideration/illusory contracts (see §§4.7, 4.19-4.21, 4.54);
- Lack of acceptance or failed agreements to agree (see §§4.4-4.9, 4.55);
- Mutual mistake of fact (see chaps 1-2);
- Fraud or undue influence (see chap 3); and
- Impossibility or illegality (see chap 1).

Some of these issues are addressed as affirmative claims in other chapters of this book, including the chapters on fraud (see chap 3), rescission (see chap 1), reformation (see chap 2), and cancellation of instruments (see chap 6). For an in-depth treatment of contract formation, see California Real Property Sales Transactions, chap 4 (4th ed Cal CEB 2007).

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§4.52 a. Incomplete, Indefinite and Uncertain Agreement

An enforceable contract for the sale of real property requires basic material terms—parties, price, and description of the property—or there is no contract at all. *King v Stanley* (1948) 32 C2d 584, 589, 197 P2d 321, disapproved in part in *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366. See §§4.14-4.17. The contract need not specify the time and manner of payment, these terms may be implied by the application of "reasonable" standards. *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366. See §4.10, 4.53.

A contract will fail if one of the material terms is too uncertain or ambiguous, thereby making it difficult or impossible to ascertain the parties' intent. *California Lettuce Growers, Inc. v Union Sugar Co.* (1955) 45 C2d 474, 481, 289 P2d 785. See California Law of Contracts §5.17 (Cal CEB 2007). Extrinsic evidence may be used to clarify the parties' intent, however, even if the agreement is in writing and contains an integration clause. See *Pacific State Bank v Greene* (2003) 110 CA4th 375, 1 CR3d 739; Contracts §§5.15, 5.21-5.22, 5.33-5.40.

Uncertainty of a material term is an effective defense to an action for specific performance (*Gorges v Johnson* (1959) 167 CA2d 349, 334 P2d 621) and may be raised against a claim for damages. On specific performance, see chap 5. The terms of a contract are reasonably certain if they provide the basis for determining the existence of a breach and for giving the appropriate remedy and are sufficiently definite to enable the courts to give it an exact meaning "sufficiently certain to make the precise act which is to be done clearly ascertainable." CC §3390; *Weddington Prods., Inc. v Flick* (1998) 60 CA4th 793, 71 CR2d 265. On basic contract elements, see California Real Property Sales Transactions, chap 4 (4th ed Cal CEB 2007).

Thus, if an essential element is reserved for future agreement of both parties, as a rule the promise can give rise to no legal obligation until a future agreement is reached (*Weddington Prods., Inc. v Flick, supra*) and, consequently, neither party is obligated to perform. See *Ablett v Clauson* (1954) 43 C2d 280, 272 P2d 753 (price to be determined later); *Bonk v Boyajian* (1954) 128 CA2d 153, 274 P2d 948; *Burgess v Rodom* (1953) 121 CA2d 71, 262 P2d 335 (failure to specify any installment payments).

The courts are liberal in construing executory contracts for the sale of real property to order to give effect to the parties' intent. A contract will be enforced if it is possible to reach a fair and just result even if, in the process, the court has to fill in some gaps. *Ersa Grae Corp. v Fluor Corp.* (1991) 1 CA4th 613, 2 CR2d 288 (citing *Okun v Morton* (1988) 203 CA3d 805, 250 CR 220). Uncertainty of release clauses and subordination agreements, which are material terms of real property sales agreements, can bar specific enforcement of the entire agreement. *Handy v Gordon* (1967) 65 C2d 578, 55 CR 769 (subordination); *White Point Co. v Herrington* (1968) 268 CA2d 458, 73 CR 885 (releases). In one case, however, a seller was permitted to recover damages on the buyer's default despite an uncertain release clause that would have barred the buyer from obtaining specific performance. *Yackey v Pacifica Dev. Co.* (1979) 99 CA3d 776, 160 CR 430. See generally Real Property Sales §§9.66-9.99 on subordination, and Real Property Sales §§9.100-9.110 on releases.

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§4.53 b. Statute of Frauds

The Statute of Frauds (CC §1624) provides that contracts for the sale of real property, or of an interest in real property, are invalid unless "they, or some note or memorandum thereof, are in writing." CC §1624(a)(3). See CCP §1971. The Statute does not require a written contract; a note or memorandum "subscribed by the party to be charged" is adequate. *Sterling v Taylor* (2007) 40 C4th 757, 765, 55 CR3d 116; *Ulloa v McMillan Real Estate & Mortgage, Inc.* (2007) 149 CA4th 333, 57 CR3d 1, cited in §5.36. The writing need not be signed by the party seeking enforcement. See CC §§1624(a), 3388; *Steel v Duntley* (1931) 115 CA 451, 1 P2d 999.

The writing may be an informal written memorandum or a letter or telegram. *King v Stanley* (1948) 32 C2d 584, 197 P2d 321, disapproved on other grounds in *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366. A memorandum satisfies the Statute "if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with reasonable certainty." *Sterling*, 40 C4th at 766.

The essential contract terms in a real property sale are the identity of the seller and buyer, the price to be paid, and a description of the property. *Sterling v Taylor* (2007) 40 C4th 757, 772, 55 CR3d 116. In *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366, the supreme court resolved the outstanding issue left unresolved in Sterling (see Sterling, 40 C4th at 772 n14) by holding that a real property contract need not specify the time and manner of payment, permitting them to be implied by inserting "reasonable" terms for both. On details of sales contract essential elements, see §§4.14-4.18. See also California Real Property Sales Transactions, chap 4 (4th ed Cal CEB 2007).

A memorandum is merely evidence of the contract. It does not have to contain all of the terms, but the memorandum should show the essential contract terms with reasonable certainty. *Sterling,* 40 C4th at 766. Contract terms that are not essential to the validity of the agreement can be established through custom or extrinsic evidence. *King v Stanley, supra*.

Extrinsic evidence is also admissible to clarify and determine the sufficiency of a memorandum under the Statute of Frauds. *Sterling*, 40 C4th at 766-770. For example, in *Sterling*, the court found that a purchase contract "made in the name of an agent may be enforced against an undisclosed principal, and extrinsic evidence is admissible to identify the principal." 40 C4th at 773. Extrinsic evidence, however, cannot be considered to contradict the memorandum or supply essential terms that are not evidenced in the memorandum. 40 C4th at 767. Conflicts in extrinsic evidence must be resolved by the trier of fact, "but whether the evidence meets the standard of reasonable certainty is a question of law for the court." *Phillippe v Shapell Indus., Inc.* (1987) 43 C3d 1247, 1258, 241 CR 22. Thus, if one party contends that its extrinsic evidence raises an issue of fact (*i.e.,* because it is in conflict with the other party's proffered evidence), that party must first persuade the court that the extrinsic evidence is sufficiently certain within the meaning of the rules applicable to the required elements.

In *Sterling*, the supreme court noted the importance of how the parties behaved after the making of the memorandum. It reiterated the rule that when a contract is ambiguous or uncertain, the practical interpretation given to it by the parties before the controversy arises is one of the most reliable means of ascertaining the parties' intent.

PRACTICE TIP: Based on this perception about postcontract behavior, litigators should focus on the facts that follow the formation of an agreement or memorandum as much as the facts before formation. See also *Bohman v Berg* (1960) 54 C2d 787, 795, 8 CR 441; *Universal Sales Corp. v California Press Mfg. Co.* (1942) 20 C2d 751, 762, 128 P2d 665; *Okun v Morton* (1988) 203 CA3d 805, 819, 250 CR 220. Postcontract interactions and conduct often clarify the true understanding of the parties because actions speak louder than words. See *Crestview Cemetery Ass'n v Dieden* (1960) 54 C2d 744, 754, 8 CR 427.

The Statute of Frauds is an affirmative defense that is waived if the defendant does not raise it. *Howard v Adams* (1940) 16 C2d 253, 105 P2d 971. Partial performance by a party can be sufficient to remove this bar to enforcement under both case law and statute. See CCP §1972 (court not prohibited by CCP §1971 from compelling specific performance in a partial performance); *Sutton v Warner* (1993) 12 CA4th 415, 15 CR2d 632 (upholding oral contract supported by evidence of mortgage payments and residential improvements). See also *Engasser v Jones* (1948) 88

CA2d 171, 198 P2d 546 (possession by buyer with seller's consent).

The doctrine of estoppel may be invoked to defeat a Statute of Frauds defense. *Wilk v Vencill* (1947) 30 C2d 104, 180 P2d 351. Contract ratification may overcome the Statute of Frauds defense. *Behniwal v Mix* (2005) 133 CA4th 1027, 35 CR3d 320 (although sellers did not sign purchase contract, their later signatures on disclosure documents bound them). For further discussion, see California Real Property Sales Transactions §4.13 (4th ed Cal CEB 2007).

The Statute of Frauds also may arise in commission disputes between the seller and the listing broker because it requires written agreements on the employment of a real estate agent or broker or other person to purchase or sell real estate for a commission. CC §1624(a)(4). See *Phillippe v Shapell Indus., Inc.* (1987) 43 C3d 1247, 241 CR 22.

A related defense is whether the broker who signs a real property purchase contract on behalf of the seller or buyer has authority to do so. See §4.56.

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§4.54 c. Illusory Agreements

For a bilateral contract to be enforceable, both parties must be bound by the agreement. For example, if the consideration for the contract is simply an exchange of promises and one party retains an unrestricted right to withdraw from the contract, the agreement will be held to be illusory and unenforceable by either party, because it lacks mutuality of obligation. See *Steiner v Thexton* (2010) 48 C4th 411, 423, 106 CR3d 252, citing *Mattei v Hopper* (1958) 51 C2d 119, 122, 330 P2d 625.

But a contract that is otherwise illusory may become enforceable if the promisor renders at least part performance. See *Steiner v Thexton, supra* (buyers' immediate and substantial efforts and expenditures to obtain bargained-for parcel split that would directly benefit seller cured initially illusory nature of promise and rendered real property option irrevocable). Although option contracts are unilateral at their inception, they become irrevocable and enforceable when the offeree tenders consideration or partially performs. *Steiner*, 48 C3d at 424.

The *Steiner* decision cited with approval *Kowal v Day* (1971) 20 CA3d 720, 98 CR 118, which ruled that although an option contract typically lacks consideration when the exchange of promises does not impose mutual obligations, the buyer's part performance created consideration sufficient to transform the contract into an irrevocable option). In the past, if the buyer's performance under a purchase agreement was subject to conditions within his or her control, the buyer's promise was considered illusory, and the contract was unenforceable for lack of mutuality of obligation. See, *e.g., Lewis v McWhirter Petroleum Co.* (1948) 89 CA2d 453, 200 P2d 856.

The *Steiner* decision acknowledged the ruling in *Mattei*, in which the real property sale was conditioned on the buyer's being able to obtain satisfactory leases. The court held that the real property sales agreement was enforceable because the buyer must make the effort to fulfill the conditions in good faith. Conditions involving personal satisfaction and judgment impose on the buyer a duty to act in good faith, while conditions involving commercial value or quality impose on the buyer a duty to accept or reject reasonably. *Mattei*, 51 C2d at 125.

In another case, a court of appeal held that the buyer's approval under a condition concerning financing terms was also subject to a reasonableness standard, and a prepayment penalty and acceleration clause in the note did not afford an adequate reason to withdraw from the transaction. *Kadner v Shields* (1971) 20 CA3d 251, 97 CR 742.

For analysis of *Steiner* focusing on contract formation issues, see Comment (by Sylvester) on *Steiner v Thexton,* 33 CEB Real Prop L Rep 64 (May 2010). For discussion of *Steiner's* impact on other types of real property purchase contracts, see Bernhardt, *The Cost of Free Looks-Ruminations on Steiner v Thexton,* 33 CEB Real Prop L Rep 61 (May 2010). For further discussion of illusory terms in real property contracts, see §§4.7, 4.21.

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§4.55 d. No Acceptance

Frequently, real property purchase and sale agreements are formed after the exchange of an original offer and one or more counteroffers. Typically, a counteroffer will incorporate, reject, modify, or augment one or more provisions of the previous offer. To form a binding agreement, there must be an unqualified acceptance. Alternatively, an acceptance must "include in itself an acceptance of that character which the proposer can separate from the rest, and will conclude the person accepting." CC §1585. In other words, the counteroffer, to be binding, must be capable of being accepted *without* acceptance of a new or different term. A qualified acceptance is a new proposal.

The common practice of using multiple preprinted counteroffer forms and addendums in a single transaction may cause confusion about whether a contract was actually formed. See, *e.g.*, *Behniwal v Mix* (2005) 133 CA4th 1027, 1037, 35 CR3d 320 (concluding that signatures on addendum showed acceptance of particular provisions embodied in counteroffer that addendum specifically referenced).

Included in the formation and acceptance of a contract is the requirement that the contract be free, mutual, and communicated by each to the other. If an acceptance is qualified, the result is a counteroffer that, if unaccepted as a new offer, creates no binding agreement. *Roth v Malson* (1998) 67 CA4th 552, 79 CR2d 226; *Krasley v Superior Court* (1980) 101 CA3d 425, 161 CR 629.

PRACTICE TIP: Most purchase and sale transactions use form contracts that give notice of whether the contract is being accepted "as is" or whether it is subject to a counteroffer. These forms also state a time limit after which the offer or counteroffer cannot be accepted. Although rare, a final counteroffer is occasionally accepted orally. In that event, counsel should investigate whether the parties' conduct or the conduct of one of them provides the partial performance necessary to evade the bar of the statute of frauds, as discussed in §§4.10, 4.53.

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§4.56 e. Broker's Lack of Authority to Bind Seller

A real estate broker's authority is limited to that actually or ostensibly conferred by the principal. CC §2315. The listing agreement should specify the extent of the broker's authority, because an agent is authorized by statute to do everything "necessary or proper and usual" to carry out the purpose of the agency. CC §2319(1). Such broad implied authority invites disputes.

Generally, the broker's authority is limited to negotiating the terms of the transaction; the broker has no authority to bind the seller contractually, even if the buyer makes an unconditional offer that is based on all the terms and conditions of sale in the listing agreement. *Holland v McCarthy* (1916) 173 C 597, 160 P 1069. For example, the broker may not sign a contract of sale on the principal's behalf without specific authority. *Lyne v Bonner* (1954) 129 CA2d 743, 277 P2d 941.

A purchase contract that is invalid because the agent lacked authority to sign on behalf of the seller may be ratified, if the ratification is in writing. See *Behniwal v Mix* (2005) 133 CA4th 1027, 35 CR3d 320 (sellers ratified agent's forgery on contract by signing and accepting disclosures).

A broker is rarely given express authority to accept the purchase price, as distinguished from the deposit, on the seller's behalf. *Sarten v Pomatto* (1961) 192 CA2d 288, 13 CR 588 (seller authorized broker to accept deposit). If the seller has led the buyer to believe that the agent can receive the purchase price, however, then ostensible authority exists, and the seller will not be able to recover from the buyer if the broker misappropriates the funds. *Hicks v Wilson* (1925) 197 C 269, 240 P 289. For further discussion, see California Real Property Sales Transactions §2.42 (4th ed Cal CEB 2007).

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§4.57 2. Other Contract Violations

In addition to the grounds discussed in §§4.51-4.56, other criteria for defending against the enforcement of a contract include:

- Expiration of the offer by a lapse of time before acceptance (see *Conley v Fate* (1964) 227 CA2d 418, 38 CR 680);
- Revocation by the offeror before acceptance (CC §1586; see *Bellasi v Shackelford* (1962) 201 CA2d 265, 19 CR 925; *Prather v Vasquez* (1958) 162 CA2d 198, 327 P2d 963);
- Breach of contract by the party attempting to enforce the contract (see §§4.28-4.29);
- Mutual mistake of fact (see chaps 1-2);
- Mutual mistake of law (see chap 1);
- Fraud or deceit (see chap 3);
- Duress, undue influence, or menace (CC §§1567-1568, 1575; see *Leeper v Beltrami* (1959) 53 C2d 195, 1 CR 12; see also chap 1);
- Failure of consideration (see *Mussler v Nash* (1953) 118 CA2d 494, 258 P2d 108); and
- Impossibility (*Baird v Wendt Enters., Inc.* (1967) 248 CA2d 52, 56 CR 118).

PRACTICE TIP: Because of an increase in the older population, real estate transactions involving older citizens are also increasing. Unfortunately, it may sometimes be necessary to consider the principles of contract law with emerging statutory and case law in the area of elder abuse. See, *e.g.,* discussion of protective statutes in chap 6.

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§4.58 3. Nonoccurrence of Conditions Precedent

It is a rare purchase and sale contract that does not contain several conditions, which typically include inspections, funding, and sometimes coordination of another purchase and sale. In addition, conditions often have time limitations (*e.g.,* time limit to get a loan approved, time limits in which to do various inspections or to object to inspection results). Thus, even when a valid contract is created, the seller may be excused from conveying the property to the buyer if certain contingencies or conditions precedent to the obligation to convey are not met. See *Consolidated World Invs., Inc. v Lido Preferred Ltd.* (1992) 9 CA4th 373, 11 CR2d 524 (opening escrow in reasonable time was condition precedent to duty to complete sale; cancellation of contract was not anticipatory breach). On conditions generally, see California Real Property Sales Transactions §§4.45-4.100, 4.121-4.131 (4th ed Cal CEB 2007).

The seller's main problem with this defense is that the contingencies are usually for the buyer's benefit, not the seller's (*e.g.,* approval of title, obtaining financing and inspections). If a contingency is solely for the buyer's benefit, the buyer is entitled to waive the performance of the contingency and seek performance from the seller. *Mattei v Hopper* (1958) 51 C2d 119, 330 P2d 625 (approval of leases); *Caras v Parker* (1957) 149 CA2d 621, 309 P2d 104 (rezoning).

Sellers who demonstrate a benefit to themselves, even if an unexpected benefit, can prevent the buyer from having the unilateral right to waive the contingency. *Britschgi v McCall* (1953) 41 C2d 138, 257 P2d 977 (release of lien personally jeopardizing seller); *Spangler v Castello* (1956) 147 CA2d 49, 304 P2d 752 (buyer's financing, with seller to carry junior paper). One appellate court reversed the trial court's decision that the financing time was for the benefit of the buyer only. The appellate court held that the time period for the loan contingency also benefited the seller, based on the seller's contractual right to rescind on expiration of the financing period, because the seller should not be required to keep property off the market indefinitely. *WYDA Assocs. v Merner* (1996) 42 CA4th 1702, 50 CR2d 323.

Even if the buyer is able to waive the conditions unilaterally, a delay in doing so may entitle the seller to believe that there will not be a waiver and that further performance by the seller is excused. See *Weneda Corp. v Dispalatro* (1964) 225 CA2d 187, 37 CR 267. But see *Pease v Brown* (1960) 186 CA2d 425, 8 CR 917.

A seller cannot generally use his or her own defective title as the basis for nonperformance of the contract. Although CC §3394 gives a buyer protection from being *required* to accept a title that is not free from "reasonable doubt," even defects in marketable title can be waived by a buyer, thereby requiring the seller to perform on the contract. See *Weneda Corp. v Dispalatro, supra*.

The buyer, however, must convey its intent to accept the seller's defective title within a reasonable time. *Weneda Corp. v Dispalatro, supra*. Properly exercising this intent to accept less than clear title, the buyer can force the seller to convey the property and receive an abatement in the purchase price. See CC §§3304-3307; *Johnson v Lehtonen* (1957) 151 CA2d 579, 312 P2d 35. Alternatively, the buyer can force the seller to use the proceeds of the purchase price to clear liens on the title, even up to time of trial. *Grant v Beronio* (1893) 97 C 496, 32 P 556; *Stevens Group Fund IV v Sobrato Dev. Co.* (1991) 1 CA4th 886, 2 CR2d 460. On covenants of title, see California Real Property Sales Transactions, chap 12 (4th ed Cal CEB 2007).

The seller cannot take advantage of a condition's nonoccurrence to excuse his or her own nonperformance when the condition is one of the seller's obligations. See *Eastwood Homes, Inc. v Hudson* (1958) 161 CA2d 532, 327 P2d 29. Only when the seller has no duty concerning the condition may its absence be relied on to excuse performance. See *Barlan v Reagan* (1963) 220 CA2d 116, 33 CR 831.

The seller cannot impede the buyer's performance in order to cause a failure of a condition and, thus, excuse the seller's own further nonperformance of the contract. *Stratton v Tejani* (1982) 139 CA3d 204, 187 CR 231 (sellers not allowed to unilaterally escalate close of escrow, knowing that buyers depended on receipt of unrelated sales commissions to perform; time-of-the-essence clause neither essential to contract nor consistent with contract provisions).

The readiness of the lender to deliver loan funds into escrow immediately on request is the equivalent of cash for purposes of measuring performance by the buyers. *Hutton v Gliksberg* (1982) 128 CA3d 240, 180 CR 141. That the buyer does not directly deposit the cash into escrow does not excuse the seller from performance. *Hunt v Mahoney*

(1947) 82 CA2d 540, 187 P2d 43.

The ability to waive an *invalid* provision in the contract may depend on who benefits from that provision. One trial court sustained a demurrer by the seller, finding that the purchase and sale agreement contained an invalid provision requiring the seller to subordinate his deed of trust to a construction loan. The trial court ruled that the buyer could not waive the provision, and thus the entire contract was unenforceable. The court of appeal reversed, holding that when a subordination provision was inserted in the contract solely for the buyer's benefit, the buyer could unconditionally waive that provision and then state a cause of action based on the contract. *Reeder v Longo* (1982) 131 CA3d 291, 182 CR 287.

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§4.59 4. Seller's Good Faith Not a Defense

The amendment of CC §3306 eliminated the former requirement that the buyer prove that the seller acted in bad faith before the buyer may be awarded the difference between the agreed price and the market value of the property. Therefore, sellers can no longer defend a breach of contract action by showing that they acted in good faith. The buyer's damages essentially are therefore limited by §3306. See §4.46. The seller's good faith is irrelevant.

Similarly, a viable tort cause of action for bad faith denial of contract is not valid unless a special relationship or other compelling circumstance is shown, such as insurance or contracts involving public policy issues. See *Freeman & Mills, Inc. v Belcher Oil Co.* (1995) 11 C4th 85, 44 CR2d 420, overruling *Seaman's Direct Buying Serv. v Standard Oil Co.* (1984) 36 C3d 752, 206 CR 354. But see Imre, *Is* Seaman's *Rising from the Ashes? The Ever-Changing Line Between Contract and Tort Remedies*, 27 CEB Civ LR 96 (June 2005).

Even before §3306 was amended, case law frowned on sellers' refusals to perform. See, *e.g., Mercer v Lemmens* (1964) 230 CA2d 167, 40 CR 803; *Kahn v Lischner* (1954) 128 CA2d 480, 275 P2d 539 (seller's property value greater than sales price).

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§4.60 5. Statute of Limitations

Like the statute of frauds, an affirmative defense of the statute of limitations will bar a complaint, but it can be waived if it is not asserted. *Minton v Cavaney* (1961) 56 C2d 576, 15 CR 641. A buyer's action for damages is generally governed by CCP §337(1), which provides for a 4-year limitation period for an action on a written contract for either damages or specific performance. *Kidd v Kidd* (1964) 61 C2d 479, 39 CR 203; *McAulliffe v Foglesong* (1961) 193 CA2d 525, 14 CR 397; *Reiner v Hermann* (1947) 79 CA2d 543, 180 P2d 385.

When an oral contract is enforceable because it has been partly performed, the statute of limitations is 2 years. CCP §339(1). The statute of limitations for fraud is 3 years after the date of discovery. CCP §338(d).

PRACTICE TIP: These different statutes of limitations should be carefully considered so that an otherwise available remedy is not lost. For example, these limits could affect a cause of action for rescission that is based on fraud or based on breach of contract. Thus, the wisest choice is to file within the earliest time period.

If the buyer has fully performed, the statute of limitations does not begin to run until the seller has made an unequivocal repudiation. If the buyer is in possession, the seller's repudiation does not start the statute running unless the seller also takes actual possession of the property. *Kidd v Kidd, supra*.

On asserting the doctrine of equitable estoppel to extend the statute of limitations, see §12.79.

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D. Special Considerations in Installment Land Contracts

§4.61 1. Prerequisites for Relief

In a typical purchase and sale agreement, the buyer receives title to the property at the time the purchase money is paid to the seller. In a typical installment land contract (also called a "land sale contract"; see *Petersen v Hartell* (1985) 40 C3d 102, 219 CR 170), however, the buyer makes a series of payments (installments) on the purchase price to the seller. On further distinctions, see §4.64.

Payment of the final amount owed under the installment land contract is a condition precedent to the buyer's right to demand and receive a conveyance of title to the property. *Glock v Howard & Wilson Colony Co.* (1898) 123 C 1, 55 P 713; *Post v Palpar, Inc.* (1960) 184 CA2d 676, 7 CR 823. Therefore, the buyer is subject to risk, during the transaction, that can and should be addressed when the contract is drafted. A buyer who can show that the seller committed fraud concerning title, or who cannot provide marketable title at the time of performance, may be able to rescind. See *Brimmer v Salisbury* (1914) 167 C 522, 140 P 30; *Post v Palpar, Inc.*, *supra*. See also chaps 1 (rescission), 3 (fraud).

PRACTICE TIP: Various requirements to give the buyer more protection can be inserted into a generic installment land contract. These measures could include (1) requiring that the contract be acknowledged so that it can be recorded; (2) requiring title insurance that both names the buyer as an insured and insures (a) the seller's title to the property, (b) the buyer's interest under the contract, and (c) exceptions to title; and (3) requiring that an executed grant deed be held by a neutral collecting agent, such as a bank or a savings and loan association, with accompanying instructions authorizing automatic delivery to the buyer on the completion of payments. This same neutral agent can be used to collect payments from the buyer, to be forwarded to the seller, after the deduction of any amounts the seller is required to pay on existing encumbrances.

Even if the buyer knows that the seller cannot perform, the buyer is not excused from making the incremental payments, because such payment is a condition precedent in the usual land sale contract. A buyer who stops payment because of a belief that the seller will not perform is generally in breach. The buyer may be excused from further payments, however, if it can be shown that the seller will be insolvent by the time of the buyer's performance or that the seller cannot possibly acquire title to convey to the buyer by the contract deadline. See *Luette v Bank of Italy Nat'l Trust & Sav. Ass'n* (9th Cir 1930) 42 F2d 9. The seller must be irrevocably in breach before the buyer can be excused.

To add greater flexibility and protection for the buyer, the installment land contract should allow for prepayment of any or all installments with the right to receipt of title on full payment. With this protection, the buyer then has the option of seeking alternative funding to pay the remaining amounts owed if the buyer begins to worry that the seller will not perform. See *Record Mach. & Tool Co. v Pageman Holding Corp.* (1954) 42 C2d 227, 266 P2d 1.

Prepayment is permitted for most residential properties sold after January 1, 1969, under an installment land contract, although the contract may prohibit prepayment for up to 12 months. CC §2985.6. Contracts predating the enactment of §2985.6 seldom permitted the buyer to precipitate a default by the seller by making prepayments not permitted under the original agreement. Compare *Smith v Hill* (1965) 237 CA2d 374, 394, 47 CR 49, with *Luette v Bank of Italy Nat'l Trust & Sav. Ass'n, supra*. Before the enactment of CC §§2985-2985.4, a buyer had little effective recourse, such as redeeming the property from foreclosure when the seller failed to pay the mortgage. See *Lloyd v Locke-Paddon Land Co.* (1935) 5 CA2d 211, 42 P2d 367.

Attention to detail in drafting the contract can help protect a buyer from a seller's default on an existing encumbrance. The situation is analogous to a "wraparound" deed of trust in which a clause in the contract can allow the buyer to make one consolidated payment to the seller or a collection agent. The collection agent should be specifically authorized to pay any existing encumbrances and then to distribute any remaining proceeds to the seller. To encourage payment of encumbrances, CC §2985.3 provides for criminal fines, imprisonment, or both when a seller fails to make required payments. On wraparounds, see California Real Property Sales Transactions §§9.56-9.65 (4th ed Cal CEB 2007).

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§4.62 2. Relief in Absence of Contract Provisions

In the absence of contract provisions giving greater relief, one of the buyer's remedies for the seller's breach is the right to vacate the premises and seek to recover all installments paid (with interest on each from the date of payment), plus the cost of any improvements or work done (also with interest), less a reasonable rental value. *Romero v Rainey* (1955) 138 CA2d 139, 291 P2d 38; see *Utemark v Samuel* (1953) 118 CA2d 313, 257 P2d 656.

Alternatively, even a buyer who has not made full payment can sue for specific performance demanding conveyance of title—as long as the buyer has already paid a substantial part of the purchase price and makes full payment before judgment or within a reasonable time set by the court. On specific performance, see chap 5.

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§4.63 E. Damages for a Violation of the Home Equity Sales Contract Act

All contracts for the purchase or sale of residential real property in foreclosure must contain certain notices and cancellation provisions. CC §1695. When the contract does not contain those provisions, under CC §1695.7, the court must award actual damages to the seller. *Segura v McBride* (1992) 5 CA4th 1028, 1038, 7 CR2d 436. The seller is also entitled to recover attorney fees and costs in the action. CC §1695.7. For full discussion of the Home Equity Sales Contract Act (CC §§1695-1695.17), see §§1.22, 1.59, 4.26.

The *Segura* court said that damages under CC §1695.7 are akin to damages under CC §3306. 5 CA4th at 1039. Damages under the act, however, may involve types of damages that are unrecoverable under CC §3306, such as appreciation that an equity seller loses by reason of a violation of the act. 5 CA4th at 1039. The various *types* of damages must each be measured at an "appropriate date" which is determined by isolating when the various kinds of violations of the requirements occur. 5 CA4th at 1039-1040. However, the courts should take into account that the seller was in foreclosure and whether such sellers had any "colorable chance" of avoiding a foreclosure sale in order to recover damages for lost appreciation, if that is being sought. 5 CA4th at 1037. The calculation of damages should also take into account rental offsets and other expenditures such as prepayment penalties and other costs of refinancing residential real property. *Boquilon v Beckwith* (1996) 49 CA4th 1697, 1718-1719, 57 CR2d 503.

The most controversial feature of CC §1695.7 is the prospect for an award of punitive damages, treble damages or a civil penalty in addition to actual damages. The $2500 civil penalty component is not likely to undergo rigorous challenge because of the many decisions that have upheld penalties in that monetary range. However, the punitive and treble damages components present harder questions about the validity of them. One of those questions is whether punitive or treble damages may be imposed for conduct that *appears* to be essentially contractual in nature. The corollary to this question is whether the legislature sufficiently separated the contractual nature of the "wrong" from the tort nature of the conduct involved on which to punish a "wrongdoer." On its face, CC §1695.7 is also not tethered to a CC §3294 analysis and does not require the same considerations demanded by CC §3294 (*i.e.,* fraud, malice or oppression) for the imposition of either CC §1695.7 punitive or the treble damages components. This raises the additional question of whether the punitive and treble damages components of that section represents a new breed of punitive or treble damages that is unaffected by the considerations on which CC §3294 is based. On the constitutionality of statutes allowing the imposition of punitive-types of damages see *e.g., U.S. v Bajakajian* (1998) 524 US 321, 334, 141 L Ed 2d 314, 118 S Ct 2028 (penalty violated the Excessive Fines Clause); *Simon v San Paolo U.S. Holding Co.* (2005) 35 C4th 1159, 1171-1190, 29 CR3d 379, 113 P3d 63 (punitive damages under CC §3294); *Hale v Morgan* (1978) 22 C3d 388, 397-398, 149 CR 375 ("we agree that §789.3 permits the assessment of arbitrary, excessive and unreasonable penalties and that the penalty sustained by defendant in this case exceeded constitutional limits."); *Balmoral Hotel Tenants Ass'n v Lee* (1990) 226 CA3d 686, 692, 276 CR 640 ("If we were to approve the trial court's construction of section 37.9 as providing for the mandatory trebling of damages for mental suffering, the statute would give rise to serious issues of substantive due process under *Hale* [ ].")

The act also speaks in terms of rescission and cancellation rights but does not make clear whether they are different or the same. Rescission and cancellation are distinct remedies. See §4.29. A notice of rescission must also be recorded in the county recorder's office pursuant to CC §1695.14.

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VIII. BUYER'S BREACH

§4.64 A. Purchase Agreement and Installment Land Contract Distinguished

In determining the seller's right to damages or any other relief, it is necessary to categorize or identify the type of contract that has been breached. Traditional contract remedies apply if the contract is treated as a purchase and sale agreement, which typically includes a deposit receipt. See California Real Property Sales Transactions §§6.3-6.28 (4th ed Cal CEB 2007). If the contract is treated as an installment land contract (also called a "land sale contract"; see authorities cited in *Petersen v Hartell* (1985) 40 C3d 102, 219 CR 170), the seller's remedies are closer to those of a secured creditor. Depending on the specific provisions of the particular contract, the buyer may have the same debtor protections that apply to mortgages and deeds of trust.

Although many agreements to purchase real property clearly fall into one category or the other, those that fall into the borderline area between them can be difficult to characterize. See, *e.g., Cain v Hunter* (1958) 161 CA2d 808, 327 P2d 583. On the buyer's remedies under an installment land contract, see §§4.61-4.62, 4.88-4.90. On the seller's remedies, see §§4.83-4.87.

In an installment land contract, the buyer agrees to make a series of periodic payments for the property over a period of time and, typically, the seller retains title until the purchase price is fully paid. *Roemer v Pappas* (1988) 203 CA3d 201, 249 CR 743. See generally California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 1 (4th ed Cal CEB 2009). This arrangement functions like a security device, similar to a mortgage or deed of trust, and precludes any action for past-due installments. *Venable v Harmon* (1965) 233 CA2d 297, 300, 43 CR 490.

Unlike installment land contracts, purchase and sale agreements (sometimes called "marketing contracts") contemplate transfer of title to the buyer *concurrently* with payment of the purchase price through escrow. On closing, any deferred balance of the purchase price under a marketing contract is secured by a deed of trust, mortgage, or other security device. Compounding the confusion over terminology, the Civil Code calls an installment land contract a "real property sales contract" and defines it as an agreement to convey title on satisfaction of specified conditions that do "not require conveyance of title within one year from the date of formation of the contract." CC §2985. Note that this definition could include a purchase and sale contract that does not require closing within 1 year, even though the parties have no intention that the contract function as a security device.

In distinguishing between a purchase and sale agreement and an installment land contract, the courts consider the parties' intent as shown by their conduct. *Venable v Harmon, supra*. This standard requires analysis of the facts of a particular transaction to discern the purpose of the contract.

Facts to be established hinge on the following questions:

- Who had *possession* during the contract period? If possession changes from seller to buyer, leaving the seller with only title as security, the contract looks more like a security device.
- Who will pay current and recurring *expenses* of the property? The buyer's discharge of these expenses is more consistent with an installment land contract.
- How many *payments* will the buyer have to make before receiving a deed, and how regular are the payments? When several periodic payments are to be made, and if the payments are made over a long period of time (see CC §2985), the contract looks like an installment land contract.
- Will the contract be fulfilled by conveyance of a deed without further financing or payments, or will it be replaced by a note and deed of trust? A true purchase and sale agreement is replaced at close of escrow by a deed of trust or related security instrument. An installment land contract is itself the security device and endures until the buyer has paid the number of installments that entitles the buyer to conveyance of the deed. *Roemer v Pappas, supra.* See also *Venable v Harmon, supra.*

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§4.65 B. Breach of Purchase and Sale Agreement

The buyer's basic obligation under a purchase and sale agreement is ordinarily to pay the purchase price, and breach consists of failure to pay the price when due. Many purchase agreements make the buyer's performance conditional (*e.g.,* on obtaining financing) and will excuse the buyer's performance if the condition does not occur. In *WYDA Assocs. v Merner* (1996) 42 CA4th 1702, 50 CR2d 323, the court distinguished between the ability to get a loan and actually signing a loan document. Implicit in this distinction is that the loan financing contingency would be fulfilled if the buyer was able to obtain the loan within the contract time and but failed to sign the loan contract with the intention of canceling the purchase.

If a condition fails through no fault of the buyer, nonperformance is not a breach, and the buyer is entitled to recover the deposit regardless of the language of the agreement. *Rodriguez v Barnett* (1959) 52 C2d 154, 338 P2d 907. The seller must stay alert to see that conditions do not fail solely because the buyer wants to back out. Thus, if performance is contingent on the buyer's obtaining financing, the seller could try to find the buyer a loan that matches the contract terms. *WYDA Assocs. v Merner, supra; Fry v George Elkins Co.* (1958) 162 CA2d 256, 327 P2d 905.

The seller can also claim that the buyer has waived a condition through inactivity if the buyer has the exclusive power to make a condition (such as sale of his or her own property) occur, but fails to do so. See *Consolidated World Invs., Inc. v Lido Preferred Ltd.* (1992) 9 CA4th 373, 11 CR2d 524; *Noel v Dumont Builders, Inc.* (1960) 178 CA2d 691, 3 CR 220.

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1. Seller's Remedies

§4.66 a. First Steps After Breach

When a buyer fails to perform when required, or gives irrevocable notice that he or she will not or cannot perform, the seller may sue for rescission (see chap 1), specific performance (see chap 5) or damages (see §§4.74-4.80). Although not without risk, a seller who *effectively* rescinds the contract is free to sell the property to a new buyer, while sellers seeking specific performance must retain title to the property until the end of the lawsuit, because they may have to convey title to the buyers.

Sellers claiming monetary damages should base their decision about resale on the real estate market, because a breach in an appreciating market evidences no price damage; only incidental consequential damages are recoverable, with interest. CC §3307. See §4.74. Resale during a market downtrend might have the same effect, because price differential is based on the price difference at the time of the breach, not at a resale; thus, the timing of the resale is crucial.

Lurking beside these decisions is the aggrieved party's obligation to take reasonable steps to mitigate damages. See *Spurgeon v Drumheller* (1985) 174 CA3d 659, 220 CR 195. Whichever remedy is selected, the sellers should elect the type of potential damages as soon as possible to prevent an inadvertent and potentially irrevocable election of remedies.

To successfully place a buyer in default, sellers must be able to demonstrate that they are able to perform. *Weneda Corp. v Dispalatro* (1964) 225 CA2d 187, 37 CR 267. Sellers must tender performance and demand strict performance (timely payment) from the buyer. See *Baird v Barton* (1958) 163 CA2d 502, 329 P2d 492. Unless the breach consists of repudiation, a tender and a demand for performance seem to be necessary, regardless of the remedy chosen. *McKinley v Lagae* (1962) 207 CA2d 284, 24 CR 454. Also, any conditions benefiting the seller must be waived. See *Tibbets v Robb* (1958) 158 CA2d 330, 340, 322 P2d 585.

After the buyer's failure to complete performance on time and the seller's notice that no delay will be tolerated, the buyer may still attempt to perform at a later date. Furthermore, the buyer may sue for specific performance and record a lis pendens, perhaps successfully contending that the seller was not entitled to enforce strict time limits for performance. See *Nash v Superior Court* (1978) 86 CA3d 690, 696, 150 CR 394, disapproved on other grounds in *Malcolm v Superior Court* (1981) 29 C3d 518, 528, 174 CR 694; *Katemis v Westerlind* (1953) 120 CA2d 537, 261 P2d 553, appeal after new trial (1956) 142 CA2d 799, 299 P2d 383.

PRACTICE TIP: Unless the seller has irrevocably chosen rescission, he or she should consider accepting belated performance because the buyer's late attempt to perform may seriously diminish the seller's damages, and a lis pendens would seriously delay a resale.

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Source: Real Property/California Real Property Remedies and Damages/4 Damages for Breach of Seller-Buyer Contracts/ b. Disposition of Deposit/§4.67 (1) Defining or Liquidating Damages

b. Disposition of Deposit

§4.67 (1) Defining or Liquidating Damages

Some contractual clauses *define* how damages may be determined, as in the case of a liquidated damages clause. Some contractual clauses *affect* how damages are determined in various degrees, such as what the price for property is or how it is to be determined. The bulk of contractual provisions, however, are for purposes other than defining a party's damages. Contract law "fills this gap" in the mini-universes formed by the parties and generally provides that contract damages are measured by CC §§3306 and 3307, which govern the measure of damages for actions involving the sale and purchase of real property. The code sections contain different measurements depending on whether the plaintiff is the seller or the buyer, but both contain provision for consequential damages. Whether a buyer or seller is entitled to an award of damages under either statute may depend on whether a contract is valid, enforceable and also upon whether formation, interpretation and defense rules apply. Whether consequential damages are recoverable usually depends on the provisions of the contract itself and, therefore, formation, interpretation and defense principles also govern the outcome of such awards.

PRACTICE NOTE: The ability to formulate limitations upon the damages at the formation stages of a contract that a buyer or seller may be entitled to recover is as important a matter to consider as any other contractual provision. "The parties to a contract may agree in advance to liquidate their damages—to provide ahead of time that a certain sum of money is conclusively presumed to represent the amount of damage that will be caused by a specified breach of the contract." *Utility Consumers' Action Network, Inc. v AT&T Broadband of S. Cal., Inc*. (2006) 135 CA4th 1023, 1028, 1039, 37 CR3d 827. The use of limitation provisions in a first draft of a proposed agreement may also force the other party to reveal that party's plans or expectations in the event of default or the failure of some condition and, thereby, discourage litigation should the initiating party insist upon damage limitations being imposed.

Parties to a contract may agree in advance to liquidate their damages, which means that they simply agree ahead of damages actually arising what the amount should be. *Utility Consumers' Action Network, Inc. v AT&T Broadband of S. Cal., Inc*. (2006) 135 CA4th 1023, 1028, 37 CR3d 827. Many real property contracts contain liquidated damages clauses. There are, essentially, two types of such clauses. One type generally follows the provisions in CC §§1675-1681 (which are applicable to the sale of residential real property) and typically limits damages to 3 percent of the purchase price. See *Allen v Smith* (2002) 94 CA4th 1270, 1278, 114 CR2d 898 (3 percent upheld as a valid liquidated damages clause). The other type generally includes provisions that utilize a different type of limitation, such as by exclusion. These type of clauses may be governed by CC §1671. In this latter type of provision, some contracts exclude or otherwise limit consequential, or special damages as they are sometimes called, such as by excluding or limiting types of damages like alleged lost profits.

Except for liquidated damages that are established pursuant to CC §1675 for the purchase and sale of residential real property, clauses liquidating damages must (1) be separately signed or initialed (CC §1677(a)), (2) be in 10-point bold type or in contrasting red print in at least 8-point bold type (CC §1677(b)), and (3) pass a test that was initially judicially crafted and subsequently codified in §1671(b) that the amount selected must represent a reasonable endeavor by the parties to estimate fair compensation for the loss sustained. CC §1676; *Consumers' Action* at 1029. If a clause violates one of these elements, it is treated as a penalty and void. CC §1671(d); See *Howard v Babcock* (1993) 6 C4th 409, 425, 25 CR2d 80.

PRACTICE NOTE: If a liquidated damages clause is included in a settlement agreement in connection with the resolution of a lawsuit, it must still conform to the rules applicable to liquidated damages. *Timney v Lin* (2003) 106 CA4th 1121, 1126, 131 CR2d 387.

A seller who wants to retain the buyer's entire deposit should insist on including, in the purchase and sale agreement, a liquidated damages provision that complies with CC §§1675-1681. Depending on the amount of the

deposit, the seller may be able to obtain a larger recovery by leaving the damages remedy open in the purchase and sale agreement. See California Real Property Sales Transactions §§4.141-4.143 (4th ed Cal CEB 2007). Without a liquidated damages clause, the seller may be unable to retain all, or even a part, of the deposit when the sale is not completed. The standards for recovery vary between residential and commercial transactions. See §§4.68-4.73.

Special liquidated damages provisions apply in the event that the transaction involves newly constructed condominiums that meet the criteria specified in CC §1675(f).

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(2) No Liquidated Damages Clause

§4.68 (a) Failure of Condition

Buyers are entitled to a return of their entire deposit if the contract cannot be performed because of a failure of a condition. Usually, the buyers' deposit is part of the consideration for performance of the purchase and sale contract, so that when a failure of a condition excuses performance, the buyer is entitled to a return of the deposit. *Rodriguez v Barnett* (1959) 52 C2d 154, 161, 338 P2d 907. But if the deposit is actually a separate consideration paid for an option to purchase, the seller may retain the deposit. See 52 C3d at 160. See also *Caplan v Schroeder* (1961) 56 C2d 515, 519, 15 CR 145 (awarded return of deposit, found not to be separate consideration, to "willfully" defaulting buyer). See also California Real Property Sales Transactions, chap 8 (4th ed Cal CEB 2007).

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§4.69 (b) Buyer's Breach

Without the benefit of a valid liquidated damages clause, the seller may retain the deposit only to the extent that actual damages were incurred according to CC §3307. A deposit, however, can serve as a fund from which the seller obtains whole or partial reimbursement for actual losses. See *Beason v Griff* (1954) 127 CA2d 382, 274 P2d 47.

The seller must refund the excess over actual damages to the buyer, regardless of whether the breach was innocent or willful. *Freedman v The Rector* (1951) 37 C2d 16, 230 P2d 629. This is true whether the buyer paid the deposit directly to the seller or into an escrow account. See *Caplan v Schroeder* (1961) 56 C2d 515, 15 CR 145. The deposit gives the seller the practical advantage of shifting the burden to the buyer to show that the seller's retention of the deposit constitutes unjust enrichment. *Baffa v Johnson* (1950) 35 C2d 36, 216 P2d 13. See *Kuish v Smith* (2010) 181 CA4th 1419, 1429, 105 CR3d 475 (citing rulings in *Freedman* and *Baffa*). However, *Freedman* and *Baffa* did not consider the effects of §3307 on a seller's assertion of a right to retain a deposit described as nonrefundable. Although some principles are the same for both, unjust enrichment claims (like those in *Freedman* and *Kuish*) and claims for damages based on breach of contract are animated by different principles.

In *Kuish*, the court held that a contract provision that described the deposit as nonrefundable was unenforceable in the context of a rising market. It explained that construing the term "nonrefundable" to entitle the defendants to the entire deposit "without regard to actual damages would essentially create a liquidated damages provision." 181 CA4th at 1429. The court in *Kuish* appears to have treated the question of how a nonrefundable provision is judicially evaluated more in the nature of a damages issue than an unjust enrichment issue.

In *Kuish*, the evidence showed that the seller subsequently sold the property for more than the contract price. In situations in which the seller does not complete a subsequent sale, it is uncertain which party has the burden of proof on whether a deposit is unenforceable. It appears that a seller has the burden of proof to establish evidence of damages incurred by reason of a declining market if the seller asserts a right to retain a nonrefundable deposit. As *Kuish* explained, the buyer's deposit would have been forfeited in a falling market to the extent that the seller is able to show damages under §3307. 181 CA4th at 1428. Absent such evidence, a court may determine that a nonrefundable deposit is actually refundable as a matter of law because the interpretation of the nonrefundable term in the contract is a question of law.

The presence of an enforceable liquidated damages clause that complies with statutory requirements in CC §1677 may support a seller's retention of a deposit (classified as nonrefundable), depending on whether the property is residential or not (see CC §1675), and may allocate the burden of proof to the buyer to establish that the liquidated damages provision is unenforceable. See CC §1671(b). In *Kuish*, there was no liquidated damages clause, and the nonrefundable deposit provision was not separately signed or initialed, as required by CC §1677(a). 181 CA4th at 1429.

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(3) Liquidated Damages

§4.70 (a) Agreements Executed Before July 1, 1978

In the past, sellers had difficulty enforcing liquidated damages clauses in real property purchase agreements because they had to establish the validity of the clause. Before CC §1671 was amended, the party seeking to enforce such a clause had to prove (1) that there was an agreement between the parties, (2) that it was impracticable or extremely difficult to fix actual damages, and (3) that there was a reasonable endeavor to agree on an amount bearing a reasonable relationship to actual damages. See, *e.g., Barbera v Sokol* (1980) 101 CA3d 725, 161 CR 843. The conclusionary recital of these elements in a contract was insufficient evidence of their validity. *United Sav. & Loan Ass'n v Reeder Dev. Corp.* (1976) 57 CA3d 282, 129 CR 113; *Cook v King Manor & Convalescent Hosp.* (1974) 40 CA3d 782, 115 CR 471.

For an interesting case upholding a liquidated damages clause that provided for $20,000 in damages if the buyer resold to a particular person, see *Zlotoff v Tucker* (1984) 154 CA3d 988, 201 CR 692.

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§4.71 (b) Agreements Executed on or After July 1, 1978

Effective July 1, 1978, the legislature added CC §§1675-1681, which specifically govern the validity of liquidated damage provisions in real property purchase and sale agreements, but do not apply to installment land contracts as defined in CC §2985. Sections 1675-1681 apply only to liquidated damages clauses when the *buyer* defaults on a real property purchase agreement. CC §1679. If the *seller* defaults, CC §1671, which governs general contract liquidated damages, applies. Also effective July 1, 1978, the legislature amended §1671. (For an overview of the amendment to §1671, see *Ridgley v Topa Thrift & Loan Ass'n* (1998) 17 C4th 970, 73 CR2d 378.)

Whether the purchase agreement is for residential or nonresidential property, the liquidated damages clause must be separately signed or initialed by each party, and if the clause is in a printed agreement it must be set out in 10-point bold type or contrasting red 8-point bold type. CC §1677. An uninitialed liquidated damages clause is a valid limitation on the *buyer's* liability if the buyer defaults. Failure to comply with §1677 makes the clause voidable at the option of the buyer *only*, because the legislature intended the initialing requirement to protect the buyer, not the seller. See CC §1679.

Civil Code §§1675-1681 do not affect any party's right to obtain specific performance of a purchase and sale agreement. CC §1680.

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§4.72 (i) Residential Real Property

In addition to the formal requirements of CC §1677 (see §4.71), CC §1675 provides additional protections for a buyer under a purchase agreement for residential property, which is defined to include dwellings of no more than four residential units, at least one of which the buyer intends, when the agreement is executed, to occupy as his or her residence. CC §1675(a). To be valid, the liquidated damages clause must meet the following tests: (1) the payment to be kept by the seller as liquidated damages must actually have been made in cash or by check (including postdated check), and (2) the amount paid must not exceed 3 percent of the purchase price unless the seller can establish that the amount was reasonable as liquidated damages. CC §1675(b)-(d).

To recover a deposit that exceeds 3 percent, the burden is on the seller to prove that the amount was reasonable; if the seller fails to do so, the entire clause is invalid, and the seller cannot keep as liquidated damages even that part of the payment that does not exceed 3 percent. CC §1675(d). See *Timney v Lin* (2003) 106 CA4th 1121, 1130, 131 CR2d 387. If the deposit is less than 3 percent, the buyer can still invalidate the clause by showing that the amount was unreasonable (CC §1675(c)), but in this situation the burden is on the buyer.

The reasonableness of the amount actually paid as liquidated damages is to be determined by the circumstances at the time the agreement was executed and the price and other terms and circumstances of any subsequent sale or sale agreement that is made within 6 months after the buyer defaults. CC §1675(e). See *Timney,* 106 CA4th at 1128 (legal effect of forfeiture clause in settlement agreement was to allow penalty against potential buyers for lateness even though sellers were unable to show they were damaged in any way).

When the agreement calls for the buyer to make more than one payment that will constitute liquidated damages, the seller may validly retain any amount beyond the first payment as liquidated damages if the total of all such payments meets the 3 percent requirement of CC §1675 and a separate liquidated damages provision meeting the requirements of CC §1677 is separately signed or initialed by each party for each subsequent payment. CC §1678.

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§4.73 (ii) Nonresidential Real Property

In addition to the formal requirements of CC §1677 (see §4.71), CC §1676 provides that, in agreements for the purchase and sale of real property other than residential property, liquidated damages clauses are governed by CC §1671(b). *Guthman v Moss* (1984) 150 CA3d 501, 198 CR 54. If the liquidated damages clause meets the formal requirements of CC §1677, it is valid unless the party seeking to invalidate it establishes that it was unreasonable under the circumstances at the time the agreement was made. The amount of damages actually incurred by the party seeking to enforce the liquidated damages clause is irrelevant. *Guthman v Moss, supra*.

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c. Seller's Damages

§4.74 (1) General Damages Under CC §3307

Damages recoverable by the seller for the buyer's breach of a real property purchase agreement are governed by CC §3307, which allows the seller to recover "the excess, if any, of the amount that would have been due to the seller under the contract over the value of the property to him or her, consequential damages according to proof, and interest." Considerations of good or bad faith are not required. The seller's main measure of damages is essentially the difference between the contract price and the property's value at the time of breach. See CC §3307; *Kuish v Smith* (2010) 181 CA4th 1419, 1426, 105 CR3d 475.

Whether the default is willful or innocent *may* still have some significance, however, under CC §3275 (relief from forfeitures) and CC §3369 (penalties and forfeitures). For example, *Petersen v Hartell* (1985) 40 C3d 102, 219 CR 170, held that there is an absolute right to redeem with an installment land contract, *regardless* of the fact that the purchaser had willfully defaulted on the payments.

PRACTICE TIP: The seller's primary problem is to prove that the property's value decreased significantly from the contract date to the date of the breach. Under CC §3307, if the property's value either increases or remains constant, damages are not recoverable—other than recovery for consequential damages and interest. See §4.75.

The seller has a duty to mitigate damages. As a matter of law, sellers did not fulfill their duty to mitigate damages when the property increased in value by the time of trial to a value exceeding the contract price plus sellers' actual expenses, and the sellers' decision to take the property off the market was solely in the control and for the sellers' benefit and for reasons unrelated to the marketability of the property. *Spurgeon v Drumheller* (1985) 174 CA3d 659, 665, 220 CR 195.

Sellers may recover damages from defaulting buyers who breach purchase agreements in partition matters under CCP §873.760 (former CCP §785), which includes recovery of the loss caused by the resale. See *Kerrigan v Maloof* (1950) 98 CA2d 605, 221 P2d 153 (directions to court on remand).

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§4.75 (2) Effect of Market

During a period of rising property values, when a seller seeks damages from a defaulting buyer, if the property has increased in value before trial and the seller resells the property at a price equal to or higher than the value of the contract, there are no longer any loss-of-bargain damages. See *Kuish v Smith* (2010) 181 CA4th 1419, 1426, 105 CR3d 475. Nor are any loss-of-bargain damages available to the seller when the value at the time of trial equals or exceeds the value of the contract and the seller has chosen not to mitigate damages by reselling the property. See CC §3307; *Spurgeon v Drumheller* (1985) 174 CA3d 659, 220 CR 195.

In a declining market, the longer the time between execution of the contract and breach, the greater will be the buyer's liability. See *Bouchard v Orange* (1960) 177 CA2d 521, 2 CR 388. Once the breach occurs, however, the buyer's liability is fixed by the market value as of that date and cannot be increased. Thus, if it takes the seller a considerable time to resell, and the resale is at a substantial loss because of the continued downward trend of prices, the seller cannot recover any increment of this downward trend beyond the date of the breach. *Royer v Carter* (1951) 37 C2d 544, 233 P2d 539.

If the market is stable, the market value on the date of breach will probably be the same as the contract price, and the seller will be unable to recover loss-of-benefit damages (see *Fleischer v Cosgrove* (1956) 145 CA2d 14, 301 P2d 911), although consequential damages and interest would still be available under CC §3307.

Practically, in a rising market, if it is clear that the buyers do not want the property, the seller's best course of action is to simply remarket the property and proceed with an advantageous resale. Consequential damages to the seller are often minimal, and some of the expenditures incurred in the failed transaction are such that they would have been incurred in the second transaction as well. *Royer v Carter, supra*; *Kuish v Smith* (2010) 181 CA4th 1419, 1426 n3, 105 CR3d 475.

PRACTICE TIP: If personal negotiation is not successful, the choice of a resolution forum is influenced by the out-of-pocket expenses incurred, the amount of the deposit, and the existence of a liquidated damages clause.

Mediation is both highly effective and widely used to resolve real estate disputes. Almost all form purchase and sale contracts have a clause requiring mediation before litigation, excluding small claims court. Mediation costs are minimal compared to the anger, hard feelings, and heightened emotions that can result when the seller and the buyer cannot expeditiously resolve their failed transaction.

Small claims court is an effective forum for speedy resolution of claims with a low monetary value. Although the parties are not allowed to have attorneys appear on their behalf, they should take the time to seek counsel before the hearing for assistance to ensure clarity and organization at their court presentation.

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§4.76 (3) Discounting Price to Cash Equivalent

In assessing damages under CC §3307, the value of the property should be estimated on a cash basis. The contract price in a credit sale must be discounted to reflect its cash equivalent. Thus, when the seller takes back a note and deed of trust, the contract price is discounted on the basis of various factors such as the value of the real property securing the note, the amount of senior encumbrances, the provisions of the note, the risk of economic changes during the term of the note, the risk and expense of foreclosure, and the risk of changing interest rates. This discounting in a credit sale could eliminate any excess of the purchase price over the value of the property to the seller at the date of breach. *Abrams v Motter* (1970) 3 CA3d 828, 83 CR 855.

PRACTICE TIP: The discount rate, the factors to consider, and the method of calculation are generally proved by expert witness testimony. Most counsel engage a real estate appraiser or an economist experienced in real estate valuation for this purpose. Counsel should make sure that the expert's experience is in valuating the same type of real property as that at issue (*e.g.,* residential, restaurant, golf course, unimproved rural acreage).

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§4.77 (4) Proof of Damages

Although they are usually not experts, sellers may testify about their opinion of the property's market value, if they still own the property. Evid C §813; *Fleischer v Cosgrove* (1956) 145 CA2d 14, 301 P2d 911. If not an owner, either party might also qualify to testify when the former seller or the inchoate buyer is a party in an action "to determine the ownership of the property between the parties if the court determines that it would not be in the interest of efficient administration of justice to determine the issue of ownership" before admitting into evidence the opinion of the party. Evid C §813(c)(2). Conspicuously absent from §813(c)(2) is any mention of a "prior owner." A prior owner or prospective purchaser may also qualify under the general nonexpert definition as one whose opinions are rationally based on the perception of the witness and are helpful to a clear understanding of his or her testimony. See Evid C §800. See also *Marriage of Stoll* (1998) 63 CA4th 837, 74 CR2d 506, cited in §3.46.

The seller should do more than just guess at the property's value; otherwise, no finding can be based on this testimony. *Newhart v Pierce* (1967) 254 CA2d 783, 62 CR 553. Expert testimony should be elicited from either a broker or an appraiser. *Newhart v Pierce, supra.* For additional discussion of proving market value, see chap 3.

Opinions of value at the date of breach may be based on subsequent events. The resale price is relevant evidence, but adjustments must be made for subsequent changes in market conditions (*Royer v Carter* (1951) 37 C2d 544, 233 P2d 539; *Bouchard v Orange* (1960) 177 CA2d 521, 2 CR 388) and for subsequent improvements added by the seller (*Mathews v MacArthur* (1953) 119 CA2d 196, 258 P2d 1068). The trial court may ignore the resale price if it is an inappropriate indicator of value under the circumstances. *Fleischer v Cosgrove, supra; Major-Blakeney Corp. v Jenkins* (1953) 121 CA2d 325, 263 P2d 655. If no resale has occurred, the seller may testify about the highest offer received in order to corroborate his or her opinion of value. *Bouchard v Orange, supra*.

PRACTICE TIP: The seller always faces the problem of explaining the difference between price sought or paid and the market value being claimed, especially if the breach occurred soon after execution of the contract, when there was little appreciable change in the market. On the correct facts, one possible way to address this is through experts who can testify about the chilling effects of a buyer's breach on the resale market after property has had its initial exposure. *Abrams v Motter* (1970) 3 CA3d 828, 83 CR 855; *Bouchard v Orange, supra*. As a practical matter, though, when the market is active, it is hard to argue a chilling effect, especially if the property sold fairly quickly the first time.

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(5) Special Damages

§4.78 (a) Resale Expenses

In addition to general damages under CC §3307 (see §4.74), the seller may recover expenses incurred in reselling the property after the original sale fails. *Royer v Carter* (1951) 37 C2d 544, 233 P2d 539. When the property's market value increases or remains constant (see §4.75), resale expenses may be the only damages the seller can recover. *Allen v Enomoto* (1964) 228 CA2d 798, 39 CR 815. If no second sale occurs, a court might conclude that the wasted expenses are roughly equivalent to the expenses of a hypothetical second sale and award that amount to the seller as damages. See *Royer v Carter, supra*.

In one case, the property sold at less than market value because of a lis pendens against the property, which the defaulting buyer agreed to clear. Although the sellers later resold the property at a higher price, they were permitted to recover additional attorney fees incurred because of the lis pendens, property taxes paid after the date of breach, and interest on amounts due but not paid by the buyers. *Yackey v Pacifica Dev. Co.* (1979) 99 CA3d 776, 160 CR 430.

The effect of rising property values on the calculation of damages was considered in *Askari v R & R Land Co.* (1986) 179 CA3d 1101, 225 CR 285, when an escrow failed because the parties refused to execute matching escrow instructions. The appellate court remanded and, citing *Yackey,* emphasized that the damages should put the seller in the same position as if the buyer completed the transaction. The trial court was directed to make findings concerning the seller's expenses from the date of the breach to the date of the judgment, including lost interest and operating costs. Further, the appellate court agreed that, if the property's value had appreciated between the breach and the trial, the buyer was entitled to offset that appreciation against the seller's consequential damages.

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Source: Real Property/California Real Property Remedies and Damages/4 Damages for Breach of Seller-Buyer Contracts/§4.79 (b) Broker's Commission

§4.79 (b) Broker's Commission

The seller may incur out-of-pocket expenses for a broker's commission on both the failed sale and a subsequent sale held to mitigate damages. In most residential purchase and sales, the seller is generally responsible for paying the broker's commission. See *Chan v Tsang* (1991) 1 CA4th 1578, 1583, 3 CR2d 14. If the seller is liable to the broker for a commission without completing the sale, the seller might be able to recover that expense from a defaulting buyer. *Caplan v Schroeder* (1961) 56 C2d 515, 15 CR 145. Occasionally, the broker may recover directly from the defaulting buyer. *Chan v Tsang, supra*. A broker may not recover a commission on a partition sale that is not consummated. *Sullivan v Dorsa* (2005) 128 CA4th 947, 27 CR3d 547. See chap 8.

The statute of frauds requires a written contract for any agreement authorizing or employing an agent, a broker, or anyone else to purchase or sell real estate. CC §1624(a)(4). Without such a writing, a licensed broker cannot recover a commission, even on a theory of promissory estoppel or quantum meruit. *Phillippe v Shapell Indus., Inc.* (1987) 43 C3d 1247, 241 CR 22.

PRACTICE TIP: Counsel might review the listing agreement, the purchase and sale contract, and any addendums to determine the seller's potential liability when the buyer cannot or does not complete the sale. A validly executed liquidated damages clause can provide the measure of recovery by the realtor. Also, a separate agreement between the buyer and any broker or agent might exist. See, *e.g., Chan v Tsang, supra*. These documents will also show whether the broker's commission is payable on execution of the contract, close of escrow, the recordation of the deed, or some other event.

Because the broker's rights typically depend on the language in the listing agreement or in the purchase and sale agreement, if the commission is earned when the broker produces a ready, willing, and able buyer, the seller could be liable for two commissions—one on the failed sale to the defaulting first buyer and one on the resale. For a case considering the risk that a seller might owe two commissions, see *Metzenbaum v R.O.S. Assocs.* (1986) 188 CA3d 202, 232 CR 741 (in dictum indicated that client could be liable to mortgage broker after violating exclusive loan brokerage agreement if broker proves he procured a loan acceptable to client during period of exclusivity). A prudent seller can avoid this problem by conditioning the commission on consummation of the transaction. See California Real Property Sales Transactions §§2.108, 2.110 (4th ed Cal CEB 2007).

Brokers have been allowed to collect their commission from sellers or buyers who have allowed the transaction involving the broker to fail in order to negotiate a subsequent deal eliminating the broker's commission. *Torelli v J. P. Enters., Inc.* (1997) 52 CA4th 1250, 61 CR2d 76 (seller breaches implied covenant of good faith by allowing signed counteroffer to expire, only to enter into subsequent contract with same buyer); *R. J. Kuhl Corp. v Sullivan* (1993) 13 CA4th 1589, 17 CR2d 425 (client traded his position as buyer for option on half of property and right to indemnification for half of broker's commission.); *Buckaloo v Johnson* (1975) 14 C3d 815, 122 CR 745, disapproved on other grounds in *Della Penna v Toyota Mtr. Sales* (1995) 11 C4th 376 at 393, 45 CR2d 436. Both *Buckaloo* and *Della Penna* were further refined and harmonized in *Korea Supply Co. v Lockheed Martin Corp*. (2003) 29 C4th 1134, 1153, 131 CR2d 29, in which the supreme court reaffirmed that "a plaintiff must plead and prove that the defendant's acts are wrongful apart from the interference itself." A seller who is required to pay a broker's commission because of the buyer's breach can recover that payment and is entitled to keep the benefit of any savings made by reselling without a broker's assistance. *Caplan v Schroeder, supra*. But if the seller and the buyer acted in concert to breach the sale and avoid payment of the commission, the seller's ultimate liability to the broker for the commission would not likely be recoverable from the buyer. Commission disputes are discussed further in Real Property Sales, chap 2.

If the property is not resold, the seller is entitled to a broker's commission based on a hypothetical resale at the market price at the time of breach, but from this must be subtracted anything the seller saved by paying less than the full commission on the original sale. *Royer v Carter* (1951) 37 C2d 544, 233 P2d 539. This result was confirmed in *Barton v White Oak Realty, Inc.* (1969) 271 CA2d 579, 76 CR 587.

If the buyer and the seller have initialed the liquidated damages provision in the sale agreement, the broker may be

entitled to a specified amount under that provision. These provisions generally allow recovery to the broker for half of what the seller recovers from a defaulting buyer, and a full commission from the seller if the seller defaults. However, such a liquidated damages clause does not prohibit the broker from seeking independent recovery from the buyer directly, as long as the broker had a preexisting relationship with the buyer and was retained by the buyer. *Chan v Tsang* (1991) 1 CA4th 1578, 1583, 3 CR2d 14.

On the broker's right to a portion of the deposit on the buyer's default, see Real Property Sales §2.119.

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§4.80 (c) Other Expenses

Courts have permitted sellers to recover some other categories of expenses. For example, in *Yackey v Pacifica Dev. Co.* (1979) 99 CA3d 776, 160 CR 430, a lis pendens created additional damages by preventing resale. In *McKinley v Lagae* (1962) 207 CA2d 284, 24 CR 454, the seller who evicted a tenant because of the sale agreement was entitled after the breach to recover the lost rental value until the resale date. Other courts have permitted recovery of various operating expenses after the breach, such as (1) penalty interest paid on a note on a new residence (*Angell v Rowlands* (1978) 85 CA3d 536, 149 CR 574); (2) the cost of the commute between the old and new residences (*Jensen v Dalton* (1970) 9 CA3d 654, 88 CR 426); and (3) fire insurance, mortgage payments, and property taxes (*Allen v Enomoto* (1964) 228 CA2d 798, 39 CR 815).

In light of the obligation to mitigate damages, it is not surprising that recovery is allowed only for operating expenses when the seller resells with reasonable diligence (*Sutter v Madrin* (1969) 269 CA2d 161, 74 CR 627) and only in connection with a resale—not continued use of the property (*Abrams v Motter* (1970) 3 CA3d 828, 83 CR 855).

One appellate court reversed an award for taxes when the parties failed to consider adverse tax consequences when forming or even modifying the contract, and the buyer's default was not in fact the cause of the seller's tax liability. *Nielsen v Farrington* (1990) 223 CA3d 1582, 273 CR 312. The *Nielsen* court cited *Walker v Signal Cos.* (1978) 84 CA3d 982, 993, 149 CR 119, for the rule that special damages are generally not recoverable without special circumstances that were known or should have been known to the defaulting party at the time the contract was entered into.

EXAMPLE: A buyer, a seller, or both can be involved in a 26 USC §1031 tax-deferred exchange, commonly called a "1031 exchange," which is both property and time specific. Failure to meet the requirements for this complex and detailed transfer will result in the loss of the tax-deferral benefits. The purchase and sale contract should specifically recite that the sale is intended to be a §1031 exchange and that the other party will cooperate with the exchange and should reiterate that "time is of the essence," to alert the other party to the importance of timely performance of the transaction in all respects, and to protect the potential right to recover lost tax benefits in the event of a default.

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2. Buyer's Defenses and Offsets

§4.81 a. Antideficiency Bar

When a seller of real property finances the sale by carrying back a note and deed of trust secured by the property, the buyer who defaults on payment may raise the antideficiency bar of CCP §580b, which limits the seller's recovery solely to the property. See California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 5 (4th ed Cal CEB 2009). The form of the transaction is crucial to a buyer's ability to use the antideficiency bar as a defense, because it is also available to a buyer who defaults on an installment land contract. See §§4.84-4.85.

A buyer's waiver of the antideficiency protection is not possible in ordinary purchase money secured land transactions. *DeBerard Props. v Lim* (1999) 20 C4th 659, 85 CR2d 292. See also *Thompson v Allert* (1991) 233 CA3d 1462, 285 CR 367; *Palm v Schilling* (1988) 199 CA3d 63, 244 CR 600. There are limited (*i.e.*, nonstandard) transactions in which the courts will imply a waiver, such as when the seller subordinates its secured interest in the property to another interest, like a construction loan deed of trust. See *DeBerard Props. v Lim, supra; Lawler v Jacobs* (2000) 83 CA4th 723, 100 CR2d 52. See also Mortgage Deed of Trust Foreclosure, chap 5.

NOTE: The economic policy considerations underlying the protections of CCP §580b do not bar a seller from recovering sums omitted from the original payoff demand statement sent to and paid by the buyers. *Ghirardo v Antonioli* (1996) 14 C4th 39, 57 CR2d 687.

A creative attempt to circumvent antideficiency protections was raised in *Birman v Loeb* (1998) 64 CA4th 502, 75 CR2d 294. In *Birman*, the buyers successfully sued the sellers for fraud, negligent misrepresentation, and nondisclosure, recovering both a large money judgment and attorney fees. The sellers, holding an unpaid purchase money secured loan, then reacquired the property in a nonjudicial foreclosure sale, leaving $2 million outstanding in unsecured debt. When the sellers sought to have this debt set off against the attorney fee award in the litigation, the court refused to allow the setoff because it violated the policies underlying §580b.

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§4.82 b. Other Defenses and Offsets

In residential transactions, delivery to a prospective buyer of the transfer disclosure statement required by CC §§1102-1102.18 (see §3.30) is a nonwaivable condition precedent to the buyer's duty to perform. Consequently, the seller's failure to deliver the disclosure statement precludes a breach of contract action against the buyer. *Realmuto v Gagnard* (2003) 110 CA4th 193, 1 CR3d 569.

If the seller proves that the buyer breached the contract, the buyer has a strong argument that a liquidated damages clause in the purchase agreement, or other writing that is signed by the buyer, limits the seller to recovery of the buyer's deposit. *Fleischer v Cosgrove* (1956) 145 CA2d 14, 301 P2d 911. If any essential element is absent, the liquidated damage clause may be invalid. However, the provisions will be interpreted liberally in favor of the buyer, especially a residential buyer. See §§4.70-4.72.

The statute of limitations in a seller's suit for damages is generally 4 years under CCP §337(1), but this affirmative defense is waived if it is not timely asserted. See §4.60. Defenses that vitiate the contract altogether (*e.g.,* statute of frauds, uncertainty, nonacceptance) are available to the buyer, just as they are to the seller. See §§4.51-4.60.

The buyer may reduce the seller's damages (either as a defense to the seller's damage action or with an action brought to recover the deposit) by showing unjust enrichment to the seller, *i.e.,* that the amounts received or claimed by the seller exceed actual damages. Although this defense is available even if the buyer's breach is willful (*Freedman v The Rector* (1951) 37 C2d 16, 230 P2d 629), the buyer has the burden of proof on this issue (*Baffa v Johnson* (1950) 35 C2d 36, 216 P2d 13).

Decisional law is split on whether a defaulting buyer may offset damages awarded to the seller by the amount of the increased price obtained by the seller in a subsequent, rapid resale. Compare *Smith v Mady* (1983) 146 CA3d 129, 194 CR 42 (offset not permitted), with *Askari v R & R Land Co.* (1986) 179 CA3d 1101, 225 CR 285 (allowed increased value between breach and sale to offset sellers' consequential damages).

Improvements made by the buyer should be offset against any award made to the seller. See *Behrendt v Abraham* (1966) 64 C2d 182, 49 CR 292.

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C. Breach of Installment Land Contract

1. Seller's Remedies

§4.83 a. Quiet Title; Ejectment

A device formerly used by sellers to finance real property sales, but infrequently used since the mid-1960s, is the installment land contract (also called a "land sale contract"). (On the details of this transaction, see §§4.61-4.62, 4.64; California Real Property Sales Transactions, chap 9 (4th ed Cal CEB 2007)). If a buyer breaches an installment land contract, the seller may bring a quiet title action against the buyer, effectively terminating the buyer's interest in both the contract and the property. See *Petersen v Hartell* (1985) 40 C3d 102, 219 CR 170. Quiet title may be joined with ejectment, if necessary. On quieting title and ejectment, see chaps 7, 10. Unlawful detainer, however, does not lie because the unlawful detainer statutes do not authorize it. *Greene v Municipal Court* (1975) 51 CA3d 446, 124 CR 139. Self-help (eviction without court process) renders the owner liable for damages. *Jordan v Talbot* (1961) 55 C2d 597, 12 CR 488.

A decree quieting title in the seller's favor and against the buyer's interest has the same effect as a strict foreclosure against a mortgagor's or trustor's equity of redemption. (On equity of redemption, see California Mortgages, Deeds of Trust, and Foreclosure Litigation §§1.33, 2.73, 3.63 (4th ed Cal CEB 2009).) Consequently, the buyer must be given notice and an opportunity to perform before its rights are completely cut off. *Petersen v Hartell, supra,* quoting *Keller v Lewis* (1878) 53 C 113, 118. If the buyer does not redeem the property (see §4.90), the court will quiet title in favor of the seller, who must refund to the buyer any excess payments received (see §4.88) over the seller's actual damages (see §4.86). *Honey v Henry's Franchise Leasing Corp. of Am.* (1966) 64 C2d 801, 52 CR 18.

Whether the seller quiets title by judgment or by stipulation, if the seller does get the land back, it may be subject to a lien for any federal taxes owed by the buyer. The lien attaches to the buyer's right to recover the amount paid toward the purchase. See *Bensinger v Davidson* (SD Cal 1956) 147 F Supp 240.

If the installment land contract has been recorded, the seller must quiet title against the defaulting buyer even if the buyer has deserted the premises. See chap 7. Even if the installment land contract is not recorded because it contains a clause prohibiting its recordation, the clause may contravene public policy and the contract may be enforced. See *Resh v Pillsbury* (1936) 12 CA2d 226, 230, 55 P2d 264.

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§4.84 b. Judicial Sale; Power of Sale

The supreme court recognized that "foreclosure by sale" is an established remedy for the seller when a buyer defaults under an installment land contract. See *Petersen v Hartell* (1985) 40 C3d 102, 115 n5, 219 CR 170. See also *Honey v Henry's Franchise Leasing Corp. of Am.* (1966) 64 C2d 801, 52 CR 18. A judicial sale may be ordered if, *e.g.,* the seller sues for specific performance and the buyer fails to pay the contract balance as required by the judgment. In that event, the sale proceeds will be applied to the balance. *Longmaid v Coulter* (1898) 123 C 208, 55 P 791. Presumably, a seller could instead file a complaint for judicial foreclosure (see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 3 (4th ed Cal CEB 2009)), but either action would be subject to the buyer's equity of redemption (see §4.90).

A judicial sale might give the buyer possession for another year, plus the right to redeem at the sale price. CCP §§729.010-729.090. See Mortgage Deed of Trust Foreclosure, chap 3. Under CCP §729.010, however, the right of postsale redemption exists only if the judgment of foreclosure decrees that a deficiency judgment may be entered against the defendant after the sale. The applicability of the postsale redemption statutes is therefore open to question, and the foreclosing seller might argue that the redemption period should not be applied to a judicial sale, because the debt already has antideficiency protection (under CCP §580b) and needs no further protection. Like a private sale under a power of sale clause, a judicial sale places the seller in the position of being unable to collect any difference between the judicial sales price and the unpaid balance on the contract because CCP §580b bars a judgment for the difference. See §4.85.

Finally, if the seller does get the land back by purchasing it at the judicial sale, it may be subject to a lien for any federal taxes owed by the buyer. See *Bensinger v Davidson* (SD Cal 1956) 147 F Supp 240.

The possibility of enforcing a power of sale clause in an installment land contract by conducting a nonjudicial foreclosure (trustee) sale was recognized by the legislature when it amended the foreclosure law to apply its notice and reinstatement rules to installment land contracts. See CC §2920(b). See also California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 1-2 (4th ed Cal CEB 2009). A power of sale clause permits the seller to hold a private sale on the buyer's default and refund to the buyer any part of the sale proceeds that exceeds the unpaid balance of the contract price. If under a private sale the proceeds are less than the unpaid balance, however, the seller cannot collect from the buyer any damages to compensate the seller for that difference because of CCP §580b's antideficiency bar. See Mortgage Deed of Trust Foreclosure, chaps 2, 5.

Although the form promissory notes and deeds of trust that are used in most financed real property sales contain a power of sale clause and allow the lender (or financing seller) to keep all paid installments on the loan after foreclosing, the courts have not yet considered such a situation arising from installment land contracts, which became almost extinct after the mid-60s.

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c. Recovery of Damages Limited

§4.85 (1) If Seller Elects Foreclosure

The damages available to a seller for the buyer's breach of an installment land contract (as well as the procedural mechanisms for recovering damages) are limited by CCP §580b, which expressly prohibits sellers from collecting a deficiency judgment "in any event after any sale of real property for failure of the purchaser to complete his contract of sale." Section 580b prevents foreclosing sellers from recovering either past-due payments or the remaining unpaid installments on the property. *Venable v Harmon* (1965) 233 CA2d 297, 301, 43 CR 490. See §4.81. Therefore, the seller can recover its damages only by reselling the property to a third party (either under a power of sale clause or by judicial foreclosure; see §4.84).

In a foreclosure sale of the property, the seller can seek from an alternative source (*i.e.,* a new purchaser), as a minimum, the remaining contract price. Any sale proceeds exceeding the unpaid balance (and costs of sale) would go to the defaulting buyer. See California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 2-3 (4th ed Cal CEB 2009). But if the purchase price received is less than the unpaid balance, or if the seller purchases the property by a credit bid, the seller cannot obtain a judgment against the defaulting buyer for the deficiency (see CCP §580b) or any other damages except, perhaps, bad faith waste (see Mortgage Deed of Trust Foreclosure §§2.119, 5.58).

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§4.86 (2) If Seller Elects Quiet Title and Restitution

If the seller chooses to quiet title and take back the property (see §4.83), the seller gets no affirmative monetary relief. The seller's damages only reduce the amount of collected installments that the seller must restore to the buyer. See *Honey v Henry's Franchise Leasing Corp. of Am.* (1966) 64 C2d 801, 52 CR 18. In *Honey*, the court allowed the seller to quiet title on the condition that he refund the excess, if any, of the payments received over the amount necessary to give him the benefit of his bargain under CC §3307 (the difference between the contract price and the market value at the time of breach). In allowing damages under §3307, and rejecting a measure of damages that included predefault rental value, the court in *Honey* observed that the restitution made under a seller's quiet title action is not the same as restitution under a rescission, which restores both parties to their precontract positions.

PRACTICE TIP: It could be argued that the seller in this example is made whole only by receiving both items of loss—loss of bargain for decrease in market value of the property and loss of rental value for the period before the buyer defaulted. This argument was squarely rejected, however, in *Kudokas v Balkus* (1972) 26 CA3d 744, 103 CR 318.

The measure of damages under CC §3307 ignores the fact that the buyer has been given predefault rent-free possession, and the rental value measure ignores the fact that the seller will suffer lost profit if the property's market value decreases. However, even a seller who held a purchase money deed of trust and had to foreclose judicially would be in no better position, because he or she would be out of pocket for rental value for the period of litigation during which the buyer had possession of the property.

Civil Code §3307 also provides that a seller can recover consequential damages and interest. On calculating a seller's damages, including those recovered under CC §3307. See §§4.74-4.80. On past installment payments as liquidated damages, see §4.87.

A seller who takes back the property in worse condition than when it was sold can offset the cost of restoration as an additional item of loss. The seller may also offset rental value for the buyer's possession after the contract has been terminated, irrespective of whether CC §3307 or the rental value is the measure of damages. See *Bensinger v Davidson* (SD Cal 1956) 147 F Supp 240.

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§4.87 (3) Past Installment Payments as Damages

The seller's right under an installment land contract to keep installment payments received is no greater than that of the seller under a purchase and sale agreement. See §§4.64-4.69. Ordinarily, the payments the seller received under the contract are ordered refunded to the buyer in the seller's quiet title action if the buyer does not redeem the property. See §4.83. These payments are considered liquidated damages for the seller only if the contract makes retention of the payments the seller's sole monetary remedy, and the appropriate party satisfies its burden of proof under CC §1671. See §§4.70-4.73. See also CC §§1681, 2985; *Behrendt v Abraham* (1966) 64 C2d 182, 49 CR 292 (rejecting characterization of payments as rent on ground that leasing theory is incompatible with buyer's original deposit).

PRACTICE TIP: The only contract provision that might enable the seller to keep the buyer's payments without proving actual damages would be a power of sale clause like the one found in a standard deed of trust. See §4.84.

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2. Buyer's Counter-Remedies

§4.88 a. Restitution

The defaulting buyer under an installment land contract who forfeits the property in a quiet title action (see §4.83) may recover that part of the price already paid minus the seller's damages. *Honey v Henry's Franchise Leasing Corp. of Am.* (1966) 64 C2d 801, 52 CR 18. On the seller's measure of damages, see §§4.85-4.87. The buyer's right to recover the amount paid to the seller does not depend on a showing that the buyer's breach was innocent. See *Crofoot v Weger* (1952) 109 CA2d 839, 241 P2d 1017. Because a seller who sued to quiet title would have to refund this amount even to a willfully defaulting buyer, the result is the same when the buyer instead of the seller files the lawsuit. *Freedman v The Rector* (1951) 37 C2d 16, 230 P2d 629.

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§4.89 b. Reinstatement

Reinstatement is somewhat analogous to specific performance, except that the buyer seeking relief is the party in default. It is well established that, when time is not of the essence, a nonwillfully defaulting buyer may reinstate the contract despite a notice of termination by the seller. See *Cushing v Levi* (1931) 117 CA 94, 3 P2d 958. (On statutory reinstatement of a note secured by real property, see California Mortgages, Deeds of Trust, and Foreclosure Litigation §§2.51-2.61, 2.72 (4th ed Cal CEB 2009).)

The California Supreme Court extended this common-law remedy to a case in which time was of the essence, basing the result on CC §3275 (relief from forfeiture). *Barkis v Scott* (1949) 34 C2d 116, 208 P2d 367. (Note, in comparison, that another supreme court case established the absolute right of the purchaser to redeem, in a reasonable time or before judgment (see §4.90), even if the default was willful. *Petersen v Hartell* (1985) 40 C3d 102, 219 CR 170.) Finally, a defaulting buyer, who is permitted by judgment to reinstate, does not lose the right when the reinstatement itself is late because of a nonwillful default. *Newhouse v Upchurch* (1971) 22 CA3d 204, 99 CR 436.

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§4.90 c. Redemption

Whether or not the default is willful, a buyer in default on an installment land contract, who has paid a substantial part of the purchase price, has the right to redeem the property (*i.e.*, complete the purchase) by paying the entire balance plus damages before the seller is allowed to quiet title or foreclose. *Petersen v Hartell* (1985) 40 C3d 102, 219 CR 170. On equity of redemption, see California Mortgages, Deeds of Trust, and Foreclosure Litigation §§1.33, 2.73, 3.63 (4th ed Cal CEB 2009).

The buyer should exercise its right of redemption either before judgment in the seller's quiet title or foreclosure action (see §§4.83-4.84) or within the time allowed by the court. *Petersen v Hartell, supra*. If the seller does not make specific and timely objections to the buyer's tender of performance, any objections will be waived. See *Riverside Fence Co. v Novak* (1969) 273 CA2d 656, 78 CR 536 (citing CC §1501; CCP §2016). The buyer must be permitted to remedy any defect in his or her tender. See *Riverside Fence Co. v Novak, supra* (citing *Thomassen v Carr* (1967) 250 CA2d 341, 58 CR 297). On consequences of a buyer's failure to redeem the property, see §4.83.

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§4.90A D. Bid-Chilling and Breach in Foreclosure Auction Sales

In a lender's nonjudicial foreclosure conducted in the form of a trustee sale, the sale is accomplished through the auction process; the sale is final when the trustee accepts the last and highest bid. See California Mortgages, Deeds of Trust, and Foreclosure Litigation §2.79 (4th ed Cal CEB 2009). Afterward, the successful bidder must promptly deposit in cash or cashier's check the full amount of the bid with the trustee. Failure to do so renders the bidder liable for damages and, if willful, is punishable as a misdemeanor. CC §2924h(d).

It is unlawful to offer to accept or accept consideration to not bid, to fix bidding, or to restrain bidding. If an interested party is defrauded as a result of such activities, the wrongdoer can be fined, imprisoned, or both. CC §2924h(g). These remedies are not exclusive when the bidders engage in fraudulent and felonious conduct. In *California Golf, LLC v Cooper* (2008) 163 CA4th 1053, 78 CR3d 153, successful bidders used cashier's checks to bid at a trustee sale. Subsequently, the bidders submitted affidavits to the issuing bank, falsely stating that the checks had been lost (thus inducing the bank to stop payment on the checks) and then attempted to negotiate with the trustee for a reduction in the purchase price. The court held that CC §2924h did not preclude claims for fraud and for breach of warranty under other statutes and that criminal statutes might be applicable. For further discussion, see Mortgage Deed of Trust Foreclosure §2.80.

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§4.91 IX. FORM: COMPLAINT FOR DAMAGES FOR BREACH OF CONTRACT

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	**COMPLAINT FOR DAMAGES**
vs	)	**FOR BREACH OF REAL**
_ _[*Name(s)*]_ _,	)	**PROPERTY PURCHASE AND**
Defendant(s)	)	**SALE AGREEMENT**
_____	)	

Plaintiff alleges:

1. _ _[*State capacity and residence of plaintiff*]_ _**.**

2. _ _[*State identity, capacity, and residence of defendant*]_ _**.**

3. _ _[*Fictitious name allegations, if needed*]_ _**.**

4. On or about _ _[*date*]_ _**, defendant was** _ _[*e.g., the owner in fee*]_ _ **of real property located in** _ _ _ _ _ _ **County, California, commonly known as** _ _[*street address or other common designation*]_ _ **and more particularly described as** _ _[*legal description*]_ _**.**

5. On or about _ _[*date*]_ _**, in** _ _[*city*]_ _**,** _ _ _ _ _ _ **County, California, plaintiff** _ _[*name*]_ _ **and defendant** _ _[*name*]_ _ **entered into a written agreement for the purchase and sale of the real property described in Paragraph 4. A copy of the agreement, marked Exhibit** _ _ _**, is attached to and incorporated in this complaint** _ _[*or set out language of the agreement or its legal effect*]_ _**.**

6. Plaintiff has performed all _ _[*he/she*]_ _ **is required to do under the agreement described in Paragraph 5** _ _[*except* _ _ _ _ _[*describe what is unperformed and explain reason or excuse for nonperformance*]_ _]_ _**.**

7. _ _[*If the happening of an event is a condition precedent to defendant's duty to perform under the agreement, allege the happening of the event*]_ _**. On** _ _[*date*]_ _**, plaintiff requested that defendant perform** _ _[*his/her*]_ _ **obligations under the agreement.**

8. On _ _[*date*]_ _**, defendant breached the agreement by** _ _[*describe the breach*]_ _**.**

9. As a result of the breach by defendant, plaintiff has suffered _ _[*describe items of damage, including items of special damages, if any*]_ _ **and been damaged in the sum of $**_ _[*dollar amount*]_ _**.**

WHEREFORE, plaintiff prays for:

1. Compensatory damages in the sum of $_ _[*dollar amount*]_ _**, together with interest from the date of defendant's breach;**

2. Special damages in the sum of $_ _[*dollar amount*]_ _, together with interest from the date of defendant's breach;

3. Costs _ _[*if a contractual or statutory basis exists, include a request for attorney fees*]_ _; and

4. Other relief that the court considers proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Verification; see Comment*]

Copies: Original (filed with court clerk); copies for service (one for each defendant who is to be served); office copies.

Comment: On introductory allegation, see complaint forms in chaps 3, 8, 11. This attorney-drafted form complaint is optional. The Judicial Council has also adopted an optional standardized complaint form for actions for breach of contract (Judicial Council Form PLD-C-001: Complaint—Contract). See California Judicial Council Forms Manual §1A-25 (Cal CEB 1981). Judicial Council forms can be found on the Internet at the Administrative Office of the Courts' website at http://www.courtinfo.ca.gov/forms. For multitheory form complaints, including causes of action for breach of contract, see §§3.91-3.92, 4.92.

On the buyer's measure of damages, see §§4.46-4.50; on the seller's measure of damages, see §§4.74-4.80. On captions and introductory clauses, see California Civil Procedure Before Trial §§15.3-15.4 (4th ed Cal CEB 2004). On whether and how to verify a complaint, see Civ Proc Before Trial §§15.14-15.21.

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§4.92 X. FORM: MULTITHEORY COMPLAINT FOR SPECIFIC PERFORMANCE; ALTERNATIVELY FOR DAMAGES FOR BREACH OF CONTRACT, DECLARATORY RELIEF, AND JUDICIAL FORECLOSURE

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No. _ _ _ _ _ _**
Plaintiff(s)	)	**COMPLAINT FOR SPECIFIC**
	)	**PERFORMANCE;**
vs	)	**ALTERNATIVELY FOR**
	)	**DAMAGES FOR BREACH OF**
_ _[*Name(s)*]_ _,	)	**CONTRACT, DECLARATORY**
Defendant(s)	)	**RELIEF, AND JUDICIAL**
_____	)	**FORECLOSURE**

Plaintiff _ _[*name*]_ _ alleges:

GENERAL ALLEGATIONS

1. This action concerns an agreement for the sale of real property (Property), commonly known as _ _[*address*]_ _, located in _ _ _ _ _ County, California, and legally described as _ _[*quote exact legal description, including assessor's parcel number, or refer to exhibit with complete legal description*]_ _. At all times relevant to this action, the Property was and is improved with a(n) _ _[*residential/commercial/apartment*]_ _ building, with appurtenant improvements and fixtures.

2. Plaintiff, _ _[*e.g., an individual, a California corporation, a partnership, or an LLC*]_ _, is informed and believes and on that basis alleges ("alleges on information and belief") that at all times relevant to this action, Defendant _ _[*name*]_ _ (Owner) was and is _ _[*e.g., an individual, a California corporation, a partnership, or an LLC*]_ _ and currently holds legal title to the Property described in Paragraph 1. _ _[*Specify county of residence if defendant is an individual, or county where principal place of business is located if defendant is a business entity.*]_ _

3. Plaintiff alleges on information and belief that at all times relevant to this action:

a. Defendant _ _[*name*]_ _ (Brokerage) is and was a licensed real estate brokerage company, with its principal place of business in _ _ _ _ _ County; Brokerage is _ _[*e.g., an individual, a corporation, a partnership, an LLC*]_ _;

b. Defendant _ _[*name*]_ _ (Agent), is and was licensed by the State of California Department of Real Estate as a real estate sales agent, and in doing the acts herein alleged was an agent and employee of Defendant Brokerage.

c. Defendant Brokerage, by and through Defendant Agent, acted as the seller's real estate agent, representing Defendant Owner in connection with the marketing of the Property and, specifically, in connection with Owner's agreement to sell the Property to Plaintiff, as alleged.

d. Defendants Brokerage and Agent, and each of them, claim some right, title, or interest in or to the Property or its proceeds, including a claim for brokerage commissions in connection with the sale of the Property to Plaintiff, which interest is inferior and subordinate to the right, title, and interest of Plaintiff, or otherwise will be affected by the relief that Plaintiff seeks in this action, as alleged.

4. The true names and capacities, whether individual, corporate, associate, or otherwise, of Defendants named in this complaint as Does 1 through 30, inclusive, are unknown to Plaintiff, who therefore sues those Defendants by fictitious names. Plaintiff will amend this Complaint to show their true names and capacities when the same have been ascertained.

5. Plaintiff alleges on information and belief that each Defendant designated in this complaint under Does 1 through 10 claims some right, title, or interest in and to the Property, which interest is inferior and subordinate to the right, title, and interest of Plaintiff, or otherwise will be affected by the relief that Plaintiff seeks in this action, as alleged. These Defendants are named as Defendants solely because of their alleged interest in the Property as shown by public records, and this Complaint seeks no direct monetary relief from these Defendants, or any of them.

6. Plaintiff alleges on information and belief that each Defendant designated in this complaint under Does 11 through 30 was and is the agent, servant, employee, partner, and/or joint venturer of each remaining Defendant, acted within the course and scope of such agency, employment, partnership, and/or joint venture, and acted in concert with or accepted the benefits of the wrongful acts and omissions of, or with the permission and consent or ratification of, each remaining Defendant in doing the things alleged. Said Defendants are also responsible for some or all of the damages claimed by Plaintiff in this complaint.

7. On or about _ _[*date*]_ _, Defendant Owner entered into a purchase and sale agreement with Plaintiff, under which Plaintiff agreed to purchase from Owner, and Owner agreed to sell to Plaintiff, the Property for the sum of $_ _[*dollar amount*]_ _. The terms and provisions of that agreement are set forth in certain documents exchanged between the parties by and through their respective real estate agents, including Defendants Brokerage and Agent, and consisting of _ _[*e.g., a Purchase and Sale Agreement, executed on _ _[date]_ _; Counteroffer, executed on _ _[date]_ _; Contingency Removal, executed on _ _[date]_ _; Addendum to Contingency Removal (undated); and Clarification of Addendum to Contingency Removal, executed on _ _[date]_ _]_ _, true and correct copies of which are attached hereto collectively as Exhibit "1" and incorporated by this reference.

8. The terms and provisions of the agreement attached collectively as Exhibit "1" were expressly incorporated into written documents as follows: Escrow Instructions dated _ _[*date*]_ _, Supplemental Instructions Pertaining to Commission dated _ _[*date*]_ _, Amendment(s) to Escrow Instructions dated _ _[*date(s)*]_ _, and Addendum(s) to Escrow dated _ _[*date(s)*]_ _, with _ _[*name*]_ _ as designated escrow company. True and correct copies of these documents are attached collectively hereto as Exhibit "2" and incorporated by this reference. The documents that compose Exhibits 1 and 2 are collectively referred to throughout this complaint as "Sale Contract."

9. On or about _ _[*date*]_ _, the escrow closing date under the Sale Contract was extended by the parties to the escrow to _ _[*date*]_ _. In connection with the extension, Plaintiff loaned Defendant Owner the sum of $_ _[*dollar amount*]_ _, which was advanced to Owner out of money that Plaintiff had deposited into escrow for funding a portion of the purchase price of the Property and, upon closing, would have been applied toward the purchase price. The loan was evidenced by a Note Secured by Deed of Trust dated _ _[*date*]_ _ and secured by a fifth deed of trust against the Property, evidenced by a Deed of Trust and Assignment of Rents (Short Form), recorded on _ _[*date*]_ _, as Instrument No. _ _[*number*]_ _, in the Official Records of the Office of the Recorder of _ _ _ _ _ County, California. True and correct copies of the Note and the Deed of Trust are attached hereto collectively as Exhibit "3" and are incorporated by this reference.

10. Defendant Owner has failed and refused to perform the conditions precedent required of Owner in the Sale Contract, which must be performed to enable Plaintiff to timely satisfy certain conditions required of Plaintiff to perform and to allow the timely close of escrow and the completion of Plaintiff's purchase under the Sale Contract. Defendant Owner also has failed and refused, and continues to fail and refuse, to agree to further extend the escrow closing date to allow Plaintiff to satisfy those remaining conditions that Plaintiff has been prevented from timely satisfying because of the failure and refusal of Defendant Owner to perform its obligations. Defendant Owner has failed and refused, and continues to fail and refuse, to transfer and convey title to the Property to Plaintiff and to apply the balance owed on the loan to the purchase price in accordance

with the Sale Contract, or to repay the loan to Plaintiff. Defendant Owner has repudiated its obligations under the Sale Contract.

11. Up to the time of Owner's repudiation and breaches of the Sale Contract, as alleged, Plaintiff had duly performed all of the conditions on his part to be performed under the Sale Contract, including the deposit of funds into escrow in excess of $_ _[*dollar amount*]_ _, and Plaintiff's further performance was prevented by the failure and refusal of Defendant Owner to perform its obligations under the Sale Contract. Plaintiff was and is ready to close escrow, except for the timely performance of those conditions, which Owner's violations and breaches, as alleged, have made impossible for Plaintiff to timely perform. Plaintiff was and is ready, willing, and able to fulfill and perform all conditions and agreements required of Plaintiff under the Sale Contract, provided that Defendant Owner promptly satisfies all conditions and agreements required of Owner under the Sale Contract.

FIRST CAUSE OF ACTION
(Specific Performance; by Plaintiff _ _[*name*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 10)

12. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 11 of the General Allegations, as if fully set forth.

13. The consideration running to Defendant Owner, as seller, under the Sale Contract is fair, adequate, and reasonable, and the provisions of the Sale Contract are sufficiently certain to enforce it by this action for specific performance. Plaintiff has no adequate legal remedy to obtain conveyance of the Property under the Sale Contract, except by this action for specific performance.

14. As a result of the repudiation and breach of the Sale Contract by Defendant Owner as alleged above, Plaintiff will suffer incidental and consequential damages for which Defendant Owner and Does 11 through 30, and each of them, should be adjudged liable to Plaintiff. The precise nature and extent of such damages are presently unknown to Plaintiff and will be proved at trial, but the amount is at least $_ _[*dollar amount*]_ _.

15. The Sale Contract includes an attorney fee provision stating that in any litigation arising between the parties, the prevailing party shall be entitled to recover its costs, including reasonable attorney fees. Plaintiff has been required to engage counsel and has engaged counsel and has incurred attorney fees and costs in commencing this action and will continue to incur fees and costs in this action, the total amount of which is presently unknown, and will be subject to proof at or after trial.

SECOND CAUSE OF ACTION
(Breach of Contract; by Plaintiff _ _[*name*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 10)

16. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 11 of the General Allegations, and Paragraph 14 through 15 of the First Cause of Action as if fully set forth.

17. As a result of the above-described failure and refusal of Defendant Owner to perform its obligations under the Sale Contract, Plaintiff has suffered damages in an amount equal to the difference between the fair market value of the Property and the contract price for the purchase of the Property as provided in the Sale Contract, and reliance damages and consequential damages, the total amount of which exceeds $_ _[*dollar amount*]_ _, the exact amount to be proved at trial.

THIRD CAUSE OF ACTION
(Breach of Covenant of Good Faith and Fair Dealing Contract;
by Plaintiff _ _[*name*]_ _ against Defendant(s) _ _[*name(s)*]_ _
and Does 1 through 10)

18. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 11 of the General Allegations, Paragraph 13 through 15 of the First Cause of Action, and Paragraph 17 of the Second Cause of Action, as if fully set forth.

19. The acts and omissions of Defendant Owner, as alleged, violate the covenant of good faith and fair dealing implied in the Sale Contract. The damage allegations of Paragraph 17 for purposes of this Third Cause of Action shall refer to acts that constitute breach of the covenant of good faith and fair dealing.

FOURTH CAUSE OF ACTION

(Declaratory Relief; by Plaintiff _ _[*name*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 30)

20. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 11 of the General Allegations, Paragraphs 13 through 15 of the First Cause of Action, and Paragraph 17 of the Third Cause of Action, as if fully set forth.

21. An actual controversy has arisen and now exists between Plaintiff, on the one hand, and Defendants Owner, Brokerage, and Agent, and Does 1 through 30, on the other hand, relating to their rights and obligations under the Sale Contract and, specifically, regarding Plaintiff's right to purchase and the obligation of Defendant Owner to convey the Property to Plaintiff on the terms and conditions stated in the Sale Contract, regarding Plaintiff's right to recover damages from said Defendants, and each of them, and regarding all parties' respective interests in and to the Property and its proceeds.

22. Plaintiff hereby requests a declaration of all parties' rights and obligations under the Sale Contract with respect to the Property, and such a declaration is necessary and appropriate at this time in order that the parties may ascertain their respective rights and obligations.

FIFTH CAUSE OF ACTION

(Judicial Foreclosure; by Plaintiff _ _[*name*]_ _ against Defendant(s) _ _[*name(s)*]_ _ and Does 1 through 30)

23. Plaintiff realleges and incorporates by reference each and every allegation of Paragraphs 1 through 11 of the General Allegations, Paragraphs 13 through 15 of the First Cause of Action, and Paragraph 17 of the Third Cause of Action, as if fully set forth.

24. Plaintiff is now, and at all times relevant to this action was, the lawful owner and holder of the Note and Deed of Trust, attached hereto as Exhibit 3 and described in Paragraph 9, and holds the beneficial interest under that Deed of Trust.

25. Defendant, _ _[*name*]_ _, and each Defendant designated under Does 1 through 10, has, or claims to have, some interest in the Property or some part of it by reason of _ _[*describe claim in detail, such as junior lienholder, lessee, holder of a judgment lien*]_ _, which interest is subsequent to and subject to that of Plaintiff.

26. Plaintiff and Defendant Owner understood and agreed that the Note and Deed of Trust would be discharged on the closing of the sale of the Property to Plaintiff under the Sale Contract. _ _[*The Note provides that if the Owner fails to complete the sale of the Property or to perform any agreement in the Deed of Trust securing payment of the Note, the entire principal and interest will become immediately due and payable at the option of Plaintiff*]_ _. The Deed of Trust provides that if the Owner defaults in paying any indebtedness secured by the Deed of Trust, or in the performance of any agreement in the Note or Deed of Trust, the entire principal and interest secured by the Deed of Trust will, at the option of the Plaintiff, become immediately due and payable.

27. Defendant has wholly failed, neglected, and refused to complete the sale of the Property to Plaintiff. For such failure and default under the Note and Deed of Trust, Plaintiff elects to declare the entire sum of principal and interest immediately due and payable. The amount owing consists of the principal sum of _ _[*dollar amount*]_ _, plus interest from _ _[*date of default*]_ _ to _ _[*date complaint filed*]_ _. Additional interest will accrue at the rate of _ _[*dollar amount*]_ _ per day for each additional day from _ _[*date complaint filed*]_ _, to the date of entry of judgment in this action.

28. Plaintiff may be required to expend additional sums to protect Plaintiff's security in the Property in the future, during the course of this action. In the Deed of Trust, Defendant Owner and Does 11 through 30, and each of them, agreed to pay any such sums expended by Plaintiff. Plaintiff will amend this complaint to allege the nature and amounts of such sums if Plaintiff is required to make the additional expenditures.

29. Under the Note and Deed of Trust, Defendant Owner and Does 11 through 30, and each of them, agreed that if any action were instituted on the Note or Deed of Trust, said Defendants would pay the sum fixed by the court as Plaintiff's attorney fees, and that these charges would also become a lien against the Property. Because of the above-described defaults, it has become necessary for Plaintiff to employ an attorney to commence and prosecute this foreclosure action. The reasonable value of services of counsel in this action shall be proved at or after trial in this action.

WHEREFORE, Plaintiff demands judgment as follows:

1. For a decree of specific performance requiring Defendants Owner and Does 1 through 10, and each of them, to transfer and convey to Plaintiff the Property, and all rents and profits arising from such real property after _ _[*date*]_ _, and to perform each and all of their other obligations to Plaintiff under the Sale Contract; and for a decree that any interests of Defendants Owner, Brokerage, Agent, and Does 1 through 10, and each of them, in the Property are inferior and subordinate to those of Plaintiff.

2. For judgment against all Defendants, including Does 11 through 30, inclusive, and each of them, for damages incidental to a specific performance decree or for breach of contract, according to proof.

3. For a declaration and decree in favor of Plaintiff and against Defendants Owner, Brokerage, Agent, and Does 1 through 30, and each of them, declaring the respective rights and obligations of the parties under the Sale Contract and in and to the Property, including a declaration of Plaintiff's right to full title to the Property according to the terms and conditions of the Sale Contract.

4. For a money judgment on the Fifth Cause of Action against Defendant Owner and Does 11 through 30, and each of them, for:

a. The sum of _ _[*dollar amount*]_ _ principal on the Note (Exhibit 3), with interest from _ _[*date*]_ _, to the date of judgment, according to proof;

b. The additional sum of _ _[*specify any amounts expended, plus interest, and desired relief for any other default alleged in the complaint*]_ _; and

c. Additional sums, if any, that plaintiff hereafter expends to protect its security interest in the Property, together with interest according to proof.

5. For a judgment on the Fifth Cause of Action declaring that the rights, claims, ownership, liens, titles, and demands of Defendants Owner, Brokerage, Agent, and Does 1 through 10, and each of them, are subject, subsequent, and subordinate to the Deed of Trust held by Plaintiff.

6. For an order and decree on the Fifth Cause of Action that the Deed of Trust be foreclosed; that the Property be sold according to law by the county sheriff or a court-appointed receiver; that the proceeds of the sale be applied in payment of the amounts due to Plaintiff; and that Defendants Owner, Brokerage, Agent, and Does 1 through 10, and each of them, and all persons claiming under them after the execution of the Deed of Trust, as lien claimants, judgment creditors, claimants under a junior Deed of Trust, purchasers, encumbrancers, or otherwise, be barred and foreclosed from all rights, claims, interests, or equity of redemption in the Property when time for redemption has elapsed.

7. For a deficiency judgment and order for execution in favor of Plaintiff against Defendants Owner and Does 11 through 30, and each of them, for any deficiency that may remain after applying all proceeds of the sale of the Property duly applicable to satisfy the amounts found due by the court under paragraph 4 of this demand for judgment.

8. For an order and decree that Plaintiff or any other party to this action may purchase the Property at the foreclosure sale, that _ _[*when the time for redemption has elapsed*]_ _ the sheriff or receiver execute a deed to the purchaser of the property at the sale, and that the purchaser be given possession of the property on production of the sheriff's or receiver's deed.

9. For attorney fees incurred by Plaintiff in commencing and maintaining this action.

10. For Plaintiff's costs of suit incurred in this action.

11. For such other and further relief as the Court deems just and proper.

Date: _ _ _ _ _ _ _ _[*Name of firm*]_ _

By: __[*Signature*]__
_ _[*Typed name*]_ _

Attorney for Plaintiff

Copies: Original (filed with court clerk); copies for service (one for each defendant who is to be served); office copies.

Comment: See Comment in §4.91. This attorney-drafted form complaint is based on a sale that did not close escrow because of the seller's default and in which the seller obtained a loan from the buyer before the anticipated closing. The causes of action are complex, and the plaintiff must be careful not to proceed in a manner that jeopardizes its security interest in the property evidenced by the deed of trust. See, *e.g.*, California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 4-5 (4th ed Cal CEB 2009). On drafting and prosecuting the judicial foreclosure cause of action, see Mortgage Deed of Trust Foreclosure, chap 3. For a multitheory complaint based on the seller's failure to disclose, including a cause of action for breach of contract, see chap 3.

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5

Specific Performance

Mark R. Hartney
Charles D. Jarrell

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I. INTRODUCTION

§5.1 A. Nature of Remedy; Scope of Chapter

A court can compel a party to perform a contractual obligation through the remedy of specific performance, which is an equitable remedy governed by CC §§3384-3395. The underlying cause of action for specific performance is breach of contract. *Golden W. Baseball Co. v City of Anaheim* (1994) 25 CA4th 11, 31 CR2d 378. Plaintiffs can plead in the alternative for specific performance or for damages if specific performance is denied.

In seeking specific performance, practitioners must plead and prove the elements establishing breach of contract (except damages resulting for the breach), as well as the elements essential to the granting of an equitable remedy. These include:

- The inadequacy of the legal remedy (see §§5.6-5.7);
- An underlying contract that is just, reasonable, and supported by adequate consideration (see §5.8);
- Contractual terms that are sufficiently definite to enable the court to know what it would enforce (see §§5.9-5.14);
- The plaintiff's performance, tender, or excuse for nonperformance (see §5.15).

This chapter discusses the nature of the remedy, when it is available, and other comparable relief in §§5.2-5.5, prerequisites to specific performance in §§5.6-5.19, initiating the action in §§5.20-5.34, defenses in §§5.35-5.43, and the judgment in §§5.44-5.50.

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Source: Real Property/California Real Property Remedies and Damages/5 Specific Performance/§5.2 B. When Available

§5.2 B. When Available

Examples of real property contractual obligations that can be specifically enforced are agreements to

- sell real property (see §§5.6-5.7);
- exchange real properties (*Remmers v Ciciliot* (1943) 59 CA2d 113, 138 P2d 306);
- devise real property (*Porporato v Devincenzi* (1968) 261 CA2d 670, 68 CR 210);
- partition real property (*Bank of Healdsburg v Hitchcock* (1888) 76 C 489, 18 P 648);
- create easements (*Fogarty v Fogarty* (1900) 129 C 46, 61 P 570);
- settle disputes among property owners (*Baugh v Garl* (2006) 137 CA4th 737, 40 CR3d 539 (involving water and easement rights));
- enforce payments owing on a promissory note secured by real estate (*Scalese v Wong* (2000) 84 CA4th 863, 101 CR2d 40);
- assign rents to lender under a deed of trust when borrower is in default (*MDFC Loan Corp. v Greenbriar Plaza Partners* (1994) 21 CA4th 1045, 26 CR2d 596; see §5.5);
- assign a lease (*Dean v Brower* (1931) 119 CA 412, 6 P2d 580);
- renew a lease (*Mitchell v Exhibition Foods, Inc.* (1986) 184 CA3d 1033, 229 CR 535);
- perform environmental cleanup on property containing abandoned oil wells (as part of real property sale contract) (*Union Oil Co. v Greka Energy Corp.* (2008) 165 CA4th 129, 80 CR3d 738); and
- maintain a navigation and drainage channel (as part of real property sale contract) (*Ellison v Ventura Port Dist.* (1978) 80 CA3d 574, 145 CR 665).

In rare instances, specific performance may be available to enforce payment of a promissory note secured by real property (see *Scalese v Wong* (2000) 84 CA4th 863, 101 CR2d 40, in which court awarded specific performance to lender by requiring borrower's successor to make monthly payments on high-interest installment note that did not allow prepayment), but such an action may be subject to defenses based on the one-action and antideficiency rules (see §5.41). Specific performance may also be used to enforce property agreements between cohabitants ("quasi-specific performance"). *Byrne v Laura* (1997) 52 CA4th 1054, 60 CR2d 908.

Although specific performance of a contract to convey real property is theoretically available to both buyer and seller, because of certain practical difficulties sellers rarely seek specific performance. See §§5.7, 5.20.

Other forms of specific relief that are distinguishable from specific performance include judgment for possession (see §5.3) and reformation (see §5.4).

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C. Other Specific Relief Compared

§5.3 1. Judgment for Possession

A person entitled to certain real property (because he or she has either a perfected title or a claim to title that should be perfected) may recover the property as provided in the Code of Civil Procedure, either by a judgment for its possession executed by the sheriff, or by a judgment requiring the other party to perfect the title and deliver possession of the property. CC §3375. Typically, the seller brings an action for ejectment (see chap 10) against a buyer who is in possession and who has defaulted on an installment payment owed on an otherwise executed purchase agreement. A seller who has allowed a buyer to obtain possession before the buyer's performance of the purchase agreement should consider ejectment as an alternative to specific performance.

Other actions for possession are for forcible entry, forcible detainer, and unlawful detainer, which are governed by CCP §§1159-1179a. On unlawful detainer, see California Landlord-Tenant Practice, chaps 9-13 (2d ed Cal CEB 1997); California Eviction Defense Manual (2d ed Cal CEB 1993). Another method of obtaining possession, often used in installment land contract cases (see chap 4), is to bring an action to quiet title (see chap 7).

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§5.4 2. Reformation

Reformation is an action to revise an instrument that, because of fraud or mistake, does not reflect the parties' intent. See chap 2. It too is an equitable action and is governed by CC §§3399-3402. Reformation and specific performance are not mutually exclusive. A party may, in a single action, seek both reformation and specific performance of a contract. CC §3402.

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§5.5 3. Availability of Provisional Remedies

Provisional remedies are available in some actions for specific performance. For example, in an action to specifically enforce an assignment of rents provision in a deed of trust when the debtor is in default, the court may appoint a receiver to take possession and collect the rents pending judgment. See, *e.g., MDFC Loan Corp. v Greenbriar Plaza Partners* (1994) 21 CA4th 1045, 26 CR2d 596. On appointment of receivers, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 6 (4th ed Cal CEB 2009); California Civil Procedure Before Trial, chap 33 (4th ed Cal CEB 2004).

A preliminary injunction should sometimes be obtained to preserve the status quo pending trial of an action for specific performance. For example, a buyer may seek to enjoin the sale of property to a third party. The buyer can also record a lis pendens, thus preventing the third party from being a bona fide purchaser. See §5.33. On lis pendens procedures, see chap 13. This use of a preliminary injunction should be distinguished from the remedy afforded by permanent injunction for specifically enforcing a negative covenant of an agreement. See, *e.g., Smith v Mendonsa* (1952) 108 CA2d 540, 238 P2d 1039 (promise not to permit trees to grow higher than 15 feet was specifically enforced by permanent injunction). A court may enjoin the breach of a contract that is capable of being specifically enforced. *Southern Christian Leadership Conf. v Al Malaikah Auditorium Co.* (1991) 230 CA3d 207, 224, 281 CR 216. On injunctive relief, see Civ Proc Before Trial, chap 32.

A plaintiff may bring an action to impose a constructive trust on property in the hands of those who have succeeded to the estate of a decedent who, during his or her life, had agreed to convey property to the plaintiff. Such an action is termed an action for "quasi-specific performance." *Lombardo v Santa Monica YMCA* (1985) 169 CA3d 529, 537, 215 CR 224. The elements for quasi-specific performance are the same as those for specific performance, with the additional requirement that, if the contract was oral, the complaint must also allege that the defendant is estopped from relying on the statute of frauds because failure to enforce the contract would result in either unconscionable injury to the plaintiff or unjust enrichment of the defendant. *Lombardo v Santa Monica YMCA, supra; Porporato v Devincenzi* (1968) 261 CA2d 670, 68 CR 210.

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II. PREREQUISITES TO SPECIFIC PERFORMANCE

A. Inadequate Remedy at Law

§5.6 1. Statutory Presumption for Agreements to Transfer Real Property

The remedy of specific performance is available only when a monetary award will not adequately compensate the aggrieved party. *Morrison v Land* (1915) 169 C 580, 147 P 259. Civil Code §3387 codifies the equity rule that "[l]and is assumed to have a peculiar value, so as to give an equity for specific performance, without reference to its quality or quantity." See *Remmers v Ciciliot* (1943) 59 CA2d 113, 120, 138 P2d 306.

It is presumed that the breach of an agreement to transfer real property cannot be adequately relieved by pecuniary compensation. CC §3387. For a single-family dwelling that the buying party seeking performance intends to occupy, the presumption is conclusive. *Hall v Hall* (1990) 222 CA3d 578, 588, 271 CR 773. Otherwise, the presumption affects only the burden of proof. CC §3387. If the selling party does not meet its burden to rebut the statutory presumption with evidence showing that monetary damages are adequate, the court will grant specific performance. See *Wheat v Thomas* (1930) 209 C 306, 287 P 102; *Real Estate Analytics v Vallas* (2008) 160 CA4th 463, 72 CR3d 835.

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§5.7 a. Applying Presumption to Seller Action Against Buyer

The presumption in CC §3387 that breach of an agreement to transfer real property cannot be adequately compensated for by monetary damages clearly applies to the seller's breach. It is less clear whether this presumption applies to the buyer's breach when the seller brings an action to compel specific performance.

It could be argued that a seller does not have the benefit of the presumption that real property is unique, because CC §3387 by its terms concerns an agreement to "transfer," not an agreement to acquire. Moreover, CC §3307 (providing that, on breach of an agreement to purchase a property, a seller can recover consequential damages and interest as well as any excess of the amount that would have been owed to the seller under the contract over the value of the property) appears to provide an adequate remedy at law to the aggrieved seller.

Yet sellers have obtained specific performance in many cases. See, *e.g., Ellison v Ventura Port Dist.* (1978) 80 CA3d 574, 145 CR 665. One court held that the seller cannot be denied specific performance simply because the property could be sold on the open market at the contract price, thus implying the application of CC §3387 without mentioning it. See *Waratah Oil Co. v Reward Oil Co.* (1914) 23 CA 638, 139 P 91. Another court squarely affirmed the seller's right to seek specific performance. It found that in enacting CC §3307, the legislature did not intend to eliminate a seller's ability to seek specific performance as an alternative to damages. *BD Inns v Pooley* (1990) 218 CA3d 289, 266 CR 815. See §5.20.

The result is the same even if the purchase and sale agreement has a liquidated damages provision. Civil Code §3389 provides that a contract otherwise specifically enforceable will be so enforced, even if it provides for a penalty or liquidated damages for its breach. Under §3389, a party may waive the right to liquidated damages and maintain an action in equity. *Morrison v Land* (1915) 169 C 580, 589, 147 P 259.

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§5.7A b. Applying Presumption in Postsale Actions

The presumption that a breach of an agreement to transfer real property cannot be adequately compensated by money damages (see §5.6) extends to purchase agreements containing covenants to be performed after the sale closes, such as environmental cleanup or maintaining the property in a specified condition. *Union Oil Co. v Greka Energy Corp.* (2008) 165 CA4th 129, 80 CR3d 738; *Ellison v Ventura Port Dist.* (1978) 80 CA3d 574, 145 CR 665. The court in *Union Oil* further ruled that when a party "commits multiple breaches, specific performance is preferred over the inadequate remedy of repetitive future damage actions." 165 CA4th at 136.

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§5.7B 2. Analyzing Adequacy of Legal Remedy in Nonsale Actions

A court can compel a party to perform a contractual obligation not involving a real property sale under the equitable remedy generally provided in CC §3384. But to obtain specific performance, the plaintiff must show that a legal remedy in the form of damages is inadequate to compensate the plaintiff for the defendant's breach. See, *e.g., Wait v Kern River Mining* (1909) 157 C 16, 106 P 98. Examples of real property contractual obligations not involving sales that may be specifically enforced are listed in §5.2. For a case granting specific performance despite the potential for compensatory damages, see *Clear Channel Outdoor, Inc. v Erkelens* (ND Cal 2008) 2008 US Dist Lexis 79702 (specific enforcement of lease provision that allowed lessee to remove billboard sign on refusal of lessor to renew lease; monetary remedy alone would have unjustly enriched lessor).

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Source: Real Property/California Real Property Remedies and Damages/5 Specific Performance/§5.8 B. Adequate Consideration; Just and Reasonable Contract

§5.8 B. Adequate Consideration; Just and Reasonable Contract

Specific performance of a contract is not available against a party who has not received adequate consideration. CC §3391(1). Moreover, specific performance of a contract cannot be enforced against a party to a contract if the contract is not, as to that party, just and reasonable. CC §3391(2). These two requirements are closely related, and the cases often discuss them as one. See, *e.g., Petersen v Hartell* (1985) 40 C3d 102, 110, 219 CR 170. Both recognize the rule that the person who seeks equity must do equity. *Jacklich v Baer* (1943) 57 CA2d 684, 693, 135 P2d 179. A court, however, may find a contract to be unjust or unreasonable even if it also finds the underlying consideration to be adequate. See *Eldridge v Burns* (1978) 76 CA3d 396, 142 CR 845.

Adequacy of consideration and whether an agreement is just and reasonable are to be determined from circumstances as they existed when the agreement was made. *Petersen v Hartell, supra*. The determination should take into account all circumstances of the transaction, including the relationship of the parties, the object of the contract, and the value of the property being sold. See *Meyer v Benko* (1976) 55 CA3d 937, 945, 127 CR 846.

Consideration, to be adequate, need not amount to the full value of the property. *Meyer v Benko, supra.* The test is not whether the seller received the highest price obtainable, but whether the price received is fair and reasonable under the circumstances. Other factors, such as the seller's desire to consummate a sale quickly, may explain the difference between the price agreed to and the alleged full value of the property. *Meyer v Benko, supra.* Although adequacy of consideration must ordinarily be alleged in the complaint, acceptance of the agreed-on consideration waives any potential claim of inadequacy. *Conway v Moore* (1945) 70 CA2d 166, 160 P2d 865. For further discussion on adequacy of consideration, see §§4.19-4.21.

The adequacy of consideration in an option agreement for the sale of real property, however, need not be determined solely at the time the agreement is entered into. In *Steiner v Thexton* (2010) 48 C4th 411, 422, 106 CR3d 252, for example, the court concluded as a matter of law that even though the buyers' "promise to undertake the burden and expense of seeking a parcel split may have been illusory at the time the agreement was entered into," the buyers' part performance of the "bargained-for promise" to obtain the split "created sufficient consideration to render the option irrevocable." For analysis of *Steiner* focusing on contract law, see Comment (by Sylvester) on *Steiner v Thexton,* 33 CEB Real Prop L Rep 64 (May 2010). For discussion of *Steiner's* impact on other types of real property purchase contracts, see Bernhardt, *The Cost of Free Looks-Ruminations on Steiner v Thexton,* 33 CEB Real Prop L Rep 61 (May 2010).

The courts will refuse to specifically enforce a contract, or any clause of a contract, that is found to be unconscionable at the time it was made. CC §1670.5. Though modeled after a section of the Uniform Commercial Code, CC §1670.5 applies to all contracts, not just those for the sale of goods. *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 99 CR2d 745; *Stirlen v Supercuts, Inc.* (1997) 51 CA4th 1519, 1530, 60 CR2d 138. The court has the power to enforce the remainder of the contract without the unconscionable clause or to limit the application of any unconscionable clause so as to avoid an unconscionable result. CC §1670.5(a). See *Little v Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1076, 130 CR2d 892.

Although adequacy of consideration and fairness of the contract are to be considered as of the time the contract was made, a court asked to grant equitable relief will assess the impact that the requested relief may have on the defendant, often taking post-contract formation circumstances into account. See *Steiner v Thexton* (2010) 48 C4th 411, 106 CR3d 252.

EXAMPLE 1: A court denied the seller specific performance because of the length of time between the execution of the sales agreement and the trial of the action, even though the court found that the buyer's refusal to complete the purchase was unjustified. See *Pasteur Realty Corp. v La Fleur* (1957) 154 CA2d 5, 315 P2d 374.

EXAMPLE 2: In *Eldridge v Burns* (1978) 76 CA3d 396, 142 CR 845, the court analyzed the effect of a release clause by which the seller was obligated to release portions of the real property security as the buyer made payments on the note, and the buyer could choose which portions of the property would be released. Although the court ruled

that the release agreement was not invalid because of uncertainty or inadequate consideration, it upheld the trial court's refusal to specifically enforce the release clause because the buyer "attempted to exercise the release provision in an inequitable and unconscionable manner, which severely prejudiced the [seller's] security." 76 CA3d at 429. The buyer had selected the most appealing acreage to be released, and if that acreage had been released, the seller would have been left with virtually undevelopable land and therefore little or no security for the remainder of the note.

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C. Sufficient Certainty

§5.9 1. Certainty of Material Terms

Courts may not specifically enforce "an agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable." CC §3390(5). A contract must not only contain all the material terms but must also express each term in a reasonably definite manner. *Lawrence v Shutt* (1969) 269 CA2d 749, 75 CR 533; *Spellman v Dixon* (1967) 256 CA2d 1, 3, 63 CR 668. Whether a contract is certain enough to be enforced is a question of law for the court. *Bustamante v Intuit, Inc.* (2006) 141 CA4th 199, 45 CR3d 692.

The material factors that must be set forth with sufficient certainty in a real property purchase contract are (1) the identity of the seller, (2) the identity of the buyer, (3) the price to be paid, and (4) a specific description of the property. See *King v Stanley* (1948) 32 C2d 584, 589, 197 P2d 321, disapproved in part in *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366. In *Patel,* a suit for specific performance of a real estate option contract, the supreme court unanimously held that the contract was enforceable despite its lack of terms of time and manner of payment; reasonable terms may be implied for both. See §§4.18, 4.52-4.53. Compare *Patel* with *Bruggeman v Sokol* (1954) 122 CA2d 876, 265 P2d 575 (other terms besides time and manner of payment were unresolved, including price, description of property, and terms and conditions of interim financing).

WARNING: The property description is a major source of claims of uncertainty, and, to ensure enforcement of the contract, practitioners should carefully identify the subject property. Although many real property contracts use the description obtained as part of a preliminary report from the title company, preliminary reports are no longer treated as title abstracts and generally cannot be the basis for reasonable reliance. See California Title Insurance Practice, chaps 5, 11 (2d ed Cal CEB 1997). The best approach may be to compare the property description with that in prior recorded instruments and to use multiple means of describing the property, as by using the legal description, the street address, and the Assessor's Parcel Number (APN). See also Practice Tip in §5.27 on obtaining a litigation guaranty.

"In order for a court of equity to decree that an obligation is specifically enforceable, the terms of the contract must be complete and certain in all particulars essential to its enforcement." *Eldridge v Burns* (1978) 76 CA3d 396, 420, 142 CR 845. "Only the valid and binding agreement of the parties, including all material terms well-defined and clearly expressed, may be ordered specifically enforced." *Weddington Prods., Inc. v Flick* (1998) 60 CA4th 793, 817, 71 CR2d 265 (citing *White Point Co. v Herrington* (1968) 268 CA2d 458, 468, 73 CR 885).

The certainty requirement does not preclude enforcement of agreements that have a degree of uncertainty. "Equity does not require that all the terms and conditions of the proposed agreement be set forth in the contract." *Mitchell v Exhibition Foods, Inc.* (1986) 184 CA3d 1033, 1047, 229 CR 535. See also *Behniwal v Mix* (2005) 133 CA4th 1027, 35 CR3d 320 (although sellers did not sign sale contract, later signatures on disclosure documents bound sellers). If reasonably possible, the courts will give written agreements a construction that will result in their being enforceable. *Ray Thomas Enters. v Fox* (1982) 128 CA3d 361, 367, 180 CR 253 (citing *Lawrence v Shutt* (1969) 269 CA2d 749, 761, 75 CR 533). The dispute in *Fox* concerned whether a subordinated loan given in conjunction with the sale of a trailer park was sufficiently certain to allow for specific performance. Distinguishing construction loans from a land development scheme, the court allowed enforcement of the contract because the agreement limited the proposed subordinated loan to less than 60 percent of the purchase price while giving the sellers sufficient equity to protect them (as holders of the subordinated note) against the possibility of loss of both the land and the purchase price.

If the contract does not make time of the essence and no time is specified for the performance of an act required to be performed, a reasonable time is inferred. CC §1657; *Patel v Liebermensch, supra; House of Prayer v Evangelical Ass'n for India* (2003) 113 CA4th 48, 7 CR3d 24; *Henry v Sharma* (1984) 154 CA3d 665, 669, 201 CR 478. "What constitutes a 'reasonable time' for performance is a question of fact." *Henry v Sharma, supra.* Time is not assumed to be of the essence in an agreement, and a plaintiff's slight delay in performance of an act does not bar the action unless time is expressly made of the essence by the parties or is necessarily so from the nature of the agreement.

Kossler v Palm Springs Devs., Ltd. (1980) 101 CA3d 88, 161 CR 423; *Crowell v Braly* (1959) 169 CA2d 352, 337 P2d 211 (time can be construed as of the essence if allowing late performance of a condition would create an injustice).

The modern view of the doctrine of uncertainty favors carrying out the parties' intentions through the enforcement of contracts and disfavors holding them unenforceable because of uncertainty. *Okun v Morton* (1988) 203 CA3d 805, 817, 250 CR 220. "The defense of uncertainty has validity only when the uncertainty or incompleteness of the contract prevents the court from knowing what to enforce." *Hennefer v Butcher* (1986) 182 CA3d 492, 500, 227 CR 318. The defense of uncertainty is not available to the party who drafted the allegedly uncertain contract terms. *Yackey v Pacifica Dev. Co.* (1979) 99 CA3d 776, 783, 160 CR 430.

On the differences between the certainty required for specific performance and for contract formation in damages actions, see §4.22.

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§5.10 2. Extrinsic Evidence and Conduct of Parties

Extrinsic evidence can explain the essential terms, as understood by the parties, but it cannot supply those terms. *Sterling v Taylor* (2007) 40 C4th 757, 767, 55 CR3d 116 (disapproving earlier cases to the contrary). Extrinsic evidence is admissible to determine what the parties intended. *Crescenta Valley Moose Lodge No. 808 v Bunt* (1970) 8 CA3d 682, 87 CR 428; see *McKeon v Santa Claus, Inc.* (1964) 230 CA2d 359, 41 CR 43 (parol evidence that does not contradict the written words and terms of contact is admissible). It is appropriate for a court to determine by reference to custom incidental matters, such as opening an escrow, furnishing a deed or title insurance policy, and proration of taxes, unless the contract contains express conditions to the contrary. *King v Stanley* (1948) 32 C2d 584, 197 P2d 321, disapproved on other grounds in *Patel v Liebermensch* (2008) 45 C4th 344, 86 CR3d 366. See *Hutton v Gliksberg* (1982) 128 CA3d 240, 245, 180 CR 141.

If a purchase agreement contains only a lot number description of the property, the court may consider extrinsic evidence (such as standard features sheets, site plans, floor plans, elevation plans, and tract maps furnished to the parties at the time of contracting) to determine if the agreement is sufficiently definite for enforcement. *Blackburn v Charnley* (2004) 117 CA4th 758, 766, 11 CR3d 885.

The court may also consider the parties' conduct before the dispute in ruling on the meaning of contract terms. *Okun v Morton* (1988) 203 CA3d 805, 819, 250 CR 220. Although the parties' conduct after contract formation, including their asserted disputes and remedies, may be relevant in determining which terms they considered essential, the parties' subsequent disputes and "unsuccessful attempts to complete the transaction" do not preclude a finding that there was "a meeting of the minds on all essential terms" at the formation. *Patel v Liebermensch* (2008) 45 C4th 344, 351, 86 CR3d 366.

Although usage or custom may be used to explain the meaning of language or to imply terms, no material element can be left to future agreement. *Krasley v Superior Court* (1980) 101 CA3d 425, 161 CR 629. Similarly, courts have imposed certain restrictions and limitations on the use of extrinsic evidence in order to remedy a defective or uncertain description of the subject property. See, *e.g., Brooks v Allard* (1966) 244 CA2d 283, 287, 53 CR 82, and cases cited there.

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§5.11 3. Different Standard for Breach of Contract

Arguably, a contract may be sufficiently certain to support a claim for breach of contract and recovery of damages yet insufficiently certain to support specific enforcement. The differing standards have been articulated as follows: To enforce a contract at law and secure damages, the offer must be sufficiently definite, or must call for such definite terms in the acceptance, that the performance required is reasonably certain; to obtain specific performance of a contract in equity, the contract terms must be sufficiently certain to make the precise act that is to be done clearly ascertainable. *Spellman v Dixon* (1967) 256 CA2d 1, 3, 63 CR 668. There has been some debate about the practical significance of this distinction, with some courts and commentators noting that, when a contract is found insufficiently certain to support specific performance, it is also unlikely to be sufficiently certain to support damages.

PRACTICE TIP: If it is unclear whether the contract at issue is sufficiently certain to be specifically enforced, counsel should, in the absence of other concerns, always plead damages as an alternative remedy.

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§5.12 4. Effect of Subordination Clauses

Contract certainty is especially important when seeking to specifically enforce an agreement that contains a subordination clause. A subordination agreement alters the priority of interests in or liens on real property. Sellers often agree to subordinate their purchase money lien to the lien of a construction lender in order to allow the purchaser to maximize the value of the property through development. The ultimate value of the property will be determined by the success of the purchaser's development efforts. Thus, a seller who agrees to subordinate his or her purchase money lien to construction financing is vulnerable because he or she cannot know for sure whether the purchaser will be successful in developing the property. *Roskamp Manley Assocs. v Davin Dev. & Inv. Corp.* (1986) 184 CA3d 513, 517, 229 CR 186.

Because of this risk to the seller, courts have required a high degree of certainty before finding a subordination agreement enforceable. Although it rejected the notion that there is a magic number of terms that a subordination agreement must contain in order to make it enforceable, the *Roskamp* court held that such an agreement must contain sufficient terms from which a court can ascertain its fairness to the seller, even assuming that some matters may be left to custom and usage. It further held in such a situation that the security of the seller's subordinated deed of trust is of paramount importance. 184 CA3d at 521.

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§5.13 5. Examples—Contract Sufficiently Certain

The following are examples of cases in which a contract was found to be sufficiently certain for specific performance remedy:

- A clause in a lease-option agreement allowing the lessee to purchase under these terms: "Through the end of the year 2003, the selling price is $290,000. The selling price increases by 3% through the end of the year 2004 and cancels with expiration of your occupancy." *Patel v Liebermensch* (2008) 45 C4th 344, 347, 86 CR3d 366 (supreme court unanimously held that contract was enforceable despite its lack of terms of time and manner of payment; reasonable terms may be implied for both).
- A bid offering $1000 more than any other sealed bid (a "relative" or "sharp" bid), when all other bids were fixed sums. *Carver v Teitsworth* (1991) 1 CA4th 845, 853, 2 CR2d 446. Because of the potential unfairness of a relative bid, such a bid is valid only when a party expressly solicits relative bids or such bidding is objectively reasonable as being customary in a particular trade or industry. 1 CA4th at 854.
- A contract that did not specify a "net" purchase price, but instead specified a purchase price and certain "adjustments." Because the adjustments were the routine debits and charges made by the escrow officer, the contract was sufficiently certain. *Hutton v Gliksberg* (1982) 128 CA3d 240, 245, 180 CR 141.
- An oral land sale contract that was uncertain regarding the description of the land, identified by a line drawn on an aerial photograph. The test was whether a competent surveyor would have difficulty locating the land and establishing its boundaries from the terms of the agreement, and the court concluded that no such difficulty existed. *Carlson v Richardson* (1968) 267 CA2d 204, 72 CR 769.
- A contract that provided an option to purchase property for "fair market value." *Goodwest Rubber Corp. v Munoz* (1985) 170 CA3d 919, 216 CR 604.
- A deposit receipt requiring the seller of a home "to do any necessary work at his expense" was specifically enforceable to require the seller to pay for the cost of repairing the roof. *Meyer v Benko* (1976) 55 CA3d 937, 127 CR 846.
- An agreement to convey property that fails to state the time of payment; the trial court can infer a reasonable time for performance. *Hastings v Matlock* (1985) 171 CA3d 826, 217 CR 856.

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§5.14 6. Examples—Contract Not Sufficiently Certain

The following are examples of cases in which a contract was found to be not sufficiently certain:

- A contract that generally described the property as "a portion" of a particular lot, and required the buyer to secure a survey and submit the survey to escrow, with the seller to approve the property description, was held not sufficiently certain. *Corona Unified Sch. Dist. v Vejar* (1958) 165 CA2d 561, 563, 332 P2d 294.
- A promissory note, which provided that it could be recorded against specified property of the promisor and would be repaid from the proceeds of sale if the property was sold before the due date of the note, was held not sufficiently certain to order the specific execution of a deed of trust. *Mueller v Chandler* (1963) 217 CA2d 521, 31 CR 646.
- Escrow instructions that provided for sale to the seller's agent "or his nominee" were held too uncertain for the plaintiff purchasers to be granted specific performance. *Cisco v Van Lew* (1943) 60 CA2d 575, 141 P2d 433.

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Source: Real Property/California Real Property Remedies and Damages/5 Specific Performance/§5.15 D. Performance of Conditions; Tender of Performance

§5.15 D. Performance of Conditions; Tender of Performance

Payment of the purchase price by the buyer and conveyance of good title by the seller are usually concurrent conditions, and one party cannot place the other into default or require the other's performance without performing or tendering performance. See CC §§1437, 1439, cited in §§4.8-4.9. Further, a party who has not fully and fairly performed all conditions precedent to an agreement ordinarily cannot obtain specific performance. Civil Code §1436 defines "condition precedent" as a condition that is to be performed before some right dependent on it accrues, or some act dependent on it is performed. When the failure, however, is only partial and is either immaterial or fully compensable, the party may obtain specific performance on making full compensation for the default. CC §3392; *Petersen v Hartell* (1985) 40 C3d 102, 111, 219 CR 170. See *Evarts v Johnston* (1949) 34 C2d 6, 206 P2d 633; *Butterfield v Gentles* (1937) 9 C2d 275, 70 P2d 613.

These rules generally require a purchaser to tender payment as a prerequisite to specific performance. See *Ninety Nine Invs. v Overseas Courier Serv. (Singapore) Private, Ltd.* (2003) 113 CA4th 1118, 1130, 6 CR3d 891; *Mayer v Beondo* (1948) 83 CA2d 665, 189 P2d 327. The actual deposit of purchase money into escrow is not a prerequisite to a valid tender. *Ninety Nine Invs. v Overseas Courier Serv. (Singapore) Private, Ltd., supra*. The buyer may show ability to pay by testimony supported by financial documentation that is properly authenticated for admissibility into evidence. *Hastings v Matlock* (1985) 171 CA3d 826, 838, 217 CR 856.

If the seller unequivocally repudiates the contract and claims not to be bound by it, a tender of performance is unnecessary. CC §§1440, 1511; *Beverage v Canton Placer Mining Co.* (1955) 43 C2d 769, 777, 278 P2d 694; *Boro v Ruzich* (1943) 58 CA2d 535, 137 P2d 51. See also *Kossler v Palm Springs Devs., Ltd.* (1980) 101 CA3d 88, 161 CR 423 (purchaser of home to be built to specification not required to deposit balance of purchase price into escrow when seller/builder has not fully performed).

Although the seller's repudiation of the contract excuses the buyer from tendering payment, a buyer seeking specific performance of a contract to sell real property must still plead and prove that he or she was and continues to be ready, willing, and able to perform (*i.e.,* that he or she had and presently has the resources to purchase the property). See *Behniwal v Mix* (2005) 133 CA4th 1027, 35 CR3d 320; *C. Robert Nattress & Assocs. v CIDCO* (1986) 184 CA3d 55, 64, 229 CR 33; *Am-Cal Inv. Co. v Sharlyn Estates, Inc.* (1967) 255 CA2d 526, 63 CR 518. In contrast, a plaintiff/seller who is suing for specific performance, to be able to perform, must hold the property off the market pending the litigation. *Hollypark Realty Co. v MacLoane* (1958) 163 CA2d 549, 329 P2d 532.

When a buyer expects to obtain the funds to purchase property from a third person, proving at trial that the buyer had the ability to perform is complex. In one line of cases, the courts of appeal allowed specific performance primarily on a showing that the buyer prequalified for a purchase loan. See authorities cited in *Behniwal v Mix* (2005) 133 CA4th 1027, 1045, 35 CR3d 320. In earlier cases, courts held that the buyer must prove that the prospective lender was able to supply the funds and was legally bound to do so by contract. See authorities cited in *C. Robert Nattress & Assocs. v CIDCO, supra*. It is not enough to establish that the plaintiff has the ability to perform at the time of trial. The issue is whether the plaintiff buyer was ready, willing, and able to perform within the time required by the contract. *Am-Cal Inv. Co. v Sharlyn Estates, Inc.* (1967) 255 CA2d 526, 545, 63 CR 518.

When a contract for the sale of real property does not have a "time is of the essence" clause, the buyer is not precluded from obtaining specific performance if he or she obtains financing within a reasonable time. *Henry v Sharma* (1984) 154 CA3d 665, 201 CR 478 (buyer who did not obtain financing for 63 days after agreement was signed could specifically enforce agreement that did not specify date for buyer's payment). But even if "time is of the essence," a buyer who is unable to close escrow by the required date because the seller did not meet its escrow obligations may obtain specific performance as long as the buyer shows it was and continues to be ready, willing, and able to perform on that date and through trial. *Ninety Nine Invs. v Overseas Courier Serv. (Singapore) Private, Ltd.* (2003) 113 CA4th 1118, 6 CR3d 891 (seller's failure to submit certain documents into escrow prevented buyer's lender from depositing purchase funds by anticipated closing date). Similarly, if the seller waives the buyer's timely performance, the buyer may obtain specific performance if it tenders the purchase funds within a reasonable time after the closing date

specified in the contract and before the seller re-establishes time conditions by giving notice to the buyer. *Galdjie v Darwish* (2003) 113 CA4th 1331, 7 CR3d 178.

If the contract contains a "time is of the essence" clause and unambiguously states the anticipated escrow period, the plaintiff's failure to open the escrow within that time frame will bar the remedy of specific performance. *Consolidated World Invs., Inc. v Lido Preferred Ltd.* (1992) 9 CA4th 373, 11 CR2d 524. See also cases cited in §4.6.

PRACTICE TIP: In purchases of residential, as opposed to commercial or industrial property, courts seem less inclined to uphold strict time limits for performance when it occurs within a reasonable time, or following only a slight delay, not resulting in any prejudice. Counsel should carefully consider all factors that may make time limits especially important to a particular transaction, *e.g.,* whether other transactions are dependent on timely performance under the subject transaction, such as in tax-deferred exchanges or time-sensitive financing commitments.

In actions for specific performance by the seller against a prospective buyer, delivery of the transfer disclosure statement required by CC §§1102-1102.18 in residential transactions (see §3.30) is a nonwaivable condition precedent to the buyer's duty to perform. Consequently, the seller's failure to deliver the disclosure statement precludes the seller from obtaining specific performance. *Realmuto v Gagnard* (2003) 110 CA4th 193, 1 CR3d 569.

For further discussion of satisfaction of conditions, see *Hutton v Gliksberg* (1982) 128 CA3d 240, 180 CR 141; on waiver of conditions, see *Reeder v Longo* (1982) 131 CA3d 291, 182 CR 287. See also chap 4.

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Source: Real Property/California Real Property Remedies and Damages/5 Specific Performance/§5.16 E. Contracts Not Subject to Specific Performance

§5.16 E. Contracts Not Subject to Specific Performance

Civil Code §3390 provides that the following obligations cannot be specifically enforced:

- An obligation to render personal services (see §5.17);
- An obligation to employ another in personal service (see §5.17);
- An agreement to perform an act that the party cannot lawfully perform when required to do so (see §5.18);
- An agreement to procure an act or a consent of the spouse of the contracting party, or of any other third person (see §5.19); or
- An agreement with terms that are not sufficiently certain to make the precise act clearly ascertainable (see §5.9).

A contract made expressly for a third person's benefit may be enforced by that person at any time before the parties rescind it. CC §1559. A party who is not expressly a third party beneficiary may not enforce a contract, even if he or she might have incidentally benefited from its performance. *Sheppard v Banner Food Prods.* (1947) 78 CA2d 808, 812, 178 P2d 455. See also *Meadows v Lee* (1985) 175 CA3d 475, 221 CR 22.

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§5.17 1. Personal Service Obligations

An obligation to render a personal service cannot be specifically enforced. CC §3390(1). For a discussion of the public policy reasons for this rule, see *Barndt v County of Los Angeles* (1989) 211 CA3d 397, 404, 259 CR 372.

Courts recognize a distinction between a party's responsibility for seeing that the service is rendered and the party's obligation to perform the service personally. Although many real estate contracts contemplate acts requiring performance of a personal service by someone (*e.g.,* when a seller agrees to provide some renovation, alteration, or addition), such an agreement ordinarily does not contemplate that performance will be rendered personally by the party. Thus, the agreed-on performance should be specifically enforceable as long as the party who is obligated to provide the service is contractually free to choose the person who actually performs it. See, *e.g., Pike v Hayden* (1950) 97 CA2d 606, 218 P2d 578 (lease provision requiring lessee to keep service station open 24 hours a day and to conduct business efficiently did not require performance of personal service so as to preclude specific enforcement).

The personal service restriction in CC §3390(1) does not bar specific performance when the services have been fully or substantially performed. *Thurber v Meves* (1897) 119 C 35, 50 P 1063; *Stone v Burke* (1952) 110 CA2d 748, 244 P2d 51.

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§5.18 2. Party Has No Power to Perform

An agreement to perform an act that a party cannot legally perform when required to do so cannot be specifically enforced. CC §3390(3). Thus, a seller who has no title or interest in land it contracts to convey cannot be compelled to perform, because equity will not compel it to obtain title. *Weisberg v Ashcraft* (1961) 194 CA2d 225, 14 CR 817. But a seller who is the equitable owner and who has the right to call for legal title may be compelled to perform. *Friedrich v Roland* (1950) 95 CA2d 543, 213 P2d 423. If the property is owned by a trust and if a beneficiary with the power to dispose of the property agrees to sell, the buyer can obtain specific performance against the trustee even after the beneficiary has died. *Walgren v Dolan* (1990) 226 CA3d 572, 276 CR 554.

Inability to perform will bar a decree of specific performance only if the party is unable to perform at the time of the judicial hearing in the specific performance action. A contract can be specifically enforced in its entirety as long as full performance is possible at the time of the decree, even if full performance might not have been possible at the time it was contractually required. *Stevens Group Fund IV v Sobrato Dev. Co.* (1991) 1 CA4th 886, 2 CR2d 460.

PRACTICE TIP: Practitioners should consider how both the filing date of an action for specific performance and the likely trial date might affect the case. See also tactical considerations in initiating the action (see §5.20) and trial priority (see §5.23).

An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give the buyer title free from reasonable doubt. CC §3394. Thus, if pending litigation creates reasonable doubt regarding title to real property, or if the property is not "marketable" as called for in the contract, then the seller is not entitled to specific performance of a contract for its sale. See *Ward v Downey* (1950) 95 CA2d 680, 213 P2d 523.

When the seller is unable to transfer perfect title as agreed on by the parties, the buyer has the option of enforcing the contract specifically with respect to whatever interest the seller has with an abatement of the purchase price. *Levy v Wolff* (1956) 46 C2d 367, 369, 294 P2d 945; *Johnson v Lehtonen* (1957) 151 CA2d 579, 312 P2d 35; see *McGinn v Willey* (1914) 24 CA 303, 141 P 49. For example, a seller who holds title as a tenant in common can be compelled to convey that interest with abatement of the price. *Milkes v Smith* (1949) 91 CA2d 79, 204 P2d 419. Alternatively, when title can be cleared by the expenditure of money, the court can direct the application of some of the purchase money for this purpose. *Grant v Beronio* (1893) 97 C 496, 32 P 556.

When all or a material part of a building that is the subject of a sale agreement is destroyed before legal title or possession is transferred, the buyer cannot seek specific performance at an abated price unless the contract specifically so provides. In one case, the court held that when a building burned down before the impending transfer of title or possession, the seller bore the risk of loss but was excused from performance. *Dixon v Salvation Army* (1983) 142 CA3d 463, 191 CR 111 (citing Uniform Vendor and Purchaser Risk Act (CC §1662)).

The foreclosure sale of property that is the subject of a purchase contract to a bona fide third party purchaser does not preclude the buyer under the purchase contract from seeking specific performance. An award of specific performance under a contract need not be identical to the performance required under the contract. The court may award the buyer, as equitable owner of the property at the time of the foreclosure sale, the proceeds of that sale under the doctrine of equitable conversion. *Rogers v Davis* (1994) 28 CA4th 1215, 34 CR2d 716.

When there is a failure to convey and specific performance, through no fault of the buyer, cannot be ordered, the measure of damages is governed by CC §3306 (damages for breach of contract to convey land). This rule also applies when the buyer obtains specific performance with respect to only part of the property or when the buyer seeks only damages. See *Christensen v Slawter* (1959) 173 CA2d 325, 332 n2, 343 P2d 341. The court can also award damages against a seller in lieu of specific performance when the seller intentionally disables himself or herself from conveying, or when the property is community property and the seller's spouse, who was not a party to the contract, refuses in bad faith to join in the conveyance. *Cushing v Levi* (1931) 117 CA 94, 3 P2d 958. See generally chap 6 on one spouse's right to cancel certain real property transactions, including a sale entered into by the other.

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§5.19 3. Agreement to Procure Third Person's Act or Consent

An agreement to procure a third person's act or consent, including the act or consent of the contracting party's spouse, is not specifically enforceable. CC §3390(4). See *Casady v Modern Metal Spinning & Mfg. Co.* (1961) 188 CA2d 728, 10 CR 790. It is necessary, however, to distinguish an agreement to procure a third person's consent, which is not specifically enforceable, from one in which the third person's consent is simply a condition precedent to the close of escrow, which is specifically enforceable. *Bleecher v Conte* (1981) 29 C3d 345, 213 CR 852. For example, §3390(4) has been held not to prohibit an action by a buyer for specific performance in the following situations:

- A real property purchase and sale agreement in which the buyers must obtain city approval of various development plans as a condition precedent to the close of escrow. *Bleecher v Conte, supra*.
- A contract to sell real property in which the seller and a third person are tenants in common and the seller has unsuccessfully sought the third person's consent. In this situation, the seller can be compelled to convey all his or her interest in the property with an abatement of the purchase price. *Milkes v Smith* (1949) 91 CA2d 79, 204 P2d 419.
- A real property purchase and sale agreement which provided that the buyers and their spouses, who were not parties to the contract, would cosign a mortgage. Although the agreement normally would fall within CC §3390(4), by the time of the entry of the decree there was no need of a mortgage, and hence no need for the spouses to cosign, because the seller was then entitled to full cash payment. *Wheat v Thomas* (1930) 209 C 306, 287 P 102, citing former CC §3390(5) (now renumbered §3390(4)).

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III. PREPARING THE ACTION

A. Tactical Considerations

§5.20 1. Seller's Perspective

When either party breaches a purchase and sale agreement, the harmed party often reacts by demanding performance. Practitioners should recognize that there are disadvantages to seeking specific performance from both the seller's and buyer's perspective. One key disadvantage to a seller who seeks specific performance is that he or she must keep the property off the market while the lawsuit is pending. See §5.15.

PRACTICE TIP: Practitioners must consider the time it will take to obtain a judgment and weigh it against the client's desire to unload the property. In an active market, it may be appropriate to simply put the property back on the market and pursue whatever damages were incurred through a breach of contract action (see chap 4).

Another disadvantage to sellers is the difficulty in proof (discussed in §§5.8, 5.29). For example, property worth the contract price at the time of a buyer's breach may decline in value by the time the matter is brought to trial. If the decline is sufficiently steep, the seller may be denied specific performance on the ground that it would be inequitable to the buyer.

Another possible disadvantage to the seller is that a decree of specific performance, even if successful, does not guarantee performance, particularly if the buyer does not have the purchase money. This problem can be resolved by a decree allowing for the judicial sale of the property with an attendant right of the seller to pursue the buyer for any deficiency (see §5.44), although the benefit of a right to a deficiency may be illusory if the buyer is destitute.

Finally, sellers seeking specific performance should consider the court's latitude to deny specific performance under equitable principles. Although CC §3387 presumes that each real property is unique, this presumption arguably does not aid a seller. See §5.7. The requirement that a seller be capable of transferring title that is free from reasonable doubt, the requirement that the transaction be fair and reasonable, and other equitable considerations may serve as hurdles to the seller's obtaining specific performance.

Some may question why a seller is entitled to specific performance at all, assuming that the contract price was close to or equal to the property's fair market value, because CC §3307 (damages for breach of contract) appears to provide the seller with an adequate legal remedy. This question was answered in *BD Inns v Pooley* (1990) 218 CA3d 289, 266 CR 815. Having reviewed the legislative history of §3307, the court in *BD Inns* ruled that the legislature intended to expand the remedies available for the breach of a real property contract, not limit them, and did not intend to eliminate a seller's option of seeking specific performance. The court held that the seller may sue for specific performance or treat the contract as breached and sue the defendants for damages. 218 CA3d at 296.

WARNING: The seller's failure to deliver to a buyer the transfer disclosure statement as required by CC §1102.3 in residential sales (see §3.30) precludes specific performance relief against the buyer. *Realmuto v Gagnard* (2003) 110 CA4th 193, 1 CR3d 569.

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§5.21 2. Buyer's Perspective

There are also disadvantages to a buyer seeking specific performance. Unless the seller has repudiated the contract, the buyer must tender the full purchase price in order to be entitled to a decree of specific performance. See §5.15. Even if the requirement of a tender has been waived by the seller's repudiation, the buyer may still be required to retain the purchase price on hand throughout the litigation to fulfill his or her obligation to be ready, willing, and able to purchase the property. *C. Robert Nattress & Assocs. v CIDCO* (1986) 184 CA3d 55, 229 CR 33.

Another hurdle facing a buyer seeking specific performance is the requirement that the consideration be just and reasonable to the seller (see §5.8), taking all circumstances of the transactions into consideration at the time the contract is entered into. A buyer who has negotiated too good a deal may not be entitled to specific performance.

As a rule, an action for specific performance will not succeed without the buyer's recording a lis pendens at the commencement of the action. See §5.33. On risks in recording a lis pendens, see chap 13. The lis pendens does not impart notice of a potential attorney fee award to subsequent lienholders, and if the buyer succeeds on the specific performance action, any attorney fee award the buyer obtains in a judgment cannot be deducted from the purchase price as an offset. *Behniwal v Mix* (2007) 147 CA4th 621, 54 CR3d 427. See §§5.30, 5.45.

WARNING: A buyer who seeks damages as an alternative to specific performance must do so with extreme care in order to avoid establishing that he or she has an adequate remedy at law. For further discussion, see §5.30.

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§5.22 3. Burden of Proof

The plaintiff in an action for specific performance has a heavier burden of proof than does a plaintiff in an action for damages for breach of contract because specific performance requires proof of more elements (see §5.29). Among these additional elements are sufficient certainty (see §§5.9-5.14), adequate consideration (see §§5.8, 5.29), fairness and reasonableness of the contract (see §5.8), and inadequacy of the remedy at law (see §5.6).

PRACTICE TIP: If any of these elements is factually weak, and if the facts support a breach of contract or promissory fraud theory, the complaint should include these alternative causes of action. See *Simon v San Paolo U.S. Holding Co.* (2005) 35 C4th 1159, 29 CR3d 379.

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§5.23 4. Possible Trial Priority

An action for specific performance alone is not entitled to priority. If the action is included in a complaint seeking a preliminary injunction, the plaintiff may be entitled to priority under CCP §527(e). Similarly, when the action is joined with an action for declaratory relief, the plaintiff may be entitled to priority under CCP §1062.3(b), although only on noticed motion and a showing of need for a speedy trial. For discussion, see California Civil Procedure Before Trial, chap 35 (4th ed Cal CEB 2004).

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§5.24 5. No Right to Jury Trial

Because an action for specific performance is an action in equity, a party to such an action has no right to a jury trial. *Walton v Walton* (1995) 31 CA4th 277, 287, 36 CR2d 901; *Connell v Bowes* (1942) 19 C2d 870, 123 P2d 456. This is true even if the action implicates legal issues such as contract formation. *Walton v Walton, supra*. In specific performance actions, however, that include one or more legal causes of action, such as a claim for damages for breach of contract, the party seeking the legal claims is entitled to a jury trial on those issues.

Faced with mixed questions of law and equity, courts often try the equitable issues first without a jury, perhaps obviating the need for a second trial. See, *e.g*., *Pellegrino v Robert Half Int'l, Inc.* (review granted April 28, 2010, S180849; superseded opinion at 182 CA4th 87, 113, 104 CR3d 790) (parties agreed first to have court trial on exemption affirmative defense; after court ruled on defense, parties then stipulated to all remaining issues). Alternatively, a court can try all issues together to a jury, and treat the jury's verdict on the equitable issues as advisory only. See *Raedeke v Gibraltar Sav. & Loan Ass'n* (1974) 10 C3d 665, 111 CR 693. See also California Civil Procedure Before Trial §41.5 (4th ed Cal CEB 2004). A third possibility is that the court can conduct one trial, reserving for its own judgment the equitable issues and recessing the jury during testimony that pertains only to the equitable issues. After the trial, if the court decides the equitable issues first and that decision also directs the determination of the legal issues, then the court can entertain and rule on a motion for a directed verdict and avoid jury deliberations altogether.

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B. Procedural Considerations

1. Jurisdictional Requirements

§5.25 a. Subject Matter Jurisdiction

Although superior courts have broad equitable powers in limited civil cases, awarding specific performance is not among them. See CCP §§85-86. Consequently, regardless of the amount in controversy, an action for specific performance is treated as an "unlimited" civil case in the superior court. See CCP §88. In rare instances, small claims courts have jurisdiction to award specific performance. See CCP §116.220(b). For further discussion, see California Civil Procedure Before Trial, chap 6 (4th ed Cal CEB 2004).

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§5.26 b. Venue

The venue requirements for an action for specific performance are different from those for an action for damages for breach of contract. Subject to the court's power to transfer actions under CCP §§396-403, the proper place for trial of an action to recover real property or an estate or interest in real property, or to determine such right or interest, is the county in which the property is situated. CCP §392(a)(1). This provision applies to actions by the buyer for specific performance of a real property sale contract whether or not damages are also sought. See *Santa Barbara Lodge No. 605*, *Loyal Order of Moose v Penzner* (1951) 104 CA2d 494, 231 P2d 595; *Kopke v Carlson* (1929) 98 CA 155, 276 P 606. For further discussion, see California Civil Procedure Before Trial §§8.31-8.40 (4th ed Cal CEB 2004). A litigation guaranty or other appropriate type of title company guaranty may be used to confirm the county where the real property is situated. See Practice Tip in §5.27.

Unlike an action for specific performance to compel a party to transfer real property, which is "local" in nature and therefore triable in the county where the land is situated, an action for damages for breach of contract is "transitory" and, under CCP §395(a), can be tried in the county in which the obligation is to be performed, in the county in which the contract in fact was entered into, or in the county of the defendant's residence. When the seller seeks both specific performance of an installment land contract and damages, the action has been held transitory because the seller in effect seeks only money. *Work v Associated Almond Growers* (1926) 76 CA 708, 245 P 790. See also *Hammon v American Exploration & Mining Co.* (1962) 203 CA2d 306, 309, 21 CR 409; *Marcacci v Continental Baking Co.* (1962) 202 CA2d 224, 20 CR 567.

For further discussion of the proper venue of an action in which some causes of action would most appropriately be characterized as local and some as transitory, see *Foundation Eng'rs, Inc. v Superior Court* (1993) 19 CA4th 104, 23 CR2d 469 (construction defects action in which negligence, strict liability, and breach of implied warranty alleged, but not breach of contract; court found essence of action was for injuries to real property and was thus "local"). See also Civ Proc Before Trial §§8.5-8.40.

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§5.27 2. Parties

The plaintiff in an action for specific performance should join all persons who have or claim an interest in the property, including subsequent buyers or encumbrancers with notice. Under CC §3395, an obligation with respect to real property that would be specifically enforced against a particular person may also be enforced against any other person claiming under him or her by title created subsequently to the obligation, except good faith purchasers or encumbrancers. See *Caras v Parker* (1955) 131 CA2d 141, 280 P2d 226 (vendor's second grantee who had notice held subject to specific performance decree).

In preparing a claim for specific performance, counsel will always need reliable information about persons holding recorded interests in the property that may be affected by a specific performance decree. To identify and join as parties all persons with such interests, a title search may be performed by an attorney or by a professional title searcher (title abstractor). However, this approach is expensive.

PRACTICE TIP: The better approach is to purchase a specialized title product known as a "litigation guaranty," which will provide the title company's assurance (up to a stated limit) on the holders of various interests. For more on litigation guaranties, see California Title Insurance Practice, chap 9 (2d ed Cal CEB 1997). Obtaining reliable title information or guaranties at the earliest possible date is crucial when the plaintiff contemplates pursuing provisional remedies. For an example of the dangers inherent in proceeding with enforcement without first identifying all interest holders through the use of a property title product, see *Little v Community Bank* (1991) 234 CA3d 355, 286 CR 4 (judgment creditor imprudently relied in execution proceedings on preliminary report of title that missed IRS tax liens).

The plaintiff should consider joining subsequent purchasers or encumbrancers who took with notice or without having given value in order to obviate the defense that the defendant does not have the power to perform. The plaintiff should also join any escrow agent or lender whose acts are required for enforcement of the obligation. See *Miller v Dyer* (1942) 20 C2d 526, 127 P2d 901. Similarly, the heirs and personal representative of a deceased seller should be joined when the seller died before the transaction was consummated. See *O'Donnell v Lutter* (1945) 68 CA2d 376, 156 P2d 958.

The seller's inability to convey perfect title is no reason to deny specific performance if the buyer is willing to take whatever title the seller has. See §5.18. In this situation, the buyer seeking specific performance should join all persons with liens that can be discharged by the application of purchase money. See *Grant v Beronio* (1893) 97 C 496, 32 P 556.

The buyer should also join an owner of record who is someone other than the defendant/seller and who is under contractual obligation to transfer the property to the defendant. See *Miller v Dyer, supra*. The buyer should consider joining anyone who induced the seller not to sell (*e.g.,* under a theory of intentional interference with contractual relations). The buyer can recover damages from these parties for all harm resulting from their acts, in addition to obtaining specific performance and incidental compensation against the seller. *Duff v Engelberg* (1965) 237 CA2d 505, 47 CR 114.

A broker/plaintiff, however, was denied the right to name a title company as a party to an action for specific performance. *Stagen v Stewart-West Coast Title Co.* (1983) 149 CA3d 114, 196 CR 732. For further discussion of *Stagen* and the broader topic of joining title insurance companies and escrow holders as additional third party defendants, see California Title Insurance Practice, chaps 11, 13 (2d ed Cal CEB 1997).

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C. Pleading and Proof

§5.28 1. Elements of Action

Specific performance is an alternative equitable remedy to damages in an action for breach of contract. Therefore, establishing a cause of action for specific performance requires allegation and proof of all elements prerequisite to a cause of action for breach of contract, except for pleading and proof of damage.

In an ordinary action for damages for breach of contract, the plaintiff must plead and prove (*McDonald v John P. Scripps Newspapers* (1989) 210 CA3d 100, 104, 257 CR 473):

- The existence of a contract;
- The plaintiff's performance, tender, or excuse for nonperformance;
- The defendant's breach; and
- Damages the plaintiff incurred from the defendant's breach.

In an action for specific performance, the plaintiff must also plead and prove (*Henderson v Fisher* (1965) 236 CA2d 468, 46 CR 173; see §§5.6-5.15 on prerequisites to specific performance):

- Sufficient certainty;
- Adequate consideration and justness and reasonableness of the contract; and
- Inadequacy of the remedy at law.

A buyer seeking specific performance must also plead and prove that it tendered performance (unless the seller repudiated the contract), and that it is ready, willing, and able to perform its part of the bargain. See *Mayer v Beondo* (1948) 83 CA2d 665, 189 P2d 327, and authorities cited in §5.15.

PRACTICE TIP: A person seeking to enforce a real property sales contract as defined in CC §2985 (an installment land contract), or a conditional sales contract of a mobilehome subject to local property taxation, should first have the contract duly recorded by the county recorder or should file a change-in-ownership statement as provided in Rev & T C §480.

A complaint for specific performance of a real property sales contract should nearly always contain an alternative cause of action for damages for breach of contract. See Practice Tip in §5.33.

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2. Pleading Particular Elements

§5.29 a. Adequacy of Consideration; Just and Reasonable Contract

Although allegations of inadequate consideration or of unjust or unreasonable contracts logically should be raised as a defense in the answer (see §5.8), it is settled law that adequate consideration is an element of a plaintiff's case that the plaintiff must allege and prove. *Stiles v Cain* (1901) 134 C 170, 66 P 231; *Boulenger v Morison* (1928) 88 CA 664, 264 P 256. If the buyer's complaint alleges as an element of damage the difference between the value of the property and the contract price, a court may construe this allegation as an admission of inadequate consideration with a resulting failure to state a cause of action for specific performance. See *Baran v Goldberg* (1948) 86 CA2d 506, 194 P2d 765.

Inadequacy of consideration, however, does not always result merely because the contract price is lower than the current value. The issue of adequacy of consideration is tested as of the time the agreement was made. *Meyer v Benko* (1976) 55 CA3d 937, 127 CR 846; *Henderson v Fisher* (1965) 236 CA2d 468, 46 CR 173. Thus, a difference between the price at the time the agreement was made and the value at the time of breach might be explained simply by the passage of time on rapidly changing property values. Moreover, even a discrepancy between price and value when the agreement was made can be justified by, *e.g.,* a seller's desire to consummate a sale quickly. *Meyer v Benko, supra*. See also *Henderson v Fisher, supra; Page v Brown* (1932) 122 CA 12, 9 P2d 895 (adequate consideration is a question for trier of fact and means a fair and reasonable price under the circumstances and not necessarily the highest price obtainable).

The requirements of adequate consideration and of a just and reasonable contract set forth in CC §3391(1)-(2) apply to a plaintiff/seller as well as to a buyer, so that, if the seller's complaint does not allege adequacy of consideration (*i.e.,* that the value of the land is reasonably proportionate to the sale price and that the contract is just and reasonable to the buyer), it does not state a cause of action for specific performance. *White v Sage* (1906) 149 C 613, 87 P 193.

It is not enough to merely allege that the contract was just and reasonable and that the consideration was fair and adequate. The complaint should also allege facts supporting the conclusion. For instance, a buyer suing for specific performance should allege the agreed-on purchase price and that the price reasonably reflected the property's value at the time the contract was formed. See *Friedrich v Roland* (1950) 95 CA2d 543, 547, 213 P2d 423.

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§5.30 b. Damages, Attorney Fees, and Costs

A cause of action for breach of contract requires an allegation of damages. *McDonald v John P. Scripps Newspapers* (1989) 210 CA3d 100, 104, 257 CR 473. Although uncertain or speculative damages are not recoverable in an action for breach of contract (CC §3301), it is the very uncertainty of damages and the consequent inadequacy of the remedy at law that is ordinarily the reason for granting equitable relief such as specific performance.

PRACTICE TIP: The buyer should avoid pleading as an element of damages the difference between current value and the contract price in order to preclude the denial of specific performance on the ground of inadequate consideration. See §5.29.

A buyer who seeks specific performance plus "compensation," *e.g.,* for loss caused by delay in performance or for loss of rents or profits (see §5.32), must allege such items and include them in the demand. One court has held that, when the items that are sought as compensation are within the terms of performance stated in the contract, they need not be pleaded. *Greenstone v Claretian Theological Seminary* (1959) 173 CA2d 21, 343 P2d 161, disapproved on other grounds in *Ellis v Mihelis* (1963) 60 C2d 206, 32 CR 415. The court noted that it could merely enforce the pertinent terms of the contract and order an accounting of the items the contract provided for as an incident to its decree of specific performance.

Attorney fees may be recovered in an action for specific performance if provided by contract. See CC §1717; *Baugh v Garl* (2006) 137 CA4th 737, 40 CR3d 539 (action for injunction to specifically enforce water rights in settlement agreement). See discussion in chap 4 on attorney fee awards in breach of contract actions and for further discussion of §1717. But any attorney fee award the successful buyer obtains in a judgment for specific performance cannot be deducted from the purchase price as an offset. *Behniwal v Mix* (2007) 147 CA4th 621, 54 CR3d 427. For commentary on and summary of *Beniwal*, see 30 CEB Real Prop L Rep 75, 84 (May 2007). For detailed discussion of recovering attorney fees in contract actions, see California Attorney Fee Awards, chap 4 (3d ed Cal CEB 2010).

WARNING: Review mandatory mediation clauses, and possible exceptions. In *Blackburn v Charnley* (2004) 117 CA4th 758, 11 CR3d 885, the court affirmed an attorney fee award in a specific performance action despite a prelitigation mediation requirement; the mediation clause contained an express exception allowing the plaintiffs to file a court action to enable recordation of a lis pendens. For further discussion, see §7.58.

Claims to attorney fees in specific performance actions involving third parties can be problematic. For example, in *Glynn v Marquette* (1984) 152 CA3d 277, 199 CR 306, although the court ordered specific performance of a sales contract against a successive purchaser who had notice of the original contract, it refused to award attorney fees against the successive purchaser.

The prevailing party's costs are recoverable as a matter of course in an action involving title or possession of real property. See CCP §1032.

PRACTICE TIP: If the contract or specific performance action was made necessary by the negligence or other tortious conduct of a third party, such as an escrow holder, attorney, title abstractor, broker, or appraiser, the attorney fees and other "dispute costs" in the action may be recoverable as damages (in a separate cause of action or a separate lawsuit against the third party) under the "tort of another" doctrine. See *Prentice v North Am. Title Guar. Corp.* (1963) 59 C2d 618, 620, 30 CR 821. For additional authority on attorney fees as damages, see chap 3; California Attorney Fee Awards, chap 7 (3d ed Cal CEB 2010); California Title Insurance Practice, chap 13 (2d ed Cal CEB 1997).

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§5.31 c. Whether Contract Is Written or Oral

Most contracts that transfer interests in real property are subject to the statute of frauds and therefore must be written. CC §1624(a)(3); CCP §1971. A party against whom an action based on a contract has been filed may object by demurrer or answer if the pleading does not indicate whether the contract is written or oral. CCP §430.10(g). Thus, when the action is based on an oral contract involving real property that is ordinarily subject to the statute of frauds, the plaintiff should plead the oral contract and any additional facts that operate to take the contract out of the statute (*e.g.,* estoppel, a written memorandum, or part performance). Mere loss of a bargain or of the opportunity to purchase other land is not sufficient to create an estoppel to take an oral agreement to purchase real property out of the statute of frauds. *Carlson v Richardson* (1968) 267 CA2d 204, 72 CR 769. On the statute of frauds, see §5.36.

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Source: Real Property/California Real Property Remedies and Damages/5 Specific Performance/§5.32 d. Compensation Incidental to Specific Performance

§5.32 d. Compensation Incidental to Specific Performance

Although some cases refer to an award of "damages" in addition to a decree of specific performance, the weight of recent authority has clarified that a party is not entitled to breach of contract damages in addition to specific performance. *Rogers v Davis* (1994) 28 CA4th 1215, 1220, 34 CR2d 716. Specific performance and damages are separate remedies for breach of contract. Although a plaintiff may request the alternative remedies of equitable relief or legal damages in the complaint, the plaintiff must ultimately elect the remedy sought. *Rogers v Davis, supra*. See also §1.29; *Southern Christian Leadership Conf. v Al Malaikah Auditorium Co.* (1991) 230 CA3d 207, 281 CR 216.

A court may award compensation as an incident to specific performance, however, if it is required to make the parties whole. *Stratton v Tejani* (1982) 139 CA3d 204, 212, 187 CR 231. Such an award is based on the premise that specific performance is an equitable remedy, and an award of compensation incident to this remedy may be necessary to relate the performance back to the contract date of performance and to adjust the equities between the parties because of the delayed performance. *Stratton v Tejani*, *supra.* See also *BD Inns v Pooley* (1990) 218 CA3d 289, 298, 266 CR 815; *Bravo v Buelow* (1985) 168 CA3d 208, 213, 214 CR 65. The compensation awarded as an incident to a decree of specific performance is more like an accounting between the parties than like an assessment of damages. *D-K Inv. Corp. v Sutter* (1971) 19 CA3d 537, 549, 96 CR 830, quoting *Ellis v Mihelis* (1963) 60 C2d 206, 220, 32 CR 415. See also *Bravo v Buelow, supra*.

Given these principles, an award of compensation incidental to specific performance is not limited solely to the nonbreaching party, and compensation may be awarded for a variety of items. A court may give the complainant credit for *any* losses caused by the delay and permit the defendant to offset such amounts as appropriate. *Ellis v Mihelis*, *supra*.

Even if the seller fails to perform, the judgment of specific performance should compensate the seller for the loss of use of the purchase money between the contract performance date and the date of judgment. *Stratton v Tejani* (1982) 139 CA3d 204, 212, 187 CR 231. See also *Abrams v Motter* (1970) 3 CA3d 828, 83 CR 855. When specific performance of a real property sales agreement is allowed, the buyer is entitled to lost rents and profits, as a credit against the purchase price, whereas the seller is entitled to an offset for the lost use of the purchase proceeds. *Hennefer v Butcher* (1986) 182 CA3d 492, 505 n8, 227 CR 318 (adding that breaching seller's offset may not exceed compensation to buyer, lest seller profit from his or her wrong); *Stratton v Tejani, supra*.

PRACTICE TIP: Whether representing the buyer or the seller in an action for specific performance, practitioners should be mindful of, and avail themselves of, the opportunity to receive compensation as an incident to a decree of specific performance, in order to maximize recovery or mitigate exposure.

Courts have awarded compensation incidental to specific performance in a variety of circumstances, such as the following:

- A prevailing buyer of residential property was awarded incidental compensation for loss of use of the subject property, and the losing seller was awarded an offset in the amount of the interest on the purchase price. *Meyer v Benko* (1976) 55 CA3d 937, 127 CR 846.
- Prevailing buyers were awarded compensation for the increase in mortgage rates between the time specified for performance in the contract and the time of judgment, in addition to the specific performance decree. The court calculated the compensation based on the present value of the differential over the whole term of the proposed mortgage. *Hutton v Gliksberg* (1982) 128 CA3d 240, 180 CR 141.

PRACTICE TIP: Compare the *Hutton* court's cost-of-money or interest-differential calculation to that used in *Stratton*, in which the court held that the "present cash value for the interest differential" should be awarded only for the plaintiffs' "anticipated time of possession rather than for the life of their loan." *Stratton v Tejani* (1982) 139 CA3d 204, 215, 187 CR 231. See also *Housing Auth. v Monterey Sr. Citizen Park* (1985) 164 CA3d 348, 210 CR 497 (following *Stratton*). Given these holdings, sellers facing an award of compensation for interest differential

incidental to specific performance should be prepared to introduce evidence of the anticipated time the purchasers will possess the property in order to minimize the amount of any such award. In addition to the interest differential compensation, the court in *Stratton* awarded the purchasers a credit for the reasonable monthly rental of the property, less the reasonable value of their use of the purchase funds not placed in escrow, and the sellers were entitled to interest on the entire purchase price, less any sums the buyer had placed in escrow.

- Compensation was awarded to the buyers for their expenditures and efforts that enhanced the value of the property, or otherwise benefited the seller, even though the buyers breached the sales agreement. Although their breach precluded specific performance, they were entitled to restitution for improvements to the property. *Lesny Dev. Co. v Kendall* (1985) 164 CA3d 1010, 210 CR 890.
- Compensation incidental to specific performance for the increased construction costs from the seller's delay in conveying title was awarded to the buyer. Compensation was not limited to contract concepts of foreseeability, as long as the compensation was reasonable. *Bravo v Buelow* (1985) 168 CA3d 208, 214 CR 65.

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§5.33 D. Availability of Lis Pendens

A buyer seeking specific performance should always consider recordation of a lis pendens under CCP §§405-405.61 soon after filing the complaint. The effect of recordation is that a subsequent purchaser or encumbrancer takes subject to the recording party's rights as determined in the action, except for the attorney fee award. See *Behniwal v Mix* (2007) 147 CA4th 621, 54 CR3d 427.

Although recordation of a lis pendens on a valid real property claim in a judicial proceeding is absolutely privileged and may not be used as the basis for a slander of title action (see §§13.5, 13.24), a party who wrongfully records a lis pendens may be liable for damages for malicious prosecution. See *Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 254 CR 336. If any uncertainty exists about whether the cause of action qualifies as a real property claim under the lis pendens statutes (see §§13.17-13.22, 13.83), the recordation of a lis pendens can be very risky (see §13.5). In that situation, obtaining a temporary restraining order and preliminary injunction under CCP §§525-534 at the beginning of the action is the safer alternative, particularly if the equities of the case favor the plaintiff. For detailed discussion of lis pendens procedures, see chap 13.

PRACTICE TIP: Sustaining a lis pendens in the face of a motion to expunge (see §§13.44-13.91) may be challenging. Therefore, a plaintiff seeking specific performance should review the facts and consider whether instead to pursue a quiet title action, which requires recordation of a lis pendens but is not usually available to enforce an executory purchase contract. See §§7.8, 7.26. But the plaintiff should nearly always plead an alternative cause of action for damages for breach of contract. If the defendant succeeds in expunging the lis pendens, the defendant could sell the real property to a bona fide purchaser (see §13.13), which would leave nothing subject to specific performance.

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Source: Real Property/California Real Property Remedies and Damages/5 Specific Performance/§5.34 E. Form: Complaint for Specific Performance

§5.34 E. Form: Complaint for Specific Performance

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	**)**	**No. _ _ _ _ _ _**
Plaintiff(s)	**)**	**COMPLAINT FOR DAMAGES**
vs	**)**	**FOR BREACH OF**
_ _[*Name(s)*]_ _, and Does 1	**)**	**CONTRACT; ALTERNATIVELY**
through 20, inclusive,	**)**	**FOR SPECIFIC**
Defendant(s)	**)**	**PERFORMANCE**
_____)		

Plaintiff alleges:

1. _ _[*State capacity and residence of plaintiff, e.g., Plaintiff is a California Corporation doing business in the County of Los Angeles, California*]_ _**.**

2. _ _[*State defendant's identity, capacity, and residence, e.g., Defendant was at all times mentioned here an individual residing in Los Angeles and doing business in the County of Los Angeles, California*]_ _**.**

3. _ _[*Venue allegations, e.g., Venue in the Superior Court for the County of Los Angeles is proper because the property at issue is located in the City of _ _ _ _ _ _, County of Los Angeles, California*]_ _**.**

[*Add, if applicable, for each named defendant an additional paragraph with allegations like those in paragraph 2*]

4. Plaintiff is unaware of the true names, capacities, or basis for liability of defendants Does 1 through 20, inclusive, and therefore sues said defendants by their fictitious names. Plaintiff will amend this complaint to allege their true names, capacities, or basis for liability when the same have been ascertained. Plaintiff is informed and believes and on that basis alleges that defendants Does 1 through 20, inclusive, and each of them, are in some manner liable to plaintiff, or claim some right, title, or interest in the subject property that is junior and inferior to that of plaintiff, or both.

5. At all times relevant to this action, each defendant, including those fictitiously named, was the agent, servant, employee, partner, joint venturer, or surety of the other defendants and was acting within the scope of said agency, employment, partnership, venture, or suretyship, with the knowledge and consent or ratification of each of the other defendants in doing the things alleged in this complaint.

6. On or about _ _[*date*]_ _, _ _[*defendant/plaintiff*]_ _ was and now is the owner of real property located in _ _ _ _ _ _ County, California, commonly known as _ _[*street address or other common designation*]_ _ and more particularly described as _ _[*legal description*]_ _.

7. On or about _ _[*date*]_ _, in _ _[*city*]_ _, _ _ _ _ _ _ County, California, plaintiff and defendant entered into a written agreement in which _ _[*plaintiff/defendant*]_ _ agreed to buy and _ _[*defendant/plaintiff*]_ _ agreed to sell the property described in Paragraph 6. Under the agreement the anticipated closing date of the sale was _ _[*date*]_ _. A copy of this agreement, marked Exhibit _ _, is attached to and incorporated in this complaint.

FIRST CAUSE OF ACTION
(Breach of Contract by Plaintiff _ _[*name*]_ _
Against Defendant _ _[*name*]_ _)

8. Plaintiff hereby realleges and incorporates by reference the allegations in paragraphs 1 through _ _ _ as though fully set forth in this cause of action.

[*Add one of the following alternatives*]

[*Alternative 1: If plaintiff is buyer*]

9. Plaintiff has performed all duties, promises, and obligations required of plaintiff and all conditions precedent that plaintiff agreed to perform in the agreement described in Paragraph 7.

10. Under the terms of the agreement described in Paragraph 7, defendant was obligated to transfer and convey to plaintiff the real property described in Paragraph 6.

11. Defendant has failed and refused, and continues to fail and refuse, to transfer and convey the real property described in Paragraph 6 to the plaintiff.

[*Alternative 2: If plaintiff is seller*]

9. Within the time prescribed by the agreement, plaintiff executed a complete conveyance of the property described in Paragraph 6, has _ _[*offered to deliver marketable title to defendant/deposited a deed conveying marketable title into escrow*]_ _, and continues to be ready, willing, and able to execute all other documents necessary for delivery of the same to defendant.

10. Plaintiff has paid or incurred _ _[*e.g., property taxes in the sum of $_ _[dollar amount]_ _ and interest in the sum of $_ _[dollar amount]_ _ on the deed of trust on the property described in Paragraph 6*]_ _, from the anticipated closing date of the sale until the present, and plaintiff will continue to make _ _[*e.g., monthly payments of $_ _[dollar amount]_ _ principal and interest on such deed of trust*]_ _, for all of which plaintiff is entitled to reimbursement from defendant.

11. Plaintiff is entitled to damages for loss of interest from the anticipated closing date of the sale under the agreement described in Paragraph 7.

[*Continue*]

12. Defendant's failure and refusal to _ _[*convey/accept conveyance of*]_ _ the real property described in Paragraph 6 constitutes a breach of the agreement described in Paragraph 7.

13. Because of defendant's breach of the agreement described in Paragraph 7, plaintiff has suffered general and consequential damages, including _ _[*set forth specific items of damage; see §5.30*]_ _. Plaintiff is therefore entitled to damages of $_ _[*dollar amount*]_ _.

14. _ _[*If the contract provides for attorney fees, insert allegation of that fact here*]_ _.

WHEREFORE, plaintiff prays for judgment as hereafter set forth.

SECOND CAUSE OF ACTION
(Action for Specific Performance by Plaintiff _ _[*name*]_ _
Against Defendant _ _[*name*]_ _)

15. Plaintiff hereby realleges and incorporates by reference the allegations in paragraphs 1 through _ _ _ as though fully set forth in this cause of action.

16. At the time plaintiff and defendant entered into the agreement referred to in Paragraph 7, the consideration plaintiff was to pay under the agreement was adequate and the agreement is just and reasonable as to defendant, as the agreed sales price reflected, at the time the agreement was entered, the fair market value for the property.

[*Add one of the following alternatives*]

[*Alternative 1: If plaintiff is buyer*]

17. Within the time prescribed by the agreement, plaintiff has offered to pay the full consideration called for in the agreement and continues to be ready, willing, and able to pay the consideration to defendant.

18. Plaintiff has demanded that defendant convey the property described in Paragraph 6, under the terms of the agreement described in Paragraph 7.

19. Defendant has refused and continues to refuse to convey to plaintiff the property described in Paragraph 6, as required by the terms of the Agreement described in Paragraph 7.

[*Alternative 2: If plaintiff is seller*]

17. Within the time prescribed by the agreement, plaintiff executed a complete conveyance of the property described in Paragraph 6, has offered to deliver marketable title to defendant, and continues to be ready, willing, and able to execute all other documents necessary for delivery of the same to defendant.

18. Plaintiff has demanded that Defendant accept conveyance of the property described in Paragraph 6, under the terms of the agreement described in Paragraph 7, and has demanded that defendant pay the agreed consideration for the property.

19. Defendant has refused and continues to refuse to accept conveyance of the property described in Paragraph 6, and has refused and continues to refuse to pay the agreed consideration for the property, as set forth in the agreement described in Paragraph 7.

[*Continue*]

20. Plaintiff has no adequate remedy at law to enforce the provisions of the agreement described in Paragraph 7 other than specific enforcement of the agreement.

21. Plaintiff is entitled to specific performance of the terms, conditions, and provisions of the agreement described in Paragraph 7, by court decree, among other things, ordering defendant to complete conveyance of the property described in Paragraph 6.

[*If applicable, add the following option*]

[*Option: For compensation incidental to specific performance*]

22. Plaintiff is entitled to compensation incidental to a decree of specific performance by virtue of the delay of defendant in _ _[*conveying/accepting conveyance*]_ _ of the property described in Paragraph 7 in that _ _[*set forth facts showing why plaintiff is entitled to compensation and in what sum (e.g., fair rental value of the property during the period of the delay), and set forth any additional items of compensation sought by the plaintiff*]_ _.

[*Continue*]

WHEREFORE, plaintiff prays for damages as follows:

FIRST CAUSE OF ACTION

1. Legal damages by virtue of defendant's breach of contract in the amount of $_ _[*dollar amount*]_ _.

2. Attorney fees and costs according to proof;

3. Interest on the damages according to proof;

4. Such other and further relief as the court deems just and proper.

SECOND CAUSE OF ACTION

[*Add one of the following alternatives*]

[*Alternative 1: If plaintiff is buyer*]

1. For an order decreeing that defendant shall execute and deliver to plaintiff a complete conveyance of the property described in Paragraph 6 to the plaintiff;

[*Alternative 2: If plaintiff is seller*]

1. For an order decreeing that defendant shall accept conveyance of the property described in Paragraph 6, and pay to plaintiff the purchase price of $_ _[*dollar amount*]_ _, as set forth in the agreement described in Paragraph 7, together with interest from the anticipated closing date to the date on which payment is made.

[*Continue*]

2. For compensation incidental to the decree of specific performance as set forth above, according to proof;

3. Interest on the compensation, as available, according to proof;

4. Attorney fees and costs according to proof;

5. Such other and further relief as the Court deems just and proper.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Verification, see Comment*]

Copies: Original (filed with court clerk); copies for service (one for each defendant who is to be served); office copies.

Comment: This form may be used when either the buyer or the seller is the plaintiff in an action for damages for breach of contract, and, alternatively, for specific performance. On costs and attorney fees, see §5.30. On the caption and introductory clauses and the advisability of verifying a complaint, see California Civil Procedure Before Trial, chap 15 (4th ed Cal CEB 2004).

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IV. DEFENSES

§5.35 A. Defenses Applicable to Contract Actions Generally

Generally, all defenses available in a breach of contract action are available in an action for specific performance, including failure to comply with the statute of frauds, failure to perform, failure of consideration, and the running of the statute of limitations. See §§5.36-5.43. Additional and significant defenses affecting contract validity or enforceability are discussed in detail in §§4.18-4.26.

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§5.36 1. Statute of Frauds; Signed Agreement

The Statute of Frauds (CC §1624) provides that contracts for the sale of real property, are invalid unless "they, or some note or memorandum thereof, are in writing." CC §1624(a)(3). The Statute does not require a written contract. A note or memorandum "subscribed by the party to be charged" is adequate. *Sterling v Taylor* (2007) 40 C4th 757, 765, 55 CR3d 116. See *Ulloa v McMillan Real Estate & Mortgage, Inc.* (2007) 149 CA4th 333, 57 CR3d 1 (absence of buyers' signatures on counteroffer signed by sellers did not preclude buyers action for specific performance). Under Corp C §16301(2), if an agreement to sell is made by a partner, the partner must have written authorization to sell for the partnership if the sale is not in the usual course of business. *Elias Real Estate, LLC v Tseng* (2007) 156 CA4th 425, 67 CR3d 360.

A memorandum satisfies the Statute "if it identifies the subject of the parties' agreement, shows that they made a contract, and states the essential contract terms with reasonable certainty." *Sterling*, 40 C4th at 766. For discussion of essential terms for real property sales contracts, see §§4.19-4.20.

The Statute of Frauds bars enforcement of oral contracts to convey an interest in real property or to lease real property for more than 1 year. CC §1624(a)(3)-(4); see CCP §1971. A court, however, can enforce such oral contracts if the plaintiff has partially performed. CCP §1972; *Sutton v Warner* (1993) 12 CA4th 415, 422, 15 CR2d 632. Taking possession or making significant improvements to the property based on the oral agreement satisfies the part performance requirement as long as the possession or improvement is known to the seller and is "actual, visible, notorious, and exclusive." *Sutton v Warner*, *supra*.

Defendant may be estopped to plead the Statute of Frauds. *Monarco v Lo Greco* (1950) 35 C2d 621, 623, 220 P2d 737. For example, when in relying on an oral promise, a plaintiff changes his or her position materially so that it would be unconscionable not to estop the defendant, the defendant may not assert the statute. *Wilk v Vencill* (1947) 30 C2d 104, 107, 180 P2d 351.

To be enforceable, a settlement agreement providing for the sale of real property must satisfy the Statute of Frauds. *Nicholson v Barab* (1991) 233 CA3d 1671, 285 CR 441. See also *Texaco, Inc. v Ponsoldt* (9th Cir 1991) 939 F2d 794 (Statute of Frauds applied to out-of-court settlement agreement not signed by appellee). However, an oral settlement agreement made in open court, entered into the record, and otherwise complying with CCP §664.6 is not subject to the Statute of Frauds. *Pietrobon v Libarle* (2006) 137 CA4th 992, 40 CR3d 718. See also *Kohn v Jaymar-Ruby, Inc.* (1994) 23 CA4th 1530, 28 CR2d 780 (oral settlement agreement stipulated before court after settlement conference did not violate Statute of Frauds); *Hastings v Matlock* (1985) 171 CA3d 826, 217 CR 856 (oral settlement agreement to rescind written agreement for purchase and sale of real property did not violate Statute of Frauds).

An invalid written contract may be ratified, if the ratification is in writing. See *Behniwal v Mix* (2005) 133 CA4th 1027, 35 CR3d 320 (sellers ratified agent's forgery of their signatures on contract documents by signing disclosures), cited in §4.22A.

Licensed real estate brokers attempting to recover a commission under an oral agreement face a difficult road. Broker agreements must be in writing. CC §1624(a)(4). Without a written agreement or proof of actual fraud, the broker may not recover under an oral agreement. *Phillippe v Shapell Indus., Inc.* (1987) 43 C3d 1247, 241 CR 22. For further discussion of the Statute of Frauds, see chaps 3-4; California Real Property Sales Transactions §§2.44-2.53, 2.95, 2.97 (4th ed Cal CEB 2007).

A party who has signed a written contract may be specifically compelled to perform it, even if the other party has not signed it, as long as the latter has performed, or offers to perform, and the case is otherwise proper for enforcing specific performance. CC §3388.

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§5.37 2. Statute of Limitations

The statute of limitations for bringing a specific performance action based on a written contract is 4 years. CCP §337(1); *Reiner v Hermann* (1947) 79 CA2d 543, 180 P2d 385. The statute will not run as long as the buyer is in actual possession of the property, unless the seller distinctly and unequivocally repudiates the agreement by, *e.g.,* commencing proceedings to oust the buyer from possession. *Hermosa Beach Land & Water Co. v Law Credit Co.* (1917) 175 C 493, 166 P 22. See also *Fleishman v Woods* (1901) 135 C 256, 67 P 276 (statute does not run against vendee in possession who paid full purchase price). A vendee who is not in possession must bring an action within 4 years after being put on notice of repudiation. *Hermosa Beach Land & Water Co. v Law Credit Co., supra*.

A defendant's conduct in response to prelitigation claims against it and its insurers may toll the limitations period or estop the defendant from asserting the statute of limitations defense. See, *e.g*., *Union Oil Co. v Greka Energy Corp.* (2008) 165 CA4th 129, 80 CR3d 738 (defendant induced plaintiff not to file court action by requesting settlement discussions after plaintiff asserted its claim; defendant also urged bonding company and plaintiff to suspend legal actions to allow negotiation for modification of contracts). For further discussion of use of equitable estoppel to extend statute of limitations, see §12.79.

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B. Equitable Defenses

§5.38 1. Unclean Hands

It is axiomatic that a party who seeks to invoke a court's equitable power must come to court with clean hands. See, *e.g., Gavina v Smith* (1944) 25 C2d 501, 154 P2d 681. See also CC §3391(3), which provides that specific performance is not available against a party whose assent was obtained by misrepresentation, concealment, circumvention, or unfair practices of the party seeking performance. See, *e.g., Cornblith v Valentine* (1930) 211 C 243, 294 P 1065. See also *Milton Kauffman, Inc. v Smith* (1947) 82 CA2d 302, 186 P2d 11. The concept of unclean hands, however, is broader than the statutory language of §3391(3) and includes any unconscionable conduct that prejudices the other party. *Soon v Beckman* (1965) 234 CA2d 33, 44 CR 190.

Although the clean hands doctrine is usually referred to as an equitable defense, it also applies in an action at law. *Unilogic, Inc. v Burroughs Corp.* (1992) 10 CA4th 612, 12 CR2d 741. Asserting the defense of unclean hands in an action at law will not change it to an action in equity or warrant a separate, prior trial by the court. *Fibreboard Paper Prods. Corp. v East Bay Union of Machinists, Local 1304* (1964) 227 CA2d 675, 728, 39 CR 64. See also *Blain v Doctor's Co.* (1990) 222 CA3d 1048, 272 CR 250.

There is some authority that the defense of unclean hands can be raised for the first time in the reviewing court. See *Katz v Karlsson* (1948) 84 CA2d 469, 191 P2d 541. But see *Marshall v Marshall* (1965) 232 CA2d 232, 253, 42 CR 686 (defense cannot be raised for first time on motion for new trial); *Moriarty v Carlson* (1960) 184 CA2d 51, 7 CR 282 (defense cannot be raised for first time on appeal).

PRACTICE TIP: The better practice is to plead and prove the defense in the trial court.

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§5.39 2. Laches

The defense of laches is based on the principle that equity will not aid a plaintiff who unreasonably delays bringing suit, when the delay is so prejudicial to the adverse party that granting the plaintiff's requested relief would be inequitable. See, *e.g., Weitz v Yankosky* (1966) 63 C2d 849, 48 CR 620. See also *Property Controllers, Inc. v Shewfelt* (1966) 245 CA2d 755, 54 CR 218. A somewhat more pithy enunciation of the laches doctrine is in the maxims of jurisprudence: "The law helps the vigilant, before those who sleep on their rights." CC §3527.

The defense of laches applies only in an action in equity. See *Unilogic, Inc. v Burroughs Corp.* (1992) 10 CA4th 612, 619, 12 CR2d 741. What constitutes an unreasonable delay is governed by the facts of each case. The statute of limitations for a comparable legal action (see *Holmberg v Armbrecht* (1946) 327 US 392, 90 L Ed 743, 66 S Ct 582) may provide guidance for an outer limit, but the defense of laches could succeed within the statute of limitations period.

Unreasonable delay alone does not amount to laches; there must also be a showing that the defendant was prejudiced by the delay. *Kling v Hallmark Cards, Inc.* (9th Cir 2000) 225 F3d 1030, 1036.

On pleading laches as an affirmative defense, see California Civil Procedure Before Trial §25.47 (4th ed Cal CEB 2004).

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§5.40 3. Relief Against Forfeiture

Neither specific performance nor preventive relief is available to enforce a penalty or forfeiture in any case, nor to enforce a penal law, except in a case of nuisance or as otherwise provided by law. CC §3369. Moreover, except for a grossly negligent, willful, or fraudulent breach of duty, a party who incurs a forfeiture (or a loss in the nature of a forfeiture) because of the failure to comply with an obligation can be relieved from making full compensation to the other party. CC §3275.

The extent to which equity will avoid a forfeiture is reflected in *Petersen v Hartell* (1985) 40 C3d 102, 219 CR 170, discussed in §4.55. There, the court held that a willfully defaulting vendee who made substantial payments on an installment land contract or substantial improvements on the property, and whose default consisted solely of failure to pay further amounts due, albeit willfully, is entitled to a conveyance of title to the property on payment of the entire remaining balance owed under the contract, together with interest and any consequential damages. If the "plaintiffs fail to make such payments within a reasonable time fixed by the court, the adjudication that plaintiffs have no further interest in the property should become effective upon defendant's payment of the sums due to plaintiffs as restitution." 40 C3d at 117.

For a case in which the court refused to apply the defense of forfeiture in a specific performance action, see *Clear Channel Outdoor, Inc. v Erkelens* (ND Cal 2008) 2008 US Dist Lexis 79702 (court granted specific performance to enforce lease provision allowing lessee to remove billboard sign after lessor refused to renew lease on same terms as before; requiring sign to remain in place would have improperly benefited breaching lessor).

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§5.41 C. Statutory Defenses

Specific performance cannot be obtained against a party whose assent was obtained by misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party that has not been substantially fulfilled. CC §3391(3). Complementarily, CC §3391(4) prohibits specific performance against a party whose assent was given under mistake, misapprehension, or surprise, except that, when the contract provides for compensation in a mistake, that mistake may be compensated for and the contract specifically enforced in other respects.

A unilateral mistake is no defense to specific performance unless the plaintiff knew of the mistake and unfairly took advantage of it. *Meyer v Benko* (1976) 55 CA3d 937, 127 CR 846.

An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give the buyer a title free from reasonable doubt. CC §3394.

Generally, specific performance is not available to a lender to enforce payments owing on a promissory note secured by real property because such an action may be subject to defenses based on the one-action and antideficiency rules. See CCP §§726(a), 580b. See also *Scalese v Wong* (2000) 84 CA4th 863, 101 CR2d 40, in which the court awarded specific performance to a lender that required the buyer to make monthly payments on a high-interest installment note that did not allow prepayment. In *Scalese*, the buyer waived the one-action and antideficiency rules by not asserting them during the litigation. For further discussion, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 4-5 (4th ed Cal CEB 2009).

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D. Disfavored Defenses

§5.42 1. Lack of Mutuality of Remedy

Specific performance is available even when the plaintiff could not have been specifically compelled to perform, if the plaintiff's performance has already substantially taken place, is assured, or can be secured to the court's satisfaction, and if specific performance would otherwise be an appropriate remedy. CC §3386; *Bleecher v Conte* (1981) 29 C3d 345, 353, 213 CR 852; *Converse v Fong* (1984) 159 CA3d 86, 205 CR 242.

PRACTICE TIP: The court may consider a plaintiff's past conduct or economic interest in performing, and can grant a conditional decree or require the plaintiff to give security for its performance.

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§5.43 2. Continuing Acts Requiring Supervision

An archaic defense, which may have grown out of the former absence of mutuality of remedy doctrine, is that an obligation cannot be specifically enforced if it contemplates continuing acts by the plaintiff that require supervision. See *Thayer Plymouth Ctr. v Chrysler Motors Corp.* (1967) 255 CA2d 300, 63 CR 148; *Bakersfield Country Club v Pacific Water Co.* (1961) 192 CA2d 528, 13 CR 573.

Although the rationale for this defense seems to have disappeared with the 1969 amendment to CC §3386, it has been said that California still follows the rule. See 13 Witkin, Summary of California Law, *Equity* §45 (10th ed 2005). It has also been said, however, that because the rule is archaic it "should not be unduly extended." *Ellison v Ventura Port Dist.* (1978) 80 CA3d 574, 581, 145 CR 665. In *Ellison,* the court reviewed the types of contracts in which specific performance was refused on the ground of requiring continuous supervision. The court concluded that the continuing supervision defense has vitality only when applied to complex acts required to develop or operate certain businesses (*e.g.,* railroads, mines, oilfields) or to exclusive distribution or sales agency contracts in which cooperation between the parties is necessary. 80 CA3d at 580. See also *Berkeley Lawn Bowling Club v City of Berkeley* (1974) 42 CA3d 280, 116 CR 762 (court upheld specific performance of implied covenant requiring city to maintain lawn bowling greens for balance of 20-year lease, even though obligation required defendant to perform continuing acts); *Mahroom v Best W. Int'l, Inc.* (ND Cal, Feb. 2, 2009, No. C07-2351) 2009 US Dist Lexis 11041 (declining to deny mandatory injunction on motion for summary judgment and noting developments since *Thayer* was decided).

PRACTICE TIP: Performance of a series of continuing acts by a plaintiff can often be assured when the court grants a conditional judgment (see §5.46) or imposes a requirement that the plaintiff post security for his or her performance. The likelihood of successfully asserting the continuing acts defense seems remote.

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V. JUDGMENT

A. Types of Judgments

§5.44 1. Judgment for Seller Stated Alternatively

If the buyer has not made full payment of the purchase price, a judgment for specific performance in the seller's favor may order that the buyer take title if it pays the balance of the purchase price. See *Laske v Lampasona* (1948) 89 CA2d 284, 200 P2d 871. This type of conditional judgment usually provides for an alternative disposition of the case if the buyer does not pay. See, *e.g., Honey v Henry's Franchise Leasing Corp. of Am.* (1966) 64 C2d 801, 52 CR 18; *Longmaid v Coulter* (1898) 123 C 208, 55 P 791.

Alternatively, the judgment may order that the property be sold judicially and the buyer held liable for any deficiency. See *Goldsworthy v Dobbins* (1952) 110 CA2d 802, 243 P2d 883. This judgment is inappropriate if the buyer has a right of redemption (see §4.55) and is not given the opportunity to exercise it.

WARNING: A judicial sale can put the seller in a difficult position because it is likely to depress the resale price. Also, a seller who financed the failed purchase will not be able to recover from the buyer the difference between the unpaid balance of the secured purchase loan and the amount realized from a judicial sale. See CCP §580b. On the effect of judicial sales, see §4.49.

A more effective form of judgment for a seller orders the defendant to purchase the property and provides that, if the defendant fails to do so within a certain time, a judgment for the purchase price be entered against him. This form of judgment has been held immune from attack on the ground that it violates the antideficiency provisions of §580b. *BD Inns v Pooley* (1990) 218 CA3d 289, 296, 266 CR 815.

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§5.45 2. Judgment for Buyers

A specific performance decree in the buyer's favor should direct the seller to execute and deliver a deed to the buyer and to perform all other necessary conditions of the contract. It should also set specific time frames for performance. A specific performance decree should also direct the buyer to perform all of the buyer's obligations under the contract, including payment of the purchase price. The decree may not deduct from the purchase price as an offset any attorney fee award given to the buyer. *Behniwal v Mix* (2007) 147 CA4th 621, 54 CR3d 427. See §§5.21, 5.30. Finally, the decree should provide for whatever additional compensation is required to vindicate the plaintiff's contractual rights. See §5.32. Often, this requires an accounting process for the period between the date the contract was to be performed and the date of the decree. See *BD Inns v Pooley* (1990) 218 CA3d 289, 298, 266 CR 815.

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§5.46 3. Conditional Judgment

A conditional judgment provides relief for the successful party on compliance with conditions imposed to protect the losing party. *Bleecher v Conte* (1981) 29 C3d 345, 213 CR 852. For example, a conditional judgment can direct the seller to deliver a grant deed and title policy to the buyer and to pay off an existing trust deed on receipt of the amount due on the purchase price. *Goldsworthy v Dobbins* (1952) 110 CA2d 802, 243 P2d 883.

Civil Code §3386(b) authorizes the court to grant conditional judgments requiring the plaintiff to give security for his or her performance. For example, as a condition of receiving a deed, a plaintiff/buyer may be ordered to deposit a promissory note and trust deed, as well as a cash downpayment, in court. As a condition of judgment for the purchase price, a plaintiff/seller might be ordered to deposit in court a survey report, in addition to a deed and title policy.

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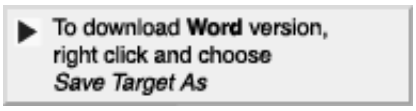
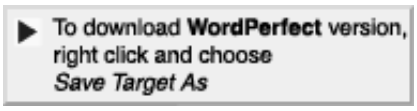
B. Drafting Judgment

§5.47 1. Checklist: Ancillary and Alternative Remedies





In drafting a proposed judgment decreeing specific performance, the attorney should be aware of ancillary and alternative remedies in the court's discretion, including:

- Issuance of a permanent injunction to enforce a negative covenant, *i.e.,* a promise not to do a particular thing. See §5.5; California Civil Procedure Before Trial §§32.16-32.18 (4th ed Cal CEB 2004).
- Imposing a constructive trust or ordering quasi-specific performance against a successor in interest to a party to the obligation, *e.g.,* the promisor in a contract to convey real property in return for personal services. See *Henderson v Fisher* (1965) 236 CA2d 468, 46 CR 173.
- Awarding money damages instead of specific performance. See §5.30.
- Awarding other equitable relief instead of specific performance, such as restitution, or a sale to a third party with a division of proceeds, to avoid a forfeiture to one party and unjust enrichment to the other. See *Eldridge v Burns* (1978) 76 CA3d 396, 437, 142 CR 845.
- Awarding compensation as an incident to specific performance. See §5.32.
- Varying the terms of the original contract in the judgment, as long as the defendant's rights are not prejudiced. See *Wheat v Thomas* (1930) 209 C 306, 287 P 102 (plaintiff/buyer ordered to pay cash to seller instead of paying off mortgage provided for in contract, because time for payment of mortgage had expired); *Ellison v Ventura Port Dist.* (1978) 80 CA3d 574, 145 CR 665 (court of equity not limited to either enforcing contract completely or not at all).
- Using an interlocutory decree to ensure the plaintiff's performance. See *Goldsworthy v Dobbins* (1952) 110 CA2d 802, 243 P2d 883; *Moser v Pearce* (1932) 124 CA 478, 12 P2d 977.

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Source: Real Property/California Real Property Remedies and Damages/5 Specific Performance/§5.48 2. Form: Conditional Judgment for Specific Performance

§5.48 2. Form: Conditional Judgment for Specific Performance

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Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	**)**	**No. _ _ _ _ _ _**
Plaintiff(s)	**)**	**CONDITIONAL JUDGMENT**
vs	**)**	**FOR SPECIFIC**
_ _[*Name(s)*]_ _, and Does 1	**)**	**PERFORMANCE**
through 20, inclusive,	**)**	**Dep't: _ _[*number*]_ _**
Defendant(s)	**)**	**Trial judge: _ _[*name*]_ _**
_____)		**Trial date: _ _[*date*]_ _**

This action for specific performance was regularly tried on _ _[*date*]_ _, before the Court sitting without a jury, the Honorable _ _[*name of judge*]_ _, presiding. Appearing as attorneys were _ _[*name*]_ _ for plaintiff and _ _[*name*]_ _ for defendant. The Court, having heard the testimony and considered the evidence, makes the following judgment, including this statement of facts established by the evidence:

1. On _ _[*date*]_ _, in _ _[*city*]_ _, _ _ _ _ _ _ County, California, plaintiff _ _[*name*]_ _ and defendant _ _[*name*]_ _ entered into a written agreement in which plaintiff agreed to _ _[*buy/sell*]_ _ and defendant agreed to _ _[*sell/buy*]_ _ real property located in _ _ _ _ _ _ County, California, commonly known as _ _[*street address or other common designation*]_ _ and more particularly described as _ _[*legal description*]_ _. Under the agreement the anticipated closing date of the sale was _ _[*date*]_ _.

2. Plaintiff made due service of process on defendant.

3. On _ _[*date*]_ _, _ _[*plaintiff/defendant*]_ _ was and now is the owner in fee of the real property described in Paragraph 1.

4. At the time plaintiff and defendant entered into the agreement referred to in Paragraph 1, the consideration to be paid by _ _[*plaintiff/defendant*]_ _ under the agreement was $_ _[*dollar amount*]_ _, which was adequate, and the agreement is just and reasonable as to defendant.

[*If applicable, add the following option*]

[*Option: If plaintiff recorded a lis pendens*]

5. Immediately after filing the complaint in this action, plaintiff recorded a lis pendens with respect to the property described in Paragraph 1, in the office of the recorder of _ _ _ _ _ _ County, which is the county in which the property is located.

[*Continue*]

6. Plaintiff has performed all conditions precedent that plaintiff agreed to perform in the agreement described in Paragraph 1.

[*Add one of the following alternatives to paragraph 6*]

[*Alternative 1: If plaintiff is buyer*]

Within the time prescribed by the agreement, plaintiff tendered the consideration called for in the agreement and demanded that defendant convey to plaintiff the property described in the agreement.

[*Alternative 2: If plaintiff is seller*]

Within the time prescribed by the agreement plaintiff executed a complete conveyance of the property described in Paragraph 1, offered to deliver marketable title to defendant, and continues to be ready, willing, and able to execute all other documents necessary for delivery of the same to defendant.

[*Continue*]

7. Defendant has refused and continues to refuse to _ _[*convey to plaintiff the property described in Paragraph 1/accept conveyance of the property described in Paragraph 1 and pay to plaintiff the agreed consideration for the property*]**_ _, as set forth in the agreement described in Paragraph 1.**

[*Add one of the following alternatives*]

[*Alternative 1: If judgment is for plaintiff/buyer*]

8. Plaintiff has been damaged by the delay of defendant in conveying the property described in Paragraph 1 in that _ _[*set forth facts showing how and in what sum plaintiff has been damaged, e.g., the amount of fair rental value of the property during the period of the delay*]**_ _.**

[*Alternative 2: If judgment is for plaintiff/seller*]

8. Plaintiff has paid or incurred _ _[*e.g., property taxes in the sum of $_ _*[*dollar amount*]**_ _ and interest in the sum of $_ _**[*dollar amount*]**_ _ on the deed of trust on the property described in Paragraph 1*]**_ _, from _ _**[*date*]**_ _, the anticipated closing date of the sale, until the present.**

[*Continue*]

9. All other facts alleged by plaintiff in the complaint are true.

[*Add one of the following alternatives*]

[*Alternative 1: If judgment is for plaintiff/buyer*]

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that, within _ _ _ days after the date on which the clerk of this Court notifies defendant _ _[*name*]**_ _ that plaintiff _ _**[*name*]**_ _ has deposited with the clerk the sum of $_ _**[*dollar amount*]**_ _, which is the balance of the purchase price owed to defendant plus interest at the rate of _ _ _ percent per year from _ _**[*date*]**_ _, which was the anticipated closing date described in Paragraph 1, to the date on which plaintiff deposits the balance with the clerk, defendant shall deposit with the clerk a complete conveyance in fee to plaintiff of the property described in Paragraph 1, together with marketable title, as evidenced by a standard title insurance policy by _ _**[*name of title company*]**_ _, _ _**[*which is the title company named in the agreement*]**_ _.**

IT IS FURTHER ORDERED AND ADJUDGED that the clerk of this Court credit plaintiff, against the amount that plaintiff is required to deposit with the clerk under the immediately preceding paragraph, the sum of $_ _[*dollar amount*]**_ _, which equals the rental value of the property plus interest at the rate of _ _ _ percent per year from _ _**[*date*]**_ _, which was the anticipated closing date, to the date on which defendant deposits the conveyance and all other documents defendant has been ordered to deposit with the clerk.**

[*Alternative 2: If judgment is for plaintiff/seller*]

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that, within _ _ _ days after the date on which the clerk of this Court notifies defendant _ _[*name*]**_ _ that plaintiff _ _**[*name*]**_ _ has deposited with the clerk a deed conveying the fee title to the property described in Paragraph 1 and a standard policy of title insurance on the property issued by _ _**[*name of title company*]**_ _, defendant shall pay to plaintiff the sum of $_ _**[*dollar amount*]**_ _, which is the balance of the purchase price owed to plaintiff plus interest at the rate of _ _ _ percent per year from _ _**[*date*]**_ _, which was the anticipated closing date described in Paragraph 1, to the date on which defendant pays such balance.**

[*If applicable, add the following option*]

[*Option: If defendant/buyer is ordered to pay compensation to plaintiff/seller*]

IT IS FURTHER ORDERED AND ADJUDGED that defendant pay to plaintiff the sum of $_ _[*dollar amount*]**_ _, which is equal to _ _**[*e.g., the property taxes that have accrued on the property/the interest that plaintiff has paid on*

the deed of trust on the property]_ _ **plus interest at the rate of _ _ _ percent per year from _ _**[*date*]_ _**, which was the anticipated closing date described in Paragraph 1, to the date on which defendant pays the balance to plaintiff.**

[*Continue*]

IT IS FURTHER ORDERED AND ADJUDGED that _ _[*defendant/plaintiff*]_ _ **pay _ _**[*plaintiff's/defendant's*]_ _ **costs in this action in an amount to be determined by a memorandum of costs after judgment. _ _**[*If provided for in contract or statute and awarded by court, include award of attorney fees.*]_ _

IT IS FURTHER ORDERED AND ADJUDGED that this Court retain jurisdiction of this action until this judgment is fully complied with or until further order of this Court.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Copies: Original (presented to judge for signature, then filed with proof of service); conformed copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: This form is suitable for use regardless of whether plaintiff is the buyer or the seller. Most recitations in the judgment are the same in either case. Recitations and orders applicable only to a buyer or seller are indicated by italicized instructions in the form.

For discussion of conditional and alternative forms of judgment, see §§5.44-5.46. The prevailing party's costs are recoverable as a matter of course in an action involving title or possession of real property. See CCP §1032. On the recoverability of attorney fees, see §5.30.

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C. Enforcement of Judgment

§5.49 1. Methods

In addition to the usual methods of enforcing judgments, the following procedures may be useful in enforcing judgments for specific performance:

- **Civil contempt.** Disobedience of a judgment for specific performance may be punishable as a civil contempt. CCP §1209(5); *Goldsworthy v Dobbins* (1952) 110 CA2d 802, 243 P2d 883 (seller failed to convey after buyer performed). See also *Addiego v Hill* (1971) 17 CA3d 453, 95 CR 151.
- **Writ of possession.** A judgment that provides for possession of real property in a specific performance action may be enforced by a writ of possession. See CCP §715.010.
- **Recordation of judgment.** A copy of a judgment affecting title to or possession of real property and authenticated by the clerk of the court in which it was rendered is recordable without an acknowledgment. Govt C §27282(a)(1). Recordation provides constructive notice of the judgment to subsequent purchasers, mortgagees, and lienholders. Govt C §§27282(b), 27326.

WARNING: The law is in conflict on whether a lis pendens continues to give constructive notice (see chap 13) after entry of judgment. Compare *Contini v Western Title Ins. Co.* (1974) 40 CA3d 536, 542, 115 CR 257, with *Ahmanson Bank & Trust Co. v Tepper* (1969) 269 CA2d 333, 342, 74 CR 774. Until this issue is resolved, counsel for the prevailing party is cautioned to record the judgment or an abstract of judgment despite the prior recording of a lis pendens. For additional strategies, see California Title Insurance Practice §13.7 (2d ed Cal CEB 1997).

- **Appointment of commissioner.** When a defendant seller refuses to obey a judgment to convey title, the court may appoint a commissioner to do so. See *Love v Watkins* (1871) 40 C 547, 559.

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§5.50 2. Effect of Appeal on Enforcement

The perfecting of an appeal does not stay enforcement of a judgment directing the sale, conveyance, or delivery of possession of real property that is in the possession or control of the appellant or the party ordered to sell, unless an undertaking in a sum fixed by the trial court is given. The undertaking should be in an amount that will protect the appellee from waste and loss of use and occupancy of the property. If the judgment includes the payment of a deficiency, the undertaking shall also provide for that payment. CCP §917.4. Section 917.4 inures to the benefit of the party for whom specific performance has been awarded, not to the appellant who holds the property. *Barnes v Chamberlain* (1983) 147 CA3d 762, 195 CR 417. Similarly, perfecting an appeal does not stay enforcement of a trial court's judgment or order directing execution of a written instrument unless the instrument is executed and deposited with the clerk of the court where the original judgment or order is entered. CCP §917.3.

Nor does perfecting an appeal stay enforcement of a trial court's judgment or order directing the payment of money. CCP §917.1. Thus, a defendant/buyer who is ordered to pay the purchase price must first give an undertaking before execution is stayed. See CCP §917.1.

Under Cal Const art VI, §§10-12, the supreme court and the courts of appeal can grant a writ of supersedeas staying execution of a judgment. *Private Investors, Inc. v Homestake Mining Co.* (1936) 11 CA2d 488, 54 P2d 535 (decided under former Cal Const art VI, §§4, 4b, on which Cal Const art VI, §§10-12 are based). See also *Hill v Finnegan* (1880) 54 C 493 (inherent power theory).

On appeals and writs generally, see California Civil Appellate Practice (3d ed Cal CEB 1996); California Civil Writ Practice (4th ed Cal CEB 2008).

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6

Cancellation of Instruments

Cynthia K. Long

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§6.1 I. INTRODUCTION

When a written instrument as it stands might cause serious injury to a person against whom it is void or voidable, it may be adjudged void and ordered delivered to the court, *i.e.,* canceled. CC §3412. Cancellation of a conveyance returns the parties to their status quo. *Duley v Westinghouse* (1979) 97 CA3d 430, 158 CR 668.

This chapter discusses the nature of the remedy in §§6.2-6.11A, the grounds for cancellation in §§6.12-6.25, when notice and offer to restore benefits is required in §§6.26-6.27, and the procedure for obtaining judicial cancellation in §§6.28-6.43.

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II. NATURE OF REMEDY

§6.2 A. Equitable and Legal Remedy

Although cancellation is equitable in nature, the existence of a remedy at law does not preclude the exercise of equitable jurisdiction by the court, which accepts jurisdiction over a cancellation action when the legal remedy is not speedy, adequate, and efficacious. *Swan v Talbot* (1907) 152 C 142, 94 P 238; see *Patterson v Clifford F. Reid, Inc.* (1933) 132 CA 454, 23 P2d 35. Cancellation retains its equitable nature even if the plaintiff also seeks recovery of the consideration (see §6.26). See *Farrar v Steenbergh* (1916) 173 C 94, 159 P 707.

An instrument that is void on its face is not subject to the remedy of cancellation (see §6.6). CC §3413. On grounds for cancellation of instruments, see §§6.12-6.25.

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§6.3 B. Instruments Subject to Cancellation

Examples of instruments relating to real property that may be canceled under CC §3412 include:

- Purchase and sale agreements. *Patterson v Clifford F. Reid, Inc.* (1933) 132 CA 454, 23 P2d 35.
- Promissory notes. *Kachlon v Markowitz* (2008) 168 CA4th 316, 85 CR3d 532.
- Deeds of trust. *Smith v Williams* (1961) 55 C2d 617, 12 CR 665.
- Deeds. *Stohr v Stohr* (1905) 148 C 180, 82 P 777; *Peterson v Ellebrecht* (1962) 205 CA2d 718, 23 CR 349.
- Options. *North Confidence Mining & Dev. Co. v Morrice* (1922) 56 CA 145, 204 P 851.
- Mortgages. *Fair Oaks Bank v Johnson* (1926) 198 C 196, 244 P 335.
- Assignments of land patents. *Haserot v Keller* (1924) 67 CA 659, 228 P 383.
- Installment land contracts. *Rheingans v Smith* (1911) 161 C 362, 119 P 494.
- Leases. *Prichard v Kimball* (1923) 190 C 757, 214 P 863.
- Reconveyances by trustees under deeds of trust. *Phelps v American Mortgage Co.* (1936) 6 C2d 604, 59 P2d 95.
- Notices allegedly recorded under CC&Rs. *Ward v Superior Court* (1997) 55 CA4th 60, 63 CR2d 731.

An action to cancel a deed of trust based on the expiration of the statute of limitations for enforcement of the secured obligation will not lie unless the time periods stated in CC §882.020 have also expired. *Miller v Provost* (1994) 26 CA4th 1703, 33 CR2d 288. Recordation of a lis pendens in an action concerning the deed of trust extends the time periods in CC §882.020. *Slintak v Buckeye Retirement Co.* (2006) 139 CA4th 575, 43 CR3d 131.

Although the court cannot cancel an oral obligation (see CC §3412; *Hilton v Reed* (1941) 46 CA2d 449, 116 P2d 98), a written instrument whose invalidity is based on the breach of an oral agreement is subject to cancellation (*Briggs v Crawford* (1912) 162 C 124, 121 P 381).

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§6.4 C. Partial Cancellation

An instrument that evidences different rights or obligations may be canceled in part, and the remainder allowed to stand. CC §3414. *Reina v Erassarret* (1949) 90 CA2d 418, 425, 203 P2d 72; see *Hoffman v Kirby* (1902) 136 C 26, 68 P 321 (amount of mortgage may be reduced in action for its cancellation); *Pitts v Highland Constr. Co.* (1953) 115 CA2d 206, 252 P2d 14 (amount of promissory note reduced in action to cancel note and deed of trust).

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§6.5 D. When Cancellation Necessary

Cancellation is necessary when a deed or other document concerning real property clouds the plaintiff's title to the property or otherwise poses a danger to the plaintiff's rights. See, *e.g., Prichard v Kimball* (1923) 190 C 757, 214 P 863 (defendants' failure to exercise option to purchase was not apparent from search of records or from face of expired lease); *Patterson v Clifford F. Reid, Inc.* (1933) 132 CA 454, 23 P2d 35 (defendants sold to third party promissory note and deed of trust executed by plaintiff under a void, but apparently valid, contract).

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E. When Cancellation Not Necessary

§6.6 1. Instrument Void on Its Face

When an instrument is void on its face, or its invalidity is apparent on the face of another instrument necessary to its use in evidence, cancellation will not lie, because the instrument is not considered capable of causing injury, as CC §3412 requires. CC §3413. This provision continues in limited fashion the old equitable rule that a void instrument need not be canceled because it can do no harm. *City of Oakland v Carpentier* (1863) 21 C 642.

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§6.7 2. Contract Extinguished by Mutual Cancellation or Destruction

Cancellation or destruction of a written contract, or of the parties' signatures, with intent to extinguish the obligation, extinguishes it for all consenting parties. CC §1699. The Civil Code does not require a judicial act to effect a mutual cancellation. When one party, against the other's wishes, seeks cancellation under CC §3412 (see §6.1), however, a judgment is necessary. See *Evans v Rancho Royale Hotel Co.* (1952) 114 CA2d 503, 250 P2d 283 (parties to instrument can, by mutual agreement, effect their own cancellation as long as that intent is adequately shown).

In addition, the intentional destruction, cancellation, or material alteration of a written contract by or with the consent of a party to it extinguishes all of the contract's executory obligations to him or her against the parties who do not consent to the act. CC §1700. Section 1700 does not apply when a contract is executed in duplicate, and only one of the duplicate originals is altered or destroyed. CC §1701.

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§6.8 3. Instrument Terminated by Its Own Provisions

A contract may be terminated by its own provisions (*e.g.,* expiration of an option to purchase by a certain date if not exercised, termination by a lessee who gives written notice as provided in the lease, or expiration of the term of a lease). Some contracts contain a reciprocal clause allowing each party to terminate for the other's breach. *B. L. Metcalf Gen. Contractor, Inc. v Earl Erne, Inc.* (1963) 212 CA2d 689, 28 CR 382. Other agreements may provide for an option to purchase when one party to the agreement dies. In one case, a surviving party's failure to exercise the option to purchase the decedent's half share on her death expressly terminated the agreement. The court construed the agreement as conferring rights only to the parties, not to their successors in interest. See *Strong v Theis* (1986) 187 CA3d 913, 232 CR 272.

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§6.9 F. Need for Additional Remedies

Cancellation under CC §3412 may not in itself be a sufficient remedy; adequate relief may require additional action or a provisional remedy. For example, when a plaintiff seeks to cancel a deed of trust at the same time that the beneficiary undertakes nonjudicial foreclosure proceedings under it, the plaintiff should seek to enjoin the foreclosure sale until the right to cancellation is adjudicated. See *Guy v Hermance* (1855) 5 C 73; *Shattuck v Carson* (1852) 2 C 588. On enjoining foreclosures, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 7 (4th ed Cal CEB 2009).

The plaintiff in an action seeking cancellation under CC §3412 should also claim any damages caused by the instrument. See *Oswald v City of El Centro* (1930) 211 C 45, 292 P 1073 (rental value damages awarded in action to cancel lease (executed under coercion) for the term plaintiff deprived of possession). It is sometimes necessary to seek an appraisal to ascertain the property's market value in the event the defendant disposes of it before entry of a judgment for the plaintiff. See *Hatch v Penzner* (1941) 44 CA2d 874, 113 P2d 295.

The plaintiff may, in the trial court's discretion, recover punitive damages. Punitive damages may be sought when the defendant has been found guilty of fraud, malice, or oppression. *Millar v James* (1967) 254 CA2d 530, 62 CR 335. See §12.87. Because a plaintiff must prove facts justifying punitive damages by clear and convincing evidence (see CC §3294(a)), however, a wider range of potential damages, attorney fees, statutory penalties, and other remedies such as rescission and injunctive relief may be obtained if the cancellation remedy is joined (or substituted) with statutory remedies, such as those provided under the Truth in Lending Act (15 USC §§1601-1667f), the unfair competition statutes (Bus & P C §§17200-17210), or other consumer protection statutes. See, *e.g., Black v Financial Freedom Sr. Funding Corp.* (2001) 92 CA4th 917, 112 CR2d 445 (reverse mortgage violated state consumer protection laws).

The Elder Abuse and Dependent Adult Civil Protection Act (Welf & I C §§15600-15660) provides additional remedies to elder or dependent adults for "financial abuse" as defined in Welf & I C §15610.30. They include prejudgment writ of attachment, mandatory attorney fees, and mandatory costs, including fees for the services of a conservator litigating an elder abuse claim, compensatory damages, and all other remedies otherwise provided by law. Welf & I C §§15657.01, 15657.5. An elder lacking capacity or that elder's representative may demand the return of misappropriated property, and if the property is not returned, remedies include mandatory attorney fees and costs. Welf & I C §§15657.5, 15657.6. If the defendant is proven guilty of recklessness, oppression, fraud, or malice in committing the abuse, the plaintiff is entitled to punitive damages. See Welf & I C §15657.5. For further discussion, see California Elder Law Litigation: An Advocate's Guide, chap 6 (Cal CEB 2003).

Civil Code §3345 authorizes the court to award an enhanced remedy—up to three times greater than the amount of a fine, civil penalty, "or any other remedy the purpose or effect of which is to punish or deter" that would otherwise be awarded—in actions by or on behalf of senior citizens or disabled persons seeking to "redress unfair or deceptive acts or practices or unfair methods of competition." The supreme court will determine in *Clark v Superior Court* (review granted Sept. 9, 2009, S174229; superseded opinion at 174 CA4th 82, 94 CR3d 135) whether this enhanced remedy is available in private actions by senior citizens seeking restitution under Bus & P C §§17200-17210.

When the defendant is in possession of the real property and claims rights under an instrument, the plaintiff may wish to join a cause of action for ejectment (see chap 10) in order to obtain a judgment for restoration of possession of the property. The plaintiff may also find it advisable to join causes of action for rescission (see §6.10), to quiet title (see §6.11), or pursue other equitable remedies (see §6.11A), depending on the circumstances.

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G. Cancellation Distinguished From Other Remedies

§6.10 1. Rescission

Cancellation is solely a judicial remedy; *i.e.,* only a court can cancel an instrument under CC §3412. Rescission is effected by the parties either by mutual consent (CC §1689(a)) or unilaterally (CC §1689(b)). *Runyan v Pacific Air Indus., Inc.* (1970) 2 C3d 304, 85 CR 138. A party who rescinds unilaterally, of course, may subsequently institute an action for relief based on the rescission. See, *e.g.,* 2 C3d at 313.

The remedy of rescission assumes the existence of a binding oral or written contract. *Charles Brown & Sons v White Lunch Co.* (1928) 92 CA 457, 268 P 490. Cancellation can be ordered by a court only if there is a void or voidable written instrument, which may be an instrument other than a contract (see §6.3); however, rescission under CC §1689 is limited to contracts only.

Cancellation terminates only the particular written instrument (CC §3412), but rescission terminates the entire contract (CC §1688). Both may be appropriate in a particular situation, and the grounds for rescission overlap considerably with the grounds on which an instrument may be found voidable and therefore subject to cancellation (compare grounds for rescission in chap 1 with grounds for cancellation in §§6.12-6.25).

When an instrument is voidable (see §6.18), cancellation will be barred unless the plaintiff acted promptly to rescind the underlying transaction and offered to restore any consideration on discovering the facts making it voidable. *Leeper v Beltrami* (1959) 53 C2d 195, 211, 1 CR 12; *Loud v Luse* (1931) 214 C 10, 3 P2d 542; *Bastajian v Brown* (1943) 57 CA2d 910, 135 P2d 374. See §§6.26-6.27.

For further comparison of cancellation and rescission, see §1.3.

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§6.11 2. Quiet Title

An action to cancel an instrument under CC §3412 is directed at a specific instrument injurious to the plaintiff's rights and is sometimes referred to as an action to remove a cloud on the title. See, *e.g., Castro v Barry* (1889) 79 C 443, 21 P 946. The purpose of an action to quiet title under CCP §§760.010-764.080 is to affirm the plaintiff's title against specific adverse claimants and against all potential unknown claimants. See chap 7. Thus, the two remedies are similar and may be joined as causes of action in one complaint. See *Loud v Luse* (1931) 214 C 10, 3 P2d 542.

A party with only an equitable interest in the property generally cannot maintain a quiet title action against the holder of legal title (see chap 7; *Castro v Barry* (1889) 79 C 443, 448, 21 P 946) but may maintain an action for cancellation under CC §3412. When a complaint contains causes of action to quiet title and cancel an instrument, the quiet title cause of action is demurrable if it is based on the same facts as the cancellation cause of action, which reveal a defect in the plaintiff's title. *Ephraim v Metropolitan Trust Co.* (1946) 28 C2d 824, 172 P2d 501.

For detailed discussion of quieting title, see chap 7.

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Source: Real Property/California Real Property Remedies and Damages/6 Cancellation of Instruments/§6.11A 3. Reversing Lien Priority

§6.11A 3. Reversing Lien Priority

A lien priority obtained under a subordination agreement may be reversed in an equitable action against the lienholder. See, *e.g., Gluskin v Atlantic Sav. & Loan Ass'n* (1973) 32 CA3d 307, 108 CR 318; *Middlebrook-Anderson Co. v Southwest Sav. & Loan Ass'n* (1971) 18 CA3d 1023, 96 CR 338. Such an action is distinguishable from a cancellation action, because in a priority reversal action the lien is not cancelled—it merely loses its priority to another lien by judicial decree.

EXAMPLE: A seller who participated in financing the property sale may bring a priority reversal action against the buyer's lender based on a breach of the purchase agreement by the buyer. See, *e.g., Brown v Boren* (1999) 74 CA4th 1303, 88 CR2d 758.

For further discussion on remedies a seller may have for not being sufficiently protected as a subordinating lienholder in a sales transaction, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 2-3, 9 (4th ed Cal CEB 2009).

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III. GROUNDS FOR CANCELLATION

A. Mental Incompetence

§6.12 1. Judicially Determined Mental Incapacity

Any contract or conveyance made by a person whose mental incapacity has been judicially determined is void. CC §40. A decree of incapacity is notice to the world that the person cannot make a valid contract. *Carroll v Carroll* (1940) 16 C2d 761, 108 P2d 420; *Hellman Commercial Trust & Sav. Bank v Alden* (1929) 206 C 592, 275 P 794.

A judicial determination of mental incapacity fixes that status until the person is restored to capacity. *Vigne v Superior Court* (1940) 37 CA2d 346, 99 P2d 589.

On remedies under the Elder Abuse and Dependent Adult Civil Protection Act (Welf & I C §§15600-15660) for mentally incompetent adults and elderly persons, see §6.9.

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§6.13 2. Mental Weakness

An instrument may be canceled if, at the time of its delivery, the plaintiff was unable to exercise rational care over his or her property because of mental delusion or weakness. *Crowther v Rowlandson* (1865) 27 C 376. The test is whether the plaintiff was mentally competent to understand his or her rights in the transaction and to understand the nature, purpose, and effect of the instrument. *Pomeroy v Collins* (1926) 198 C 46, 243 P 657.

Mental weakness alone, whether natural or resulting from old age or illness, may not ordinarily sustain an action for cancellation. *Webb v Saunders* (1947) 79 CA2d 863, 871, 181 P2d 43; *Holman v Stockton Sav. & Loan Bank* (1942) 49 CA2d 500, 508, 122 P2d 120. If mental weakness is accompanied by other factors, such as the defendant's fiduciary relationship with the plaintiff (see §6.22), undue influence (see §6.19), or inadequate consideration, the court may cancel the instrument. *Maggini v Pezzoni* (1888) 76 C 631, 18 P 687; *Estate of Brast* (1945) 69 CA2d 704, 160 P2d 193.

An instrument is seldom canceled on the ground of intoxication unless the plaintiff was so inebriated as to have been incapable of understanding the nature of the transaction and the consideration was grossly inadequate. *Swan v Talbot* (1907) 152 C 142, 94 P 238.

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§6.14 B. Minority

A minor (a person under age 18) may not make a valid contract concerning any interest in real property. Fam C §§6500, 6701. Such contracts are void from their inception and need not be disaffirmed. *Burnand v Irigoyen* (1947) 30 C2d 861, 186 P2d 417. The minor need not even return the consideration in disaffirming such a contract. *Sparks v Sparks* (1950) 101 CA2d 129, 225 P2d 238. An instrument executed by a minor in an attempt to ratify a previous conveyance of real property is itself void. *Lee v Hibernia Sav. & Loan Soc'y* (1918) 177 C 656, 171 P 677.

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§6.15 C. Illegality

An instrument that violates a statute or involves illegal consideration is void and subject to cancellation as long as the plaintiff is not equally at fault. *Colby v Title Ins. & Trust Co.* (1911) 160 C 632, 117 P 913 (agreement, deed, and deed of trust executed in consideration of defendant's compounding of felony by not prosecuting plaintiff's daughter for theft; plaintiff held not to be at fault (see §6.38)); *Woods v Kern County Mut. Bldg. & Loan Ass'n* (1939) 34 CA2d 468, 93 P2d 837 (plaintiff entitled to cancellation of grant deed and deed of trust obtained from her because defendant's fraudulent representation violated Home Owners' Loan Act of 1933).

The court must also consider the connection between the illegal transaction and the transaction sought to be canceled. How closely a transaction must be connected with an illegal purpose in order to render the collateral transaction illegal is a question of degree. In one case, the defendant/seller, in an attempt to conceal her financial worth to qualify for old-age assistance, sold land to the plaintiffs and directed them to make the promissory note payable to her son and name him the beneficiary of the deed of trust. The plaintiffs were not entitled to cancellation of the sale, because the illegal transaction was not the sale of property, but the transfer of the note and deed of trust by the defendant to her son. *Robertson v Hyde* (1943) 58 CA2d 667, 137 P2d 703.

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D. Fraud

§6.16 1. By Misrepresentation

A person who was induced by fraudulent misrepresentations to enter into a contract or to convey property may have the contract or conveyance canceled and recover the benefits lost in the transaction. *Seeger v Odell* (1941) 18 C2d 409, 115 P2d 977. The elements of actual fraud, whether as the basis of the remedy in contract or tort, may be stated as follows: There must be (1) a false representation or concealment of a material fact susceptible of knowledge, (2) made with knowledge of its falsity or without sufficient knowledge on the subject to warrant a representation, (3) with the intent to induce the person to whom it is made to act upon it, and such person must (4) act in reliance on the representation (5) to his or her damage. *Stevenson v Baum* (1998) 65 CA4th 159, 75 CR2d 904. On elements of fraud, see chap 3.

To warrant a finding of fraud, the representation must have been made with knowledge that it was untrue or without sufficient facts to justify an assumption that it was true and with the intent that the representation would be acted on. *McMahon v Grimes* (1929) 206 C 526, 275 P 440. The plaintiff's negligent failure to read the instrument is not a defense if the plaintiff justifiably relied on misrepresentations of the instrument's meaning and content. *Security-First Nat'l Bank v Earp* (1942) 19 C2d 774, 122 P2d 900 (deed of trust securing $32,750 debt set aside when it was falsely represented to be mere renewal of previous mortgage securing $3000 debt). The plaintiff is not held to a standard of precaution or hypothetical reasonableness. A gullible or ignorant plaintiff can recover from a defendant who took advantage of this weakness even though a person of normal intelligence would not have been misled. *Cortez v Weymouth* (1965) 235 CA2d 140, 45 CR 63. See also *Rogers v Warden* (1942) 20 C2d 286, 125 P2d 7 (quitclaim deed by plaintiff without any business experience canceled because it was induced by fraudulent representations that plaintiff did not own the property).

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§6.17 2. By Nondisclosure

"Fraudulent concealment" is a term of art that includes mere nondisclosure when a party has a duty to disclose. See §§3.27, 3.32. In general, a seller of real property has a duty to disclose when the seller knows of facts *materially* affecting the value or desirability of the property that are known or accessible only to the seller and also knows that these facts are not known to, or within the reach of the diligent attention and observation of, the buyer. See §§3.15, 3.17, 3.30-3.31. As a species of fraud, nondisclosure may be the basis for judicial relief in the form of either cancellation of an instrument or rescission. See §§1.3, 6.10.

In one case, by warning the plaintiffs in the purchase contract that they took title subject to easements of record, the defendant put them on notice of the material facts, which satisfied the duty of disclosure under the express terms of the contract. Because the defendant did not breach that duty, and the plaintiffs failed to consult the public records that disclosed the existence of an oil company easement on the property, the plaintiffs could not state a cause of action for fraudulent nondisclosure as a matter of law. *Stevenson v Baum* (1998) 65 CA4th 159, 75 CR2d 904. But see *Alfaro v Community Hous. Improvement Sys. & Planning Ass'n, Inc.* (2009) 171 CA4th 1356, 89 CR3d 659 (buyers who contributed 10 months' sweat equity to purchase homes, without knowing that the deeds restricted future sales to affordable housing prices, may seek damages).

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§6.18 3. Void Versus Voidable Instruments

Instruments may be either void or voidable depending on the type of fraud involved, and the distinction bears on whether the plaintiff must offer to restore any benefits received to obtain cancellation (see §§6.10, 6.26-6.27). *Fleming v Kagan* (1961) 189 CA2d 791, 11 CR 737. An instrument that the plaintiff has been fraudulently induced to execute (but that the plaintiff understands the nature of) is voidable, and the plaintiff must offer to return any benefits received. An instrument that the plaintiff executes as a result of fraud but without any knowledge of the nature of the instrument, believing it to be something else, is wholly void, and the plaintiff need not restore consideration. *Fleming v Kagan, supra*.

If the defrauded party has a reasonable opportunity to discover the fraud before execution, the agreement is merely voidable. Blindness or other physical or mental impairments have been held to legally prevent a reasonable opportunity to discover fraud. *Rosenthal v Great W. Fin. Secs. Corp.* (1996) 14 C4th 394, 419, 58 CR2d 875; *Jones v Adams Fin. Servs.* (1999) 71 CA4th 831, 835, 84 CR2d 151.

Voluntarily executed deeds obtained by fraud can be canceled by the grantor as in *Rogers v Warden* (1942) 20 C2d 286, 125 P2d 7; see §6.16. If the grantor is actually aware that title is to be conveyed, however, the deed is merely voidable and can therefore be relied on by a bona fide purchaser. *Fallon v Triangle Mgmt. Servs.* (1985) 169 CA3d 1103, 1106, 215 CR 748; see §6.40.

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§6.19 E. Undue Influence

Undue influence consists of (CC §1575):

- Using a real or apparent authority over a person or a confidence that is reposed by another to obtain an unfair advantage over that person;
- Taking an unfair advantage of another's weakness of mind; or
- Taking a grossly oppressive and unfair advantage of another's necessities or distress.

Undue influence is the supremacy of one mind over another, preventing the influenced person from acting according to his or her own wish or judgment and inducing him or her to do an act that he or she would not do if left to act freely. *Webb v Saunders* (1947) 79 CA2d 863, 181 P2d 43. In the context of real property rights, the test is whether a conveyance is the result of another's will rather than the grantor's uncontrolled will. *Krug v Meeham* (1952) 109 CA2d 274, 240 P2d 732; see *Estate of Bixler* (1924) 194 C 585, 229 P 704.

Allegations of the existence of an intimate and confidential relationship, causing the grantor to repose trust and confidence in the defendant, and of the grantor's weakness of mind, are sufficient to state a cause of action for cancellation of a deed. *Stohr v Stohr* (1905) 148 C 180, 82 P 777. See also *O'Neil v Spillane* (1975) 45 CA3d 147, 119 CR 245.

One who has obtained an advantage from a confidential relationship has the burden of proving that the other party's action was voluntary. *Webb v Saunders, supra*. Similarly, undue influence is presumed when an interspousal transfer advantages one spouse over the other; the advantaged spouse bears the burden of showing the transfer was not the result of undue influence. See *Marriage of Delaney* (2003) 111 CA4th 991, 4 CR3d 378. When no confidential or fiduciary relationship exists between the parties, the plaintiff has the burden of proving undue influence. See *Roeder v Roeder* (1953) 118 CA2d 572, 581, 258 P2d 581.

See §6.22 on abuse of a confidential relationship. On special remedies for financial abuse of the elderly, see California Elder Law Litigation: An Advocate's Guide, chaps 6-7 (Cal CEB 2003).

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§6.20 F. Duress and Menace

Duress consists of the unlawful confinement or detention of a person or property that compels assent. CC §1569. Menace is a threat of duress or of injury to the person, property, or character of another. CC §1570.

Duress can occur without threat of bodily harm; it may take the form of threats to reputation or to business or property interests. *Leeper v Beltrami* (1959) 53 C2d 195, 1 CR 12 (threat to take legal action to foreclose on mortgage based on claim that defendant knew was false). See *Goldstein v Enoch* (1967) 248 CA2d 891, 57 CR 19 (threat to reputation). However, a threat to bring or defend a lawsuit on an obligation substituted in settlement will not avoid an obligation even when it imposes a substantial loss on the party seeking cancellation. *London Homes, Inc. v Korn* (1965) 234 CA2d 233, 44 CR 262. Conditioning an extension of time for performance of a contract for street improvements on the plaintiff's execution of a lease to the city at a nominal consideration was held sufficiently coercive to warrant cancellation. *Oswald v City of El Centro* (1930) 211 C 45, 292 P 1073. See also Economic Duress or Business Compulsion in Execution of Contract for Sale of Real Property, 12 ALR4th 1262 (1982).

An obligation created under threat of criminal prosecution of the plaintiff or another person is voidable (see *Tiffany & Co. v Spreckels* (1927) 202 C 778, 784, 262 P 742 (threat of prosecution of plaintiff's spouse)) and may constitute extortion (Pen C §519(2)). A false representation that the plaintiff committed a crime, putting the plaintiff in fear of possible criminal prosecution, constitutes sufficient duress to warrant cancellation of a deed. *Ramos v Pacheco* (1944) 64 CA2d 304, 148 P2d 704. A threat of criminal prosecution may also constitute menace. *Shasta Water Co. v Croke* (1954) 128 CA2d 760, 764, 276 P2d 88.

Inadequacy of consideration is entitled to some weight in determining whether duress has compelled a conveyance. *Leeper v Beltrami* (1959) 53 C2d 195, 206, 1 CR 12.

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§6.21 G. Mistake

A mutual mistake, whether of fact or law, concerning an essential element of a transaction, is a ground for cancellation of an instrument. *Bland v Kelley* (1945) 69 CA2d 116, 158 P2d 206. A unilateral mistake of fact concerning an essential element is a ground for cancellation (*Forest Lawn Memorial Park Ass'n v DeJarnette* (1926) 79 CA 601, 250 P 581) if not caused by neglect of a legal duty by the party making the mistake (CC §1577).

In *Bland v Kelley, supra,* the trial court canceled a deed executed by the plaintiff, a bill of sale of personal property, and a contract between the parties providing the consideration (defendant's apparent agreement to take care of plaintiff who suffered both mental and physical weakness) for the deed and bill of sale. All three documents were executed under mutual mistake about their true import so that the parties had no meeting of the minds, and the documents did not carry out either party's intentions.

Note that mutual mistake may constitute an exception to the general rule that failure of consideration is not a ground for cancellation of an instrument (*Tisdale v Bryant* (1918) 38 CA 750, 177 P 510) if the conveyance was made in return for the grantee's promise to take care of the grantor (*Bland v Kelley, supra*. See also *Johnson v Clark* (1936) 7 C2d 529, 61 P2d 767). Authority is divided on this exception, and some courts have held that there is no right to cancellation if there was no agreement that failure to perform the acts of support would affect the validity of the instrument. See *Lavely v Nonemaker* (1931) 212 C 380, 298 P 976; *Ampuero v Luce* (1945) 68 CA2d 811, 157 P2d 899.

In addition, the courts will not order cancellation on the ground of mistake if the plaintiff executed the instrument without exercising reasonable care. *Mesmer v White* (1953) 121 CA2d 665, 264 P2d 60. Nor will the plaintiff's mistake constitute a basis for cancellation if the condition from which relief is sought is a result of the plaintiff's own willfulness. *Taylor v Taylor* (1944) 66 CA2d 390, 152 P2d 480. In addition, a defendant/seller's mistaken belief that he or she has title is not a valid ground to cancel a contract to sell personal property. *Alberti v Jubb* (1928) 204 C 325, 267 P 1085.

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§6.22 H. Abuse of Confidential Relationship

An instrument by which one standing in a fiduciary or confidential relationship to another gains an inequitable advantage may be set aside. *Webb v Saunders* (1947) 79 CA2d 863, 181 P2d 43. Such transactions are presumed to have been consummated without sufficient consideration and under undue influence. *Bank of America v Crawford* (1945) 69 CA2d 697, 160 P2d 169. If the instrument was obtained from an elder or dependent adult as a result of "financial abuse" as defined in Welf & I C §15610.30 and if the defendant is proven guilty of recklessness, oppression, fraud, or malice in committing the abuse, punitive damages may be awarded. Welf & I C §15657.5(b). The plaintiff also may be entitled to enhanced remedies. See Welf & I C §§15657.01, 15657.5-15657.6; California Elder Law Litigation: An Advocate's Guide, chap 6 (Cal CEB 2003). See also §6.9.

The existence of a confidential relationship must be proved on a case-by-case basis. Mere friendly and intimate associations do not necessarily create a confidential relationship, but if trust and confidence are reposed in the integrity and fidelity of another, a confidential relationship may exist. *O'Neil v Spillane* (1975) 45 CA3d 147, 119 CR 245.

In a quiet title action, one court set aside a deed that the grantees had procured without consideration from a 75-year-old man who suffered from "bodily decrepitude and chronic alcoholism" and who had no independent legal advice or business experience. *Anglo Cal. Nat'l Bank v Philpot* (1957) 148 CA2d 469, 306 P2d 970. The court relied on former CC §2235 (now Prob C §§16002, 16004), which provides that transactions between a trustee and a beneficiary by which the trustee obtains an advantage are presumed to be transactions without sufficient consideration and under undue influence. See also *Webb v Saunders* (1949) 89 CA2d 732, 201 P2d 816 (deed procured by "gratuitous agent" without consideration from aged and infirm woman); *Minor v Jones* (1936) 17 CA2d 184, 61 P2d 525 (deed procured by attorney from "ignorant" client).

Transactions between husband and wife are subject to the general rules that control actions of persons occupying confidential relations with each other. Fam C §721. Either a husband or a wife may enter into any transaction with the other, or with any other person, respecting property, that either might enter into if unmarried. Fam C §721(a). In transactions between themselves, except as provided in Prob C §§143-144, 146, and 16040, both the husband and the wife are subject to the general rules governing fiduciary relationships that control the actions of persons occupying confidential relations with each other. This relationship imposes a duty of the highest good faith and fair dealing on each spouse, and neither may take unfair advantage of the other. Fam C §721(b). Therefore, transactions in which one spouse obtains property from the other are closely examined. See *Marriage of Delaney* (2003) 111 CA4th 991, 4 CR3d 378; *Murdock v Murdock* (1920) 49 CA 775, 194 P 762. See also *Bragg v Bragg* (1934) 219 C 715, 28 P2d 1046 (deed to spouse may be canceled on ground of misrepresentations inducing conveyance and marriage). See also §§6.18, 6.23.

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§6.23 I. Conveyance by One Spouse of Community Real Property

As a rule, both spouses must join in any instrument by which community real property is sold, conveyed, encumbered, or leased for more than 1 year. Fam C §1102 (former CC §5127). Both spouses must consent to the transfer of community real property, except that either spouse may encumber his or her interest in community real property to pay reasonable attorney fees in order to retain or maintain legal counsel in a family law action. Fam C §1102.

One spouse, without the other's consent, may not sell, convey, encumber, or lease for more than 1 year his or her half interest in the property. If one spouse makes such a unilateral transfer, the other spouse can avoid the transfer entirely by bringing a timely action during the marriage. Fam C §1102; *Droeger v Friedman, Sloan & Ross* (1991) 54 C3d 26, 283 CR 584. Although the transfer is revoked as to the whole of the community property, not just the nonconsenting spouse's interest, the underlying obligation or liability of the community real property to satisfy the obligation is not canceled. *Lezine v Security Pac. Fin. Servs.* (1996) 14 C4th 56, 58 CR2d 76. A transfer is canceled only if necessary to protect a spouse from unauthorized transfers; therefore, a third-party creditor of the married couple has no standing to challenge an instrument signed by only one spouse. *Clar v Cacciola* (1987) 193 CA3d 1032, 1037, 238 CR 726.

A lease, contract, mortgage, or deed executed by a spouse (who alone holds record title to the property) to a lessee, purchaser, or encumbrancer in good faith and without knowledge of the grantor's marital status is presumed valid. Fam C §1102. An action by the other spouse (*i.e.,* the spouse without record title) to cancel such an instrument must be filed within 1 year after the instrument is recorded. Fam C §1102.

The presumption of the validity of an instrument executed by the spouse with record title was held to be rebuttable in a case brought under former CC §172a, the predecessor to Fam C §1102. *Mark v Title Guar. & Trust Co.* (1932) 122 CA 301, 9 P2d 839. The unconsenting wife was entitled to cancellation of the sale on the condition that the innocent buyers be reimbursed. The same result should follow under Fam C §1102.

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§6.24 J. Nondelivery of Deed

Delivery of an instrument is a prerequisite to its validity and its binding effect on the party who executed it; without delivery, the instrument is ineffective for any purpose. A deed may be canceled for nondelivery when the grantor retains the right to recall or repossess it even if it was delivered to a third person for the grantee's benefit. *Hudemann v Dodson* (1932) 215 C 3, 7 P2d 997. If a grantor irrevocably delivers to a third party a deed containing an unconditional conveyance and instructs that party to give the deed to the grantee on the grantor's death, title to the property vests in the grantee immediately, subject only to a life estate in the grantor. The grantor may not obtain cancellation of this conveyance on the ground of nondelivery. *Hutchinson v Colvin* (1937) 9 C2d 91, 69 P2d 416.

Delivery of a deed is primarily a question of the grantor's intention, and no particular form of delivery is necessary to give effect to a deed. All that is required is that by either words or acts the grantor manifest an intention that the deed be considered completely executed and title conveyed. *Lavely v Nonemaker* (1931) 212 C 380, 298 P 976. A deed is presumed to have been delivered if it was recorded in the official records. Evid C §§1532, 1600. For further discussion of what constitutes delivery of a deed, see California Real Property Sales Transactions §§10.71-10.74 (4th ed Cal CEB 2007).

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§6.25 K. Forgery

A forged deed, when it is prima facie valid because fraudulently acknowledged and recorded, constitutes a cloud on the plaintiff's title and is subject to cancellation under CC §3412. *Angus v Craven* (1901) 132 C 691, 64 P 1091. A forged deed does not pass title and is void even against subsequent bona fide purchasers. *Schiavon v Arnaudo Bros.* (2000) 84 CA4th 374, 378, 100 CR2d 801; *Wutzke v Biz Reid Painting Serv.* (1984) 151 CA3d 36, 43, 198 CR 418.

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IV. NOTICE AND OFFER TO RESTORE BENEFITS

§6.26 A. When Required

In obtaining cancellation, the rule is that the complainant is required to do equity, as a condition to obtaining relief, by restoring to the defendant everything of value that the plaintiff has received in the transaction. *Fleming v Kagan* (1961) 189 CA2d 791, 11 CR 737. Thus, to obtain cancellation of a voidable instrument, the plaintiff must offer to restore everything of value received from the defendant. *Loud v Luse* (1931) 214 C 10, 3 P2d 542; *Fleming v Kagan, supra*. Voidable instruments are subject to rescission, which is a prerequisite to a judicial decree canceling a voidable instrument. See §§6.10, 6.18. Bringing the action suffices to give notice to the defendant. *Smith v Williams* (1961) 55 C2d 617, 12 CR 665.

By contrast, notice and an offer to restore are not required to cancel a void instrument. *Smith v Williams, supra*. In the application of equitable principles, the basic distinction between the cancellation of a *void* instrument and the cancellation of a *voidable* contract or instrument must be recognized, and the rule requiring restoration of benefits is inapplicable when the instrument is void. *Fleming v Kagan, supra*. See also §6.27.

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§6.27 B. When Not Required

In contrast to voidable instruments, discussed in §6.26, when a plaintiff seeks to cancel a void instrument, the complaint need not allege notice of cancellation and offer to restore benefits. *Smith v Williams* (1961) 55 C2d 617, 12 CR 665.

Even when an instrument is voidable, there are exceptions to the rule that benefits must be restored. A plaintiff who received nothing of value under the instrument need not make an offer to restore. *Security-First Nat'l Bank v Earp* (1942) 19 C2d 774, 122 P2d 900. When a landlord seeks to cancel a lease, rent payments need not be restored if the tenants had use of the property during the period in which payments were made. *Isom v Rex Crude Oil Co.* (1905) 147 C 659, 82 P 317. If conditions have made restoration impossible, through no fault of the plaintiff, cancellation is still within the court's equitable powers. *Peterson v Wagner* (1921) 52 CA 1, 198 P 25.

See §6.37 on estoppel for failure to restore benefits to the defendant.

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V. PROCEDURE FOR OBTAINING JUDICIAL CANCELLATION

A. Initiating the Action

§6.28 1. Lis Pendens and Attachment

A party may record a notice of the pendency of the action (commonly known as a lis pendens) in any action affecting title to or possession of real property. CCP §§405-405.61. Actions to cancel deeds and other instruments affecting real property rights are within the class of actions covered by CCP §405.20. See *Martin v Lawrence* (1909) 156 C 191, 103 P 913. For discussion of lis pendens procedures, see chap 13.

PRACTICE TIP: Recording a lis pendens is almost always advisable because all persons who thereafter acquire rights in the property are charged with notice of the action. If they do not appear to assert their rights, they will be estopped from questioning the judgment's validity. *McNamara v Oakland Bldg. & Loan Ass'n* (1901) 132 C 247, 64 P 277.

If the plaintiff is claiming that the defendant is liable for financial abuse of an elder as defined in Welf & I C §15610.30, the plaintiff may seek a prejudgment writ of attachment. Welf & I C §15657.01. For further discussion, see California Elder Law Litigation: An Advocate's Guide, chap 6 (Cal CEB 2003).

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§6.29 2. Jurisdiction and Venue

Actions to cancel a contract when the relief sought is to recover property of a value not exceeding $25,000 are treated as limited civil cases in the consolidated courts. CCP §86(a)(3). Actions to recover property of greater value are treated as unlimited civil cases. CCP §88. On jurisdiction generally, see California Civil Procedure Before Trial, chap 6 (4th ed Cal CEB 2004).

PRACTICE TIP: It is prudent to consider the court's discretion to award costs granted in CCP §1033(a) when evaluating whether to file a "limited" or "unlimited" civil case. If the action could have been brought as a limited civil case and was brought as an unlimited civil case, the court is not required to award costs to the prevailing party.

Subject to the court's power to transfer actions, the proper county for the trial of an action to recover an interest in real property is the county in which the property or part of it is located. CCP §392(a)(1). Thus, if the essential nature of an action to cancel a deed or other instrument is to determine title to real property, the action is local and is properly brought in the county where the property is located. *Eckstrand v Wilshusen* (1933) 217 C 380, 18 P2d 931; *Kejr v Construction Eng'rs, Inc.* (1952) 111 CA2d 817, 245 P2d 21.

That the relief prayed for may also include establishment of a constructive trust or require determination of the amount of benefits the plaintiff received from the defendant does not change the local character of an action to recover real property. *Etter v Vollmer* (1956) 139 CA2d 718, 294 P2d 55. However, an action to cancel a promissory note and deed of trust in which the trustee is a person other than the payee of the note, to impress a constructive trust, and to require reconveyance has been held transitory and therefore triable in the county of the defendant's residence. *Howe v Tucker* (1933) 219 C 193, 25 P2d 832. See also *Stesel v Santa Ana River Water Co.* (1939) 35 CA2d 117, 94 P2d 1052. But see *Massae v Superior Court* (1981) 118 CA3d 527, 173 CR 527 (action to reform deed of trust held local).

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3. Parties

§6.30 a. Necessary Parties

All parties whose presence is necessary to the availability of complete relief must be joined in the action. CCP §389; *Lake v Dowd* (1929) 207 C 290, 277 P 1047. In an action to cancel a deed, the grantee is a necessary party even when the complaint alleges that he or she is a "dummy" for the real party in interest. *Palmer v Lantz* (1932) 215 C 320, 9 P2d 821. When the grantee has encumbered the property before the action, the holder of an encumbrance that precedes the filing date of the cancellation action must be joined as a party for the judgment to bind him or her. *Cooke v Darnell* (1929) 100 CA 482, 280 P 383. In an action by a named person to cancel his or her spouse's conveyance of community real property (see §6.23), the spouse is a necessary party. *Vanasek v Pokorny* (1925) 73 CA 312, 238 P 798. In an action to cancel a deed of trust, the trustee is a necessary party. *Watkins v Bryant* (1891) 91 C 492, 27 P 775.

NOTE: If the trustee under a deed of trust maintains a reasonable belief that it has been named solely in its capacity as trustee and not because of wrongful acts or omissions as trustee, it may file a declaration of nonmonetary status. If no one timely objects to the nonmonetary status, the trustee need not participate in the action and will not be subject to monetary awards such as damages, attorney fees, or costs; the trustee must, however, respond to discovery requests and must abide by the judgment. CC §2924*l*.

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§6.31 b. Proper Parties

Parties whose interests may be affected by the judgment may be joined as parties. CCP §379. Beneficiaries of a deed of trust on the property are proper defendants in an action to cancel a deed (*Watkins v Bryant* (1891) 91 C 492, 27 P 775) as are their assignees (*Johnson v Curley* (1927) 83 CA 627, 257 P 163).

When a deed to real property is obtained by fraud, and the fraudulent grantee conveys the property to others who take with notice of the fraud, the subsequent grantees are proper defendants in an action by the defrauded owner to cancel the deed. *Loud v Luse* (1931) 214 C 10, 3 P2d 542; see *Bouton v Stuart* (1921) 52 CA 484, 199 P 71.

Persons who may maintain an action to cancel an instrument executed by their predecessor include:

- Heirs (see *Cox v Schnerr* (1916) 172 C 371, 156 P 509; *Trubody v Trubody* (1902) 137 C 172, 69 P 968);
- Devisees (see *Stoner v Security Trust Co.* (1920) 47 CA 216, 190 P 500); and
- Legal representatives of a grantor (*Collins v O'Laverty* (1902) 136 C 31, 68 P 327).

A bona fide purchaser can assert his or her status affirmatively in actions to quiet title or remove a cloud from title and is not limited to pleading it as a defense. *Reiner v Danial* (1989) 211 CA3d 682, 690, 259 CR 570.

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§6.32 4. Jury Trial

An action to cancel an instrument is equitable in nature and neither party is entitled to a jury trial. *Proctor v Arakelian* (1929) 208 C 82, 280 P 368. If the complaint alleges a distinct cause of action for damages as well as cancellation, however, the parties are entitled to a jury trial on the legal issues. *Robinson v Puls* (1946) 28 C2d 664, 171 P2d 430; *Peterson v Peterson* (1946) 74 CA2d 312, 168 P2d 474.

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§6.33 5. Necessary Allegations

To state a cause of action under CC §3412, the complaint must allege:

- There is a reasonable apprehension that the instrument if left standing might cause serious injury to the plaintiff. CC §3412. See *Patterson v Clifford F. Reid, Inc.* (1933) 132 CA 454, 23 P2d 35. It is sufficient that the instrument, although inoperative, would throw a cloud on the plaintiff's title if allowed to remain uncanceled. *Lewis v Tobias* (1858) 10 C 574. The apprehension may arise even if the defendant's claim under the instrument is groundless or for purposes of vexation. *Prichard v Kimball* (1923) 190 C 757, 214 P 863.
- The instrument is valid on its face. An instrument whose invalidity is apparent on its face or on the face of another instrument necessary to use of the former in evidence is not deemed capable of causing injury under CC §3412. CC §3413; see *Hibernia Sav. & Loan Soc'y v Ordway* (1869) 38 C 679. See also *Castro v Barry* (1889) 79 C 443, 21 P 946; *Hughes v Beekley* (1927) 85 CA 313, 259 P 337.
- The instrument is void or voidable. *Hironymous v Hiatt* (1921) 52 CA 727, 199 P 850. The grounds on which an instrument is void or voidable (see §§6.12-6.25) must be alleged specifically, *e.g.,* fraud (*Lawrence v Gayetty* (1889) 78 C 126, 20 P 382), violation of confidential relationship (*Ampuero v Luce* (1945) 68 CA2d 811, 157 P2d 899), undue influence (*Davies v Symmes* (1942) 49 CA2d 433, 122 P2d 102).
- The instrument came into being, was in existence, or was in defendant's possession or under his or her control when the action was begun. *Consolidated Concessions Co. v McConnell* (1919) 40 CA 443, 180 P 842.
- If the instrument is voidable rather than void, the complaint should also allege that the plaintiff acted promptly to rescind the transaction. Without this allegation or an explanation of the reason for the delay, the complaint may be subject to a general demurrer (see §§6.26-6.27).

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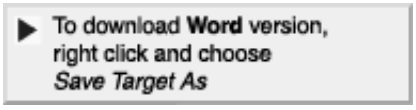
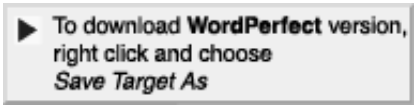
Source: Real Property/California Real Property Remedies and Damages/6 Cancellation of Instruments/§6.34 6. Form: Complaint for Cancellation of Instrument and for Damages

§6.34 6. Form: Complaint for Cancellation of Instrument and for Damages





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Attorney for Plaintiff, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No.** _ _ _ _ _ _
Plaintiff(s)	)	**COMPLAINT FOR**
vs	)	**CANCELLATION OF**
_ _[*Name(s)*]_ _,	)	**INSTRUMENT AND FOR**
Defendant(s)	)	**DAMAGES**
_____	)	

Plaintiff alleges:

1. _ _[*State capacity and residence of plaintiff*]_ _**.**

2. _ _[*State identity, capacity, and residence of defendant*]_ _**.**

3. _ _[*Fictitious name allegations, if needed*]_ _**.**

4. A written instrument that purports to be _ _[*specify instrument, e.g., a deed*]_ _ **executed by plaintiff is presently in existence and** _ _[*in defendant's possession/under defendant's control*]_ _**. A copy of the instrument, marked Exhibit** _ _**, is attached to and incorporated in this complaint.**

5. The instrument, although apparently valid on its face, is _ _[*void/voidable*]_ _ **in that** _ _[*allege facts, with as much specificity as possible, demonstrating the grounds on which plaintiff contends the instrument is either void or voidable*]_ _**.**

[*If instrument is voidable, add appropriate provision*]

6. On or about _ _[*date*]_ _**, plaintiff informed defendant in writing of plaintiff's intention to cancel the** _ _[*specify instrument*]_ _ **and offered to restore everything of value plaintiff had received from defendant, consisting of** _ _[*describe what plaintiff received*]_ _*.*

[*Add, if appropriate*]

minus all damages suffered by plaintiff, which consisted of _ _[*describe plaintiff's damages*]_ _**.**

[*Or*]

6. By this complaint, plaintiff notifies defendant of plaintiff's intent to cancel the _ _[*specify instrument*]_ _ **and offers to restore everything of value plaintiff received from defendant, consisting of** _ _[*describe what plaintiff received*]_ _ _ _[*minus all damages suffered by plaintiff, which consisted of* _ _[*describe plaintiff's damages*]_ _]_ _**.**

[*Add, if appropriate*]

[7.] Plaintiff did not learn of the grounds for cancellation alleged in Paragraph 5 until _ _[*date*]_ _**, on which**

date _ _[*set forth how plaintiff learned the facts warranting cancellation of the instrument*]**_ _.**

[*Continue*]

[8.] There is a reasonable apprehension that the _ _[*specify instrument*]**_ _ may cause serious injury to plaintiff in that _ _**[*set forth facts of potential injury, e.g., defendant has refused to return the _ _(specify instrument)_ _ or to reconvey to plaintiff the property described in it and has threatened to record it in the office of the recorder of _ _ _ _ _ _ County.*]**_ _**

[9.] Defendant took possession of the property described in the _ _[*specify instrument*]**_ _ on _ _**[*date*]**_ _, has refused to restore possession of it to plaintiff, and has remained in possession of it ever since. The reasonable rental value of the property is $_ _ _ _ _ _ per month.**

[*Add, if ground for action is defendant's fraud*]

[10.] Defendant made the false representations alleged in Paragraph 5 oppressively, maliciously, and with the intent to defraud plaintiff. Plaintiff is therefore entitled to exemplary damages of $_ _ _ _ _ _

[*Continue*]

WHEREFORE, plaintiff prays

1. That the _ _[*specify instrument, e g., deed*]**_ _ be declared void;**

2. That defendant be ordered to reconvey the property described in the _ _[*specify instrument*]**_ _ to plaintiff;**

3. That defendant be ordered to cancel the _ _[*specify instrument*]**_ _ and deliver it to plaintiff or deliver the _ _**[*specify instrument*]**_ _ to the clerk of this Court for cancellation;**

4. That if defendant fails to obey the orders of the Court under Prayer 2 or Prayer 3, that the Court award plaintiff damages in the sum of $_ _ _ _ _ _ per day, plus interest at the legal rate from the date judgment is entered;

5. For damages in the sum of $_ _ _ _ _ _ for the use of the property, plus interest at the legal rate from the date defendant took possession of the property;

[*Add, if appropriate*]

6. For exemplary damages in the sum of $_ _ _ _ _ _;

[*Continue*]

[7.] For costs _ _[*if a contractual or statutory basis exists, include a request for attorney fees*]**_ _; and**

[8.] For other relief that the Court considers proper.

Date: _ _ _ _ _ _ __[*Signature of attorney, typed name below*]__
Attorney for _ _[*name*]**_ _**

[*Verification, see Comment*]

Copies: Original (filed with court clerk); copies for service (one for each defendant who is to be served); office copies.

Comment: See California Civil Procedure Before Trial §§15.3-15.4 (4th ed Cal CEB 2004) on the caption and introductory clause.

If the plaintiff cannot attach an exact copy of the instrument, Paragraph 4 should be changed to explain why an exact copy cannot be attached and indicate that an approximate copy is attached. By attaching an exact or approximate copy of the instrument, the plaintiff can demonstrate the apparent validity of the instrument on its face (see §6.6).

If the instrument the plaintiff is seeking to cancel came into existence from a transaction that was voidable rather than void, the plaintiff must rescind the transaction and offer to restore any consideration received from the defendant

as conditions precedent to having a right to cancellation (see §§6.26-6.27). The plaintiff should therefore include the appropriate alternative Paragraph 6, depending on whether notice and an offer to restore were given previously or the complaint itself is meant to serve as notice. Regardless of which procedure the plaintiff uses to give notice of rescission, the reason for any delay in giving notice must be explained in the complaint because a long unexplained delay before attempting to rescind is demurrable. See *Leeper v Beltrami* (1959) 53 C2d 195, 211, 1 CR 12; CC §1693 (enacted after *Leeper*). This can be done by the addition of a statement such as the one in Paragraph 7.

Paragraph 8 alleges facts to satisfy the statutory requirement that, if the instrument is not canceled, there is a reasonable apprehension that it may cause serious injury to the plaintiff by clouding title to the property (see §6.1).

Paragraph 9 alleges facts to support additional relief to the plaintiff in the form of monetary damages. See §6.9 for examples of other relief the plaintiff may require depending on the particular circumstances.

The trial court may in its discretion award the plaintiff exemplary (punitive) damages under CC §3294 if the defendant acted oppressively, fraudulently, or maliciously. See §6.9; California Attorney's Guide to Damages §2.13 (2d ed Cal CEB 2004).

For discussion of whether and how to verify a complaint, see Civ Proc Before Trial §§15.14-15.21, 15.35.

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B. Defenses

§6.35 1. Statute of Limitations

The authorities do not agree on the applicable statute of limitations in an action to cancel an instrument affecting title to real property. Some courts have applied CCP §318 (5 years for recovery of real property), others have applied CCP §343 (4 years for actions not otherwise covered), and still others have applied CCP §338(d) (3 years after discovery for fraud actions). *Leeper v Beltrami* (1959) 53 C2d 195, 212, 1 CR 12. Some courts have noted that, although an action may be based on a right to cancel a deed to real property under CC §3412, that action involves possession of real property requiring application of the 5-year limitation period under CCP §§318-319 and 328. See *Robertson v Superior Court* (2001) 90 CA4th 1319, 1328, 109 CR2d 650.

Code of Civil Procedure §337(3) (enacted after *Leeper v Beltrami, supra*) provides a 4-year limitation period for an action based on rescission of a written contract. Section 337(3) arguably might apply to some cancellation actions. When the ground for cancellation is fraud or mistake, however, it seems prudent to assume that the 3-year limitation of CCP §338(d) applies.

The 4-year limitation period of CCP §343 has been held to apply to an action to cancel an instrument that is void because of being contrary to public policy. See *Moss v Moss* (1942) 20 C2d 640, 128 P2d 526. In an action to cancel a deed on the ground of undue influence, §343 again apparently applies. See *Trubody v Trubody* (1902) 137 C 172, 69 P 968.

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§6.36 2. Laches

The trial court may deny relief on its own motion when the existence of laches or estoppel (see §§6.36-6.37) is disclosed by the evidence. See *Rouse v Underwood* (1966) 242 CA2d 316, 328, 51 CR 437. Whether the plaintiff is guilty of laches is a question of fact. In deciding whether laches applies, the court considers circumstances justifying the plaintiff's delay in bringing suit, the nature of the case, and whether the defendants were prejudiced by the delay. *Rouse v Underwood* (1966) 242 CA2d 316, 51 CR 437; *Sullivan v Dunnigan* (1959) 171 CA2d 662, 341 P2d 404; see *Merry v Garibaldi* (1941) 48 CA2d 397, 119 P2d 768. Mere lapse of time does not sustain a claim of laches; the defendant must show prejudice, such as a substantial increase in the value of the land or the death of a material witness. *Zakaessian v Zakaessian* (1945) 70 CA2d 721, 161 P2d 677.

Prejudice to third parties resulting from the plaintiff's delay in bringing an action to cancel a deed because of the defendant's fraud may justify holding that the plaintiff is barred by laches. See *Sullivan v Dunnigan* (1959) 171 CA2d 662, 668, 341 P2d 404. In one case, a plaintiff was held barred by laches for delay in bringing a cancellation action and also barred by estoppel for failure to inform third party defendants or their agents of the fact that a note and deed of trust were forgeries. *Merry v Garibaldi, supra*.

Laches does not apply at all if the instrument is void because it is against public policy. *Colby v Title Ins. & Trust Co.* (1911) 160 C 632, 117 P 913.

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§6.37 3. Estoppel

The right to cancellation of an instrument may be lost by estoppel. See *Dool v First Nat'l Bank* (1930) 209 C 717, 290 P 15. For example, a grantor who refuses to restore money the defendant spent on repairs and improvements in reliance on a deed's validity may be estopped from obtaining cancellation of a deed. *Lanttree v Spring Mountain Acres, Inc.* (1931) 213 C 362, 2 P2d 338.

Borrowers who fail to offer to restore money advanced to their account by a lender are estopped from canceling a note and deed of trust securing the loan. *Ebner v Sheehan* (1950) 99 CA2d 860, 222 P2d 888. A plaintiff who discovers that his or her name was forged on an instrument but remains silent and takes no action to disclose the forgery may be estopped from asserting the forgery in a cancellation action. *Merry v Garibaldi* (1941) 48 CA2d 397, 119 P2d 768.

Estoppel does not apply to agreements that are void because they are contrary to public policy or illegal. Thus the grantor is not estopped from obtaining cancellation of a deed or other instrument procured in consideration of compounding a felony. *Colby v Title Ins. & Trust Co.* (1911) 160 C 632, 117 P 913. When a contract is void because of the plaintiff's mental disability, however, the plaintiff's actions after recovery from the disability may still give rise to estoppel. *Dool v First Nat'l Bank, supra*.

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§6.38 4. Plaintiff Equally at Fault

In cancellation actions, equity seldom aids either party to an illegal transaction when they are equally at fault. *Michell v Grass Valley Gold Mines Co.* (1929) 206 C 609, 615, 275 P 418. See also *Taylor v Taylor* (1944) 66 CA2d 390, 152 P2d 480; *Lewith v Rehmke* (1935) 10 CA2d 97, 51 P2d 476. But a plaintiff who was induced to enter into an illegal transaction by fraud, undue influence, duress, or violation of a confidential relationship may be held not to have been equally at fault. *Colby v Title Ins. & Trust Co.* (1911) 160 C 632, 117 P 913; *Donnelly v Rees* (1903) 141 C 56, 74 P 433. See *Fieg v Gjurich* (1912) 163 C 740, 127 P 49; *Merry v Garibaldi* (1941) 48 CA2d 397, 119 P2d 768.

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§6.39 5. Affirmance and Waiver

When a cancellation action depends on the right to rescind, waiver of that right would logically bar the action for cancellation. The right to rescind a contract is waived by acceptance of its benefits with knowledge of the circumstances warranting rescission. *Neet v Holmes* (1944) 25 C2d 447, 154 P2d 854. Unjustified delay in bringing an action may also constitute waiver of the right to rescind. *Leeper v Beltrami* (1959) 53 C2d 195, 1 CR 12.

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§6.40 6. Defendant a Bona Fide Purchaser or Encumbrancer

Whether a cancellation action will lie against a bona fide purchaser or encumbrancer (*i.e.,* for value and without knowledge of the defect) depends on whether the instrument is void or voidable. A void deed or deed of reconveyance does not pass title, even to a bona fide purchaser or encumbrancer for value, and is subject to cancellation. *Schiavon v Arnaudo Bros.* (2000) 84 CA4th 374, 100 CR2d 801.

When a grantor is aware that he or she is executing a deed, but was induced to do so by fraudulent misrepresentations, an action to cancel the deed for fraud will not lie against a subsequent bona fide purchaser or encumbrancer from the defrauding grantee. *Fallon v Triangle Mgmt. Servs.* (1985) 169 CA3d 1103, 215 CR 748. A deed to a subsequent purchaser or encumbrancer with knowledge of the fraud is, however, subject to cancellation. *Loud v Luse* (1931) 214 C 10, 3 P2d 542.

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C. Judgment

§6.41 1. Scope of Relief

Although a cause of action for cancellation should be alleged (see *Paillet v Vroman* (1942) 52 CA2d 297, 126 P2d 419), cancellation may be granted even when not prayed for (*Angus v Craven* (1901) 132 C 691, 64 P 1091). The court may grant any relief consistent with the facts alleged in the complaint and embraced within the issues even when not specifically prayed for, and it may grant any monetary relief necessary to complete equity between the parties. *Wright v Rogers* (1959) 172 CA2d 349, 367, 342 P2d 447. When equity has acquired jurisdiction for one purpose, it will retain that jurisdiction to the final adjudication of all differences between the parties arising from the dispute. *Swan v Talbot* (1907) 152 C 142, 147, 94 P 238.

When the defendant has rendered it impossible to restore the real property to the plaintiff (*e.g.,* the grantee under a voidable deed conveyed the property to a bona fide purchaser; see §6.40), the court may award the plaintiff monetary damages equal to the value of the plaintiff's loss. See *Walsh v Majors* (1935) 4 C2d 384, 49 P2d 598; *Hatch v Penzner* (1941) 44 CA2d 874, 113 P2d 295.

In a judgment for cancellation of a promissory note that has been fully paid, the court may award damages to the borrower against the lender for refusing to clear title. *Kachlon v Markowitz* (2008) 168 CA4th 316, 85 CR3d 532 (rejecting claims by borrower against foreclosing trustee, but allowing tort claims for damages and equitable relief as well as attorney fees against lender who had refused to reconvey deed of trust after repeated requests).

In ordering cancellation, the court may require the plaintiff to do equity. For example, if the defendant conferred benefits on the plaintiff, the plaintiff may be required to return them (see §§6.26-6.27). *Henry v Phillips* (1912) 163 C 135, 124 P 837. This rule does not apply when the instrument to be canceled was obtained by fraud in the execution (see §6.16). In that event, there is no contract under which the defendant can claim expenditures or part performance. *Fleming v Kagan* (1961) 189 CA2d 791, 797, 11 CR 737. In an action by a buyer to rescind a real property purchase and sale agreement, a judgment for return of the buyer's money should provide for a surrender and cancellation of the agreement by the buyer, who would otherwise retain an equity interest in the property. *Shaffer v Security Trust & Sav. Bank* (1935) 4 CA2d 707, 718, 41 P2d 948.

An equitable action for cancellation of a promissory note that has an attorney fees clause is an action on the contract for purposes of CC §1717, and the court may award fees to the prevailing party. *Kachlon v Markowitz, supra*.

A party seeking cancellation of a deed that was fraudulently induced is not entitled to damages for mental suffering under either CC §1692 or §3343. *Marriage of McNeill* (1984) 160 CA3d 548, 559, 206 CR 641, disapproved on other grounds in *Marriage of Fabian* (1986) 41 C3d 440, 451, 224 CR 333. Punitive damages, however, and expanded forms of relief for elders may still be available. See *McNeill*, 160 CA3d at 561. See §6.9.

If the plaintiff proves by a preponderance of the evidence that the defendant is liable for financial abuse of an elder as defined in Welf & I C §15610.30, and that the defendant is guilty of the requisite degree of misconduct (see Welf & I C §§15657-15657.3), the court must award reasonable attorney fees and costs, including reasonable fees for conservator services. Welf & I C §15657.5(a). Punitive damages may be awarded if the plaintiff proves by clear and convincing evidence that defendant is guilty of recklessness, oppression, fraud, or malice. Welf & I C §15657.5(b). For further discussion, see California Elder Law Litigation: An Advocate's Guide, chap 6 (Cal CEB 2003).

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Source: Real Property/California Real Property Remedies and Damages/6 Cancellation of Instruments/§6.42 2. Form: Judgment and Statement of Decision

§6.42 2. Form: Judgment and Statement of Decision

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Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No. _ _ _ _ _ _**
Plaintiff(s)	)	**JUDGMENT AND STATEMENT**
vs	)	**OF DECISION**
_ _[*Name(s)*]_ _,	)	**Dep't:** _ _[*number*]_ _
Defendant(s)	)	**Trial judge:** _ _[*name*]_ _
_____	)	**Trial date:** _ _[*date*]_ _

This action for cancellation was regularly tried on _ _[*date*]_ _, before the Court sitting without a jury. Appearing as attorneys were _ _ _ _ _ _ for plaintiff and _ _ _ _ _ _ for defendant. The Court having heard the testimony and considered the evidence, makes the following statement of decision:

1. A certain written instrument purporting to be _ _[*specify instrument, e.g., a deed*]_ _ is _ _[*e.g., in the possession/under the control*]_ _ of defendant.

2. The _ _[*specify instrument*]_ _ _ _[*state that a copy of the instrument, marked Exhibit _ _ _, is attached/set forth particulars of the instrument*]_ _.

3. The _ _[*specify instrument*]_ _, although apparently valid on its face, is _ _[*void/voidable*]_ _ in that _ _[*set forth the grounds of invalidity*]_ _.

4. There is a reasonable apprehension that if the _ _[*specify instrument*]_ _ is left outstanding, plaintiff will be seriously injured _ _[*e.g., because it may cloud plaintiff's title to the property described in the deed*]_ _.

5. Defendant has been in possession of the property described in the _ _[*specify instrument*]_ _ as follows: _ _[*Set out period of possession*]_ _. The rental value of the property is $_ _ _ _ _ _ per month from _ _[*date*]_ _, to date, and plaintiff is entitled to damages in the sum of $_ _ _ _ _ _.

[*Add, if appropriate*]

6. Because of defendant's fraud, plaintiff is entitled to exemplary damages in the sum of $_ _ _ _ _ _.

[*Continue*]

[7.] The _ _[*specify instrument*]_ _ is _ _[*void/voidable*]_ _; plaintiff is the owner of the property described in the _ _[*specify instrument*]_ _ and defendant has no right, title, or interest in the property; plaintiff is entitled to cancellation of the _ _[*specify instrument*]_ _ and a reconveyance of the property.

IT IS ORDERED, ADJUDGED, AND DECREED that

1. Plaintiff shall restore to defendant the following items: _ _[*Specify items to be restored*]_ _.

2. Defendant shall pay to plaintiff compensatory damages in the sum of $_ _ _ _ _ _.

[*Add, if appropriate*]

3. Defendant shall pay to plaintiff exemplary damages in the sum of $_ _ _ _ _ _.

[*Continue*]

[4.] Defendant shall forthwith deliver the _ _[*specify instrument*]**_ _ to the clerk of this Court for cancellation, and the clerk shall cancel it and deliver it promptly to plaintiff. If defendant fails to deliver the deed to the clerk of this Court as provided in this judgment, the clerk shall execute and deliver to plaintiff a reconveyance of the property described in the _ _**[*specify instrument*]**_ _.**

[5.] Plaintiff shall receive from defendant _ _[*his/her*]**_ _ costs in this action. _ _**[*If provided for in contract or statute and awarded by court, include award of attorney fees.*]**_ _**

[6.] This Court shall retain jurisdiction of this action until this judgment has been fully complied with or until further order of this Court.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Copies: Original (presented to judge for signature, then filed with proof of service); conformed copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: On preparing and serving judgments, see California Trial Practice: Civil Procedure During Trial, chap 23 (3d ed Cal CEB 1995). The judgment that cancels an instrument may be conditioned on the plaintiff's performance of specific acts, such as reimbursing the defendant for out-of-pocket sums paid under the canceled instrument to or for the benefit of the plaintiff. See *Dool v First Nat'l Bank* (1929) 207 C 347, 278 P 233.

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§6.43 3. Reconveyance Order; Recording Judgment

A California court with personal jurisdiction over the parties has jurisdiction to order cancellation of a deed to real property, including property located outside California, and to order the defendant to execute a reconveyance. If the party fails to execute the reconveyance, the court has jurisdiction to order the court clerk to execute it. *Chamberlain v Wakefield* (1949) 95 CA2d 280, 213 P2d 62.

Reconveyance is not necessary when a deed is void, because title never passed under the deed. *Upton v Archer* (1871) 41 C 85. See also *Trout v Taylor* (1934) 220 C 652, 32 P2d 968. If the deed is merely voidable, however, *Upton v Archer, supra,* suggests that a reconveyance is necessary because the voidable deed would have passed title. See *Chamberlain v Wakefield, supra*.

PRACTICE TIP: In all instances, it is recommended that the plaintiff record a certified copy of the judgment. By doing so, the plaintiff can be assured that there is no cloud on the title, even if the canceled deed was recorded, and can thus avoid title examination problems.

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7

Quieting Title

Paul Weinberg

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§7.1 I. INTRODUCTION

The long-settled, definitive purpose of a quiet title action is to resolve adverse claims to property (*Castro v Barry* (1889) 79 C 443, 21 P 946); the ultimate fact to be found is the ownership of the property or an interest in it (*Rahlves & Rahlves, Inc. v Ambort* (1953) 118 CA2d 465, 258 P2d 18). The remedy can act prospectively in nature: the plaintiff need not wait until he or she has been disturbed in possession of the property, or sued, to bring a quiet title action. *Curtis v Sutter* (1860) 15 C 259. It may therefore act as a preemptive move for clients or parties with business interests and the value of property questioned or jeopardized as the result of conflicting claims; the parties can "beat their adversary to the punch" by filing first.

The remedy is also inclusive by nature: it is not limited to situations in which an adverse claimant asserts legal or equitable title but is available against all adverse claims that deny the plaintiff enjoyment of the property, that render title to the property uninsurable, or that decrease the value of the property. See, *e.g., Noronha v Stewart* (1988) 199 CA3d 485, 245 CR 94 (action to enforce view easement); *Bank of America v Town of Atherton* (1943) 60 CA2d 268, 140 P2d 678 (action to declare zoning ordinance void); *Akley v Bassett* (1924) 68 CA 270, 228 P 1057 (action by life tenant to quiet title against claims of remaindermen).

A quiet title cause of action may be asserted defensively in a cross-complaint. See, *e.g*., *Linthicum v Butterfield* (2009) 175 CA4th 259, 95 CR3d 538 (in action to enjoin neighboring property owner from using roadway for access to landlocked property, court denied injunction and awarded equitable easement on cross-complaint).

Modern statutes governing quiet title actions allow both the right to possession and the state of the plaintiff's title to be adjudicated in one proceeding (see §7.56). *Cassin v Nicholson* (1908) 154 C 497, 98 P 190; *People ex rel Love v Center* (1885) 66 C 551, 6 P 481. A quiet title action brought by a litigant out of possession converts to an action, in effect, to recover possession. *Keele v Clouser* (1928) 92 CA 526, 268 P 682.

This chapter discusses the action to quiet title in §§7.2-7.7, strategic and tactical considerations in §§7.8-7.10, and related causes of action in §§7.11-7.19. The requisites of a quiet title action are discussed in §§7.20-7.23 and litigating a quiet title action in §§7.24-7.58. Specifically, it discusses factual investigations in §7.24, procedural considerations in §§7.25-7.29, the complaint in §§7.30-7.41, service of process in §7.42, defendant's responsive pleadings in §§7.43-7.49, trying the case in §§7.50-7.54, and judgment in §§7.55-7.60. This chapter focuses primarily on adverse possession claims; for discussion of easement litigation issues, see California Easements and Boundaries: Law and Litigation, chaps 1, 8, 10 (Cal CEB 2008).

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Source: Real Property/California Real Property Remedies and Damages/7 Quieting Title/ II. NATURE OF REMEDY/ §7.2 A. The Quiet Title Action (CCP §§760.010-765.060)

II. NATURE OF REMEDY

§7.2 A. The Quiet Title Action (CCP §§760.010-765.060)

Code of Civil Procedure §§760.010-765.060 generally govern actions to quiet title, CCP §§761.010-761.040 govern commencement of the action, CCP §§762.010-762.090 govern defendants (CCP §§763.010-763.040) cover service of process, CCP §§764.010-764.080 apply to judgments, and CCP §§765.010-765.060 govern liens and encumbrances.

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§7.3 1. Resolving Adverse Claims

An action may be brought under the quiet title statutes (CCP §§760.010-765.060) to establish title against adverse claims to real or personal property or any interest in it. CCP §760.020(a). A quiet title action is aimed at anyone who may be asserting a claim to property and is framed by simply alleging that the plaintiff is the owner and is entitled to possession and that the defendant claims an interest, adverse to the plaintiff, without right. *Wolfe v Lipsy* (1985) 163 CA3d 633, 638, 209 CR 801. The holder of any interest in property may name as defendants all unknown persons claiming adverse interests, as well as known claimants and persons having interests of record. See CCP §§762.010, 762.020, 762.060.

PRACTICE TIP: The question is when to use this remedy. The lawyer must anticipate the likelihood of adjacent neighbors, predecessors in title, or others coming forward to claim some interest in the property, and then assess the relative strength or weakness of these claims before bringing the action. Some of the claims may have merit and may have to be settled or compromised before the action can be brought to clarify the others. Some may be removed by obtaining and recording declarations or notices of abandonment; counsel must work closely with the surveyor and the title officer to fully understand the nature and extent of all claims and then decide which of them can be resolved out of court.

The plaintiff must use reasonable diligence to locate and serve unknown persons and on such a showing may obtain an order directing service by publication (see §7.42). CCP §763.010. See *Carr v Kamins* (2007) 151 CA4th 929, 60 CR3d 196. When service by publication is authorized, the plaintiff is required to post notice on the property and record a lis pendens (see §7.26; chap 13). CCP §763.020. See CCP §§405-405.61 (lis pendens).

The court is also authorized to appoint a referee to determine the adequacy of efforts to notify all parties before directing service by publication (CCP §763.010(b)), to require the plaintiff to obtain a title report (CCP §762.040(b)), and to appoint guardians ad litem to protect the interests of any party (CCP §762.080). More likely, however, a hearing on the need for publication itself can and should be sufficient to resolve the issue and save the client fees; other issues are usually done as a matter of course. Only if the lawyer is representing an adverse claimant challenging the adequacy of the proceeding should such a reference be applied for.

On the burden of proof and special proof requirements in quiet title actions, see §§7.52-7.54. On the effect and scope of a quiet title judgment, see §§7.56-7.57.

PRACTICE TIP: It is essential that the attorney contact a reputable title company long before the action is brought, and, if possible, visit the parcel and thoroughly inspect the area to learn whether any off-record parties may have adverse rights capable of being brought after the action has been finalized.

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Source: Real Property/California Real Property Remedies and Damages/7 Quieting Title/§7.4 2. Establishing Title by Adverse Possession

§7.4 2. Establishing Title by Adverse Possession

California has adopted a statutory scheme that follows the common law process of clarifying title by divesting title from those who "sleep on their rights." A quiet title action can therefore be brought by one who is "out of title" but is, in effect, the de facto user of the property. One who occupies real property for 5 years under either color of title (CCP §§322-323) or claim of title (CCP §324) and who meets the other requirements of those sections is entitled to establish clear title to the property.

Under CCP §§760.010-765.060, an adverse possessor is treated like any other quiet title plaintiff and can obtain an in rem decree if the 5-year provisions of CCP §§322-324 and the other elements of adverse possession are met. A plaintiff who seeks to quiet title by adverse possession in the form of an in rem decree must comply with all other procedural requirements of the quiet title statutes. CCP §§760.010-765.060. See §§7.20-7.23.

Occupancy of property for less than 5 years will confer good title against any other adverse claimants except the state, other political entities, and other adverse claimants relying on title by prescription, accession, transfer, will, or succession. CC §§1006-1007. This occupancy will not be sufficient, however, to prevail in an affirmative quiet title action by the adverse possessor until the occupancy ripens into title by prescription after 5 years of continuous possession (CCP §318); the 5-year period is thus a fundamental prerequisite to a successful action.

A difficult concept and definition to grasp is that of "color of title." Occupancy under color of title occurs when entry is not based on a written document. CCP §324. To make out a valid claim for adverse possession under color of title, occupancy must be so open, notorious, and hostile as to constitute reasonable notice to the owner (CCP §§323, 325; see *Dimmick v Dimmick* (1962) 58 C2d 417, 24 CR 856; *Kunza v Gaskell* (1979) 91 CA3d 201, 154 CR 101) and must be continuous for the 5-year period (CCP §§322, 324). Written or actual notice of occupancy is not required even if the record owner is not physically present in the area. *Nielsen v Gibson* (2009) 178 CA4th 318, 338, 100 CR3d 335 (record owner residing for extended period in Ireland had constructive notice of adverse possession of California real property; occupants fenced, irrigated, improved, and built a go-cart course on land).

To acquire an estate in land by adverse possession in California, the adverse possessor must have paid all state, county, and municipal taxes levied on the parcel during the 5-year statutory period of occupancy. CCP §325. Effective January 1, 2010, an absentee owner can protect its title against adverse possession by instructing the tax collector's office to return tax payments tendered on a parcel by a party who is not the owner of record. Rev & Tax C §2781.5.

PRACTICE TIP: It is crucial to investigate and learn these facts before an action for adverse possession is filed. Failure of even one renders the action without merit and may subject the attorney to liability for failure to properly investigate the claim before filing potentially frivolous litigation. The need to check tax records, talk with witnesses, take photos of the property, and perhaps contact the opposing party before litigation is filed cannot be overstated. Thus the initial client interview also takes on added importance.

If these requirements for adverse possession are met, an adverse possessor who follows all procedural requirements described in §§7.25-7.29 can obtain an in rem decree quieting title to the land in favor of the adverse possessor.

Some interesting, if archaic, ground rules apply to questionable or "gray" claims. For example, adverse possession may be founded on mistake; the adverse possessor need not be an intentional wrongdoer. Possession based on mistake is considered adverse and hostile unless it can be proved, by substantial evidence, that the possessor recognized the record owner's potential claim and expressly or impliedly showed an intent not to claim the occupied land if someone else held record title. See, *e.g., Gilardi v Hallam* (1981) 30 C3d 317, 178 CR 624.

To gain title to the land under encroaching improvements, the adverse possessor must prove that he or she paid taxes on that land, and so these types of claims are rare. An interesting anomaly in the law occurs, however, as it applies to prescriptive easements. To obtain a prescriptive easement it is not necessary to show payment of taxes unless the easement has been separately assessed. CC §1007; *Gilardi v Hallam, supra*. The *Gilardi* court pointed out that it will be almost impossible for an encroaching adverse possessor to prove that he or she paid taxes on a partial encroachment because of the difficulty in proving that the assessor looked at the land and assessed the improvements

of the encroacher. For comprehensive discussion of prescriptive easements, see California Easements and Boundaries: Law and Litigation, chaps 1, 8, 10 (Cal CEB 2008).

The rules of adverse possession against co-owners are different than those against outsiders. See *Preciado v Wilde* (2006) 139 CA4th 321, 42 CR3d 792 (tenant in common's exclusive use of property was not enough to establish adverse possession; claimant must physically exclude other owner from entering property or otherwise affirmatively challenge title) and case summary and commentary in 29 CEB Real Prop L Rep 312 (July 2006).

An adverse possessor who has fulfilled the statutory requirements for taking title by adverse possession then owns fee title by operation of law without having to assert that right. Therefore, laches may not be asserted as a defense to a claim of adverse possession. "California law does not require a plaintiff to bring an action to perfect his or her claim of adverse possession. Rather, it is the record owner—not the intruder—who must bring an action within 5 years after adverse possession commences in order to recover the property." *Marriage v Keener* (1994) 26 CA4th 186, 191, 31 CR2d 511.

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§7.5 3. In Rem Effect

A crucial goal for any lawyer considering a quiet title action is the extent to which the eventual judgment will make title marketable and insurable against anyone, including any potential adverse claimants. The relief available under the pre-1981 quiet title statute was quasi in rem in the sense that relief could be obtained through publication and posting against out-of-state defendants, but the decree did not bind all unknown defendants and was thus not sufficient to cure unmarketable titles. 15 Cal L Rev'n Comm'n Reports 1191 (1980). On and after January 1, 1981, the former law was repealed, and a comprehensive replacement quiet title law enacted, CCP §§760.010-764.070. Code of Civil Procedure §764.080 was added, effective January 1, 1990. Additional statutes governing liens and encumbrances were also added, effective January 1, 1999. See CCP §§765.010-765.060.

This statutory scheme now applies equally to actions to resolve adverse claims and to actions to establish title by adverse possession, and it provides for in rem relief for an action brought for either purpose. Consequently, most quiet title actions now result in a judgment settling the plaintiff's rights against any potential claimant, thus ensuring marketability of title. To achieve the in rem effect, specific allegations are necessary when a quiet title complaint is filed. See §§7.30-7.35.

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§7.6 4. Examples of Quiet Title Relief

What kinds of problems can be resolved by bringing a quiet title action? Simply put, if the right to title of real property or any incidents to it are at issue, a quiet title action is the appropriate remedy. For example:

- A landlord not in possession may use a quiet title action, instead of an unlawful detainer action to regain possession of the premises. *Andrews v Russell* (1927) 85 CA 149, 259 P 113. This is not a summary remedy, though, and is probably not a good idea unless a genuine question of title exists between the parties. In any event, many courts allow the plaintiff to bifurcate the issue and try the possession action in a summary fashion. See, *e.g., Wood v Herson* (1974) 39 CA3d 737, 114 CR 365. A landlord who acknowledges an issue of title by filing a quiet title action before filing the unlawful detainer suit, however, is subject to having title challenged by the tenant in the unlawful detainer action. *Greenhut v Wooden* (1982) 129 CA3d 64, 69, 180 CR 786. For further discussion, see California Landlord-Tenant Practice, chaps 9-10 (2d ed Cal CEB 1997).
- Owners of lots in a subdivision may use a quiet title action against the subdivider and other owners to remove deed restrictions. *Moe v Gier* (1931) 116 CA 403, 2 P2d 852. The quiet title action is especially useful if deed restrictions are outmoded, if a title insurance company questions the state of the title, or if one homeowner is attempting to use an outdated or outmoded restriction to arbitrarily restrict the adjoining neighbor's use of the land. This situation generally arises in blocked view or esthetic regulation actions.
- An action to quiet title may be brought in conjunction with one to enjoin an encroachment when adjoining landowners dispute the location of the boundary line or the encroaching party claims adverse possession or a prescriptive easement. See *Kapner v Meadowlark Ranch Ass'n* (2004) 116 CA4th 1182, 11 CR3d 138; *Harrison v Welch* (2004) 116 CA4th 1084, 11 CR3d 92.
- A cross-action to quiet title and establish access rights may be filed defensively in an action to enjoin a landlocked property owner from using a roadway across neighboring land. See *Linthicum v Butterfield* (2009) 175 CA4th 259, 95 CR3d 538.
- A fee owner may quiet title against a neighbor who claims a different boundary under a mistaken or ambiguous survey. *Holzer v Read* (1932) 216 C 119, 13 P2d 697; *Claudino v Pereira* (2008) 165 CA4th 1282, 82 CR3d 464; *Kunza v Gaskell* (1979) 91 CA3d 201, 154 CR 101. For further discussion, see California Easements and Boundaries: Law and Litigation, chaps 8, 10 (Cal CEB 2008).
- The purchaser at an execution sale may use a quiet title action to resolve the validity and extent of homestead rights in the property. *Montgomery v Bullock* (1938) 11 C2d 58, 77 P2d 846.
- A judgment debtor may establish the right to a homestead by means of a quiet title action. *Graham v Hunt* (1932) 119 CA 586, 7 P2d 186.
- A borrower whose obligation is secured by a deed of trust may bring an action to quiet title against the secured lender who wrongly withholds a certificate of discharge of the mortgage. *Kachlon v Markowitz* (2008) 168 CA4th 316, 85 CR3d 532 (also upheld tort damages against lender who had refused to reconvey deed of trust after repeated requests); *Gibbo v Berger* (2004) 123 CA4th 396, 19 CR3d 829.
- A beneficiary of a will may quiet title in real property as against other interested parties. *Newport v Hatton* (1924) 195 C 132, 231 P 987.
- A purchaser of real property from an heir or devisee may quiet title against anyone except the personal representative of the estate. *Jordan v Fay* (1893) 98 C 264, 33 P 95.
- A member of the public may bring an action to quiet title to private and public easements in, *e.g.,* tidelands and public beaches. *Marks v Whitney* (1971) 6 C3d 251, 98 CR 790; *Morse v E. A. Robey & Co.* (1963) 214 CA2d 464, 29 CR 734. See also *State v Superior Court* (Fogerty) (1981) 29 C3d 240, 172 CR 713; *State v Superior Court* (Lyon) (1981) 29 C3d 210, 172 CR 696.
- An owner of land abutting a street may bring an action to quiet title to an access easement over the street if the governmental agency attempts to dispose of part of the street without following the proper procedure. *Zack's, Inc. v City of Sausalito* (2008) 165 CA4th 1163, 81 CR3d 797.

- A buyer of real property who loses title because of fraud may quiet title against the defrauding party. *Warren v Merrill* (2006) 143 CA4th 96, 49 CR3d 122.
- A prospective seller of real property may quiet title against the other party to an unenforceable agreement to sell the property. *Jolliffe v Steele* (1908) 9 CA 212, 98 P 544 (combination option and listing agreement with real estate agent); *Crane v Roach* (1916) 29 CA 584, 156 P 375 (contract to build house and reconvey property). This remedy is often used when owners fear reprisal by a disgruntled breaching purchaser to a real property purchase and sale agreement. Many eventual purchasers insist on the seller's prosecuting such an action successfully as a condition of closing escrow.
- A seller of real property may use a quiet title action to regain possession and ownership from a defaulting buyer under an installment land contract. *Oursler v Thacher* (1908) 152 C 739, 93 P 1007; *Bishop v Barndt* (1919) 43 CA 149, 184 P 901.
- The seller of an easement subject to a condition subsequent may quiet title on failure of the condition. *Salter v California Cycleway Co.* (1907) 7 CA 170, 93 P 1045.
- An owner of real property may use a quiet title action to attack a zoning ordinance. *Bank of America v Town of Atherton* (1943) 60 CA2d 268, 140 P2d 678.
- A landlocked landowner may bring a quiet title action to establish a right of way by necessity over a neighboring parcel. *Roemer v Pappas* (1988) 203 CA3d 201, 249 CR 743. A quiet title action may be used to assert an easement by necessity. *Lichty v Sickels* (1983) 149 CA3d 696, 197 CR 137. A landlocked parcel created by a federal patent, however, will not support a claim of an easement by necessity unless there is a clear showing of the intent of the sovereign grantor to retain an easement. *Murphy v Burch* (2009) 46 C4th 157, 165, 92 CR3d 381. No statute of limitations applies to such an action, but the adverse claimant can allege laches. See §§7.45-7.46. Laches is often raised in the defense of establishing an easement for access to and from a landlocked parcel and, usually, one by prescription over the statutory time period. See CC §1007, noting the 5-year period under CCP §318. For further discussion, see Easements, chaps 1, 8, 10.

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Source: Real Property/California Real Property Remedies and Damages/7 Quieting Title/§7.7 5. Special Statutory Quiet Title Actions

§7.7 5. Special Statutory Quiet Title Actions

Various code provisions govern and regulate the effect of a quiet title action when applied to public property and its relationship to private lands. For example, CCP §760.020(b) provides that parties to an agreement under Pub Res C §6307 or §6357 can bring a quiet title action under CCP §§760.010-765.060 to confirm the validity of their agreement. Public Resources Code §6307 authorizes the exchange of lands between state and other public and private parties, and Pub Res C §6357 authorizes the State Lands Commission to establish high- and low-water marks of wetlands. Nothing in CCP §760.020 may be construed to limit the right of private persons to bring or participate in actions challenging the validity of agreements entered into under Pub Res C §6307 or §6357. CCP §760.020(c). See also CCP §764.080(b).

Additionally, any attorney contemplating a quiet title action needs to look at a peculiarly narrow, specialized series of statutes to determine whether the action they contemplate filing might be covered by one or more of them. They include the following:

- To reestablish title if public records in the recorder's office are destroyed. Destroyed Land Records Relief Law (also known as the McEnerney Act). CCP §§751.01-751.28.
- To reestablish boundaries after landslides, subsidence, or displacements caused by human or natural causes. Cullen Earthquake Act. CCP §§751.50-751.65.
- To establish the identity of someone in the chain of title. CCP §§770.010-770.080.
- To clear title to a proposed dedication of property for public improvement. CCP §§771.010-771.020.
- To terminate a right of entry or occupation under a lease for the production of oil or gas. CCP §§772.010-772.060.
- To decide adverse interests in real property arising from a public improvement assessment. CCP §§801.1-801.15.
- To decide adverse claims and quiet title to the property by the purchaser of tax-defaulted property. Rev & T C §§3950-3972. This judgment has an in rem effect. Rev & T C §3952.
- To quiet title against the state by a redemptioner of tax-defaulted property. Rev & T C §4113.
- To quiet title against the lien of any taxes that were canceled under Rev & T C §§4985-4992 by the property owner. Rev & T C §4990.3.
- To quiet title against the state by someone claiming title to real property situated in the former bed of a navigable stream, under a patent of tideland, or as land adjoining tideland or submerged land. Pub Res C §§6461-6465.
- To quiet title in a federal court action against the United States to real property in which the United States claims an interest. 28 USC §§1346(f), 2409a.
- To cancel an instrument, sometimes known as removing a cloud on the title. CC §3412. See §7.13.

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B. Strategic and Tactical Considerations

§7.8 1. Advantages and Disadvantages

The primary and obvious advantage of a quiet title action is that the plaintiff can secure a judgment with in rem effect. See §7.5. This ability to bind both known and unknown persons claiming interests in the property is invaluable in making an otherwise unmarketable title insurable and thus marketable. See CCP §764.030. For claims not affected by the judgment, see CCP §764.045. No other remedy can provide the sweeping effect on marketability that is available by a quiet title judgment.

The remedy's disadvantages and the facts of the particular case may dictate use of another remedy. See §§7.11-7.19. A disadvantage for an owner whose own title is defective is the cardinal principle of quiet title actions that the plaintiff must stand on the strength of his or her own title and not rely on the weakness of the defendant's title. See *Winter v McMillan* (1890) 87 C 256, 25 P 407; *Millyard v Faus* (1968) 268 CA2d 76, 73 CR 697; *Kraus v Griswold* (1965) 232 CA2d 698, 43 CR 139. A plaintiff with defective title should probably use ejectment as the remedy to remove a defendant in possession. See §7.15.

As an equitable remedy, quieting title is subject to the entire panoply of equitable defenses (*e.g.*, laches, estoppel, unclean hands; see §§7.44-7.49). A more serious drawback is that, because the plaintiff must do equity to obtain equity, conditions may be imposed on a judgment quieting title. See *O'Brien v O'Brien* (1925) 197 C 577, 241 P 861; *Lemon v Hancock* (1944) 62 CA2d 895, 145 P2d 597. Thus, an owner or successor may be required to reimburse the defendant when seeking to quiet title against the holder of an invalid mortgage (*Dool v First Nat'l Bank* (1929) 207 C 347, 278 P 233; *O'Brien v O'Brien, supra*) or a purchaser at a tax sale (*Weyse v Biedebach* (1927) 86 CA 712, 261 P 1086).

Another potential disadvantage from the plaintiff's perspective is that a defendant in a quiet title action is entitled to affirmative relief even in the absence of a cross-complaint. *McGlasson v Blythe* (1956) 143 CA2d 152, 299 P2d 325; *Ridgway v Ridgway* (1949) 95 CA2d 46, 212 P2d 6. Thus, if the defendant shows an equitable right to conveyance of legal title, the court may exercise its powers to grant the proper relief and convey the title, even if the defendant did not pray it for in a cross-action. *Noyes v Huffman* (1919) 41 CA 676, 183 P 284. A defendant may also be entitled to damages as part of a judgment quieting title in the plaintiff. *Peckwith v Lavezzola* (1942) 50 CA2d 211, 122 P2d 678.

Finally, a judgment quieting title is seldom available to a buyer under an executory purchase and sale agreement. See *Cooper v Birch* (1902) 137 C 472, 70 P 291. Specific performance is generally the appropriate remedy, in which the plaintiff bears a heavier burden of proof, as well as having to maintain and prosecute a far more legally complex cause of action. For example, the issues of certainty (CC §3390), adequacy of consideration (CC §3391), ambiguity in the contract (CC §3390(5)), and failure to perform all conditions precedent (CC §3392), must be resolved before a judgment for specific performance can be granted. See chap 5 on specific performance.

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§7.9 2. Equitable or Legal Remedy?

Even though the complaint will probably be captioned as a quiet title action (see §7.41), the lawyer needs to engage in tactical planning to decide whether to frame the action as one seeking legal or equitable relief. The distinction is important for several reasons. Equitable defenses are available to contest the equitable claims (see §§7.46, 7.48), and a court of equity may act to protect the defendant from forfeiture. *Jones v Sacramento Sav. & Loan Ass'n* (1967) 248 CA2d 522, 56 CR 741. Moreover, the parties' right to have the matter tried before a jury hinges on the legal-equitable distinction; the court tries the equitable issues, but the parties are entitled to a jury trial of the legal issues (see §7.29). See *Medeiros v Medeiros* (1960) 177 CA2d 69, 1 CR 696.

The following are also some important ground rules that may help in making the decision:

- An action to establish title that does not also seek to obtain possession is an equitable action (*Medeiros v Medeiros, supra*) and is generally subject to equitable principles (*Jones v Sacramento Sav. & Loan Ass'n, supra; South Shore Land Co. v Petersen* (1964) 226 CA2d 725, 38 CR 392).
- To the extent that the action involves legal claims, however, such as when a plaintiff out of possession seeks possession, it is also an action at law. *Thomson v Thomson* (1936) 7 C2d 671, 62 P2d 358.
- The court may allow factual issues to be tried first by a jury in an advisory capacity and then rule on the equitable remedies. *Kachlon v Markowitz* (2008) 168 CA4th 316, 85 CR3d 532.
- A jury trial may be unnecessary if the court first decides the equitable issues and thus effectively disposes of the legal issues. *Nwosu v Uba* (2004) 122 CA4th 1229, 19 CR3d 416.

PRACTICE TIP: Questions about the veracity of witnesses, the availability of documentary evidence, the emotional nature of the testimony and its effect on a jury, or the sheer complexity of the action and the difficulty of a jury to follow it, play a part in determining what relief to seek, whether to bifurcate the trial, and when and how to bring the action.

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§7.10 3. Availability of Title Insurance

It is crucial that counsel preparing to initiate or defend a quiet title action consider whether to tender the claim in the action or the defense of it to a title insurer under a title policy covering the client's disputed interest in the property. See also §7.24. One of the most important questions any attorney must ask a client for the first time in preparing to prosecute or defend a quiet title action is whether the client is aware of an insurance policy or other product, whether it be a preliminary report of title, an actual ALTA or CLTA policy, or some variant. For a comprehensive overview of the differences in title policy breadth and coverage, see California Title Insurance Practice, chaps 6-8 (2d ed Cal CEB 1997); in particular, see Title Ins §§7.36-7.49 for a comparison of different owner policies.

Understanding the nature and scope of the client's policy can make an enormous difference on the type of action filed, the best defense approach, and whether the attorney will wind up naming the title insurance carrier as an additional defendant or in a separate coverage action to compel maintenance or defense of the primary action. On tendering the claim to the title insurer and enforcing title policies, including title insurance litigation strategies, see Title Ins, chaps 11-13.

On the uses of a litigation guaranty in a quiet title action, see §7.24.

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§7.11 C. Related Causes of Action

Many times, someone filing a lawsuit seeking quiet title relief may have other real property problems associated with the lawsuit. For example, an adverse party "squatting" on the land may refuse to leave and may be damaging the property. That person or entity might also be claiming rights under "color of title" (*i.e.,* an instrument that may not be valid but superficially appears to). For these reasons, it is good practice to allege all potential causes of action against the adverse party in the same action. Judicial economy is served and it is less expensive for the client; discovery can be consolidated, and, if some of the causes of action are legal and defendant demands it, the action can be bifurcated (see CCP §1048(b)), with only the legal claims tried before a jury.

As a rule, the court may grant a plaintiff *any* equitable relief consistent with the facts pleaded in the complaint and embraced within the issues raised. See, *e.g., Newport v Hatton* (1924) 195 C 132, 153, 231 P 987; *South Shore Land Co. v Petersen* (1964) 226 CA2d 725, 38 CR 392. See also CCP §427.10; California Civil Procedure Before Trial §15.12 (4th ed Cal CEB 2004). For example, the plaintiff may seek the following, in addition to the court's ruling on the principal issue of ownership:

- Constructive trust or equitable lien (*Warren v Merrill* (2006) 143 CA4th 96, 49 CR3d 122; see chap 15);
- An order for possession or ejectment (*South Shore Land Co. v Petersen, supra; Keele v Clouser* (1928) 92 CA 526, 268 P 682; see §7.15);
- Reformation of a contract (*California Trust Co. v Cohn* (1932) 214 C 619, 7 P2d 297; see §7.12);
- Damages (*Warren v Merrill* (2006) 143 CA4th 96, 49 CR3d 122; *Nwosu v Uba* (2004) 122 CA4th 1229, 19 CR3d 416; *South Shore Land Co. v Petersen, supra; Keele v Clouser, supra;* see §7.17);
- Cancellation of an instrument (see §7.13); or
- Injunctive relief (see §7.18).

There are limits, however. For example, a quiet title action cannot be used as a substitute for a specific performance action to compel a defendant to perform its obligations under an executory contract to sell real property. *Cooper v Birch* (1902) 137 C 472, 70 P 291.

NOTE: A trustor or mortgagor may want to use the remedy of CC §2941.7 as an alternative to a quiet title action to obtain a release or reconveyance of a deed of trust. This provision is usually implemented only if the trustor cannot locate the beneficiary or obtain a reconveyance.

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§7.12 1. Reformation

Under CC §3399, a contract or legal instrument that through fraud or mistake does not reflect the parties' true intention may be reformed to reflect that intention. In contrast to quieting title, which secures the plaintiff's title against all potential claimants, reformation focuses on a specific document executed by the plaintiff and another party and results in judicial amendment of that document.

PRACTICE TIP: Problems abound in a typical reformation action, however, making it difficult to maintain and win. There are parol evidence issues, conflicting testimony, a high burden of proof, and a distaste by courts in general to redraft a facially complete and correct instrument.

If the facts show a clerical or ministerial error, the situation is different and reformation may be the most expeditious remedy. Reformation is probably also more suitable when the plaintiff's sole concern is a specific document that does not correctly express the parties' agreement. Case law permits this cause of action to be joined with one to quiet title. *California Trust Co. v Cohn* (1932) 214 C 619, 7 P2d 297. See, *e.g., Alhino v Starr* (1980) 112 CA3d 158, 166, 169 CR 136 (complaint stated cause of action for reformation and quiet title).

California statutory authority also creates procedures to establish the identity of a person in the chain of title. See CCP §§770.010-770.080. This procedure can sometimes be a more expeditious way to reform an instrument. On reformation generally, see chap 2.

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§7.13 2. Cancellation of Instrument

A void or voidable instrument that might cause harm to a party (if left outstanding or in the chain of title) can be removed by the remedy of cancellation (CC §§3412-3414), sometimes referred to as removing a cloud on title. See *Weingand v Atlantic Sav. & Loan Ass'n* (1970) 1 C3d 806, 83 CR 650. Like reformation (see §7.12), cancellation attacks a specific document and does not clear the plaintiff's title against all actual and potential claimants. Cancellation may be pleaded in the plaintiff's complaint, either as an alternative remedy to be granted in a quiet title action or as an additional cause of action. See, *e.g., Dool v First Nat'l Bank* (1929) 207 C 347, 278 P 233; *Kachlon v Markowitz* (2008) 168 CA4th 316, 85 CR3d 532. On cancellation of instruments generally, see chap 6.

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§7.14 3. Declaratory Relief

Declaratory relief is one of the most regularly used remedies by lawyers seeking to clear title. See, *e.g., Bryant v Blevins* (1994) 9 C4th 47, 36 CR2d 86; *Kachlon v Markowitz* (2008) 168 CA4th 316, 85 CR3d 532. It is fast, it is expeditious, the pleadings are relatively simple, and it can often accomplish the same purpose as a quiet title action. Sometimes declaratory relief is requested alternatively to or in conjunction with other equitable suits, such as actions to quiet title. See, *e.g., Zack's, Inc. v City of Sausalito* (2008) 165 CA4th 1163, 81 CR3d 797.

Under CCP §1060, a person with an interest under a written instrument, excluding a will or a trust, may obtain a judicial declaration of respective rights and duties under the instrument. Declaratory relief actions are normally entitled to precedence on the trial calendar. CCP §1062.3. If the attorney wants other relief along with a declaration of rights and duties, however, priority setting for trial is available only on a noticed motion and a showing that the action requires a speedy trial. CCP §1062.3(b). For discussion of declaratory relief, see California Civil Procedure Before Trial, chap 35 (4th ed Cal CEB 2004).

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§7.15 4. Ejectment

When the plaintiffs are out of possession of the property but can prove that they have the right to it, by either perfected or perfectible title, they can obtain a judgment for its possession. CC §3375. Normally, a cause of action for ejectment should be joined with a quiet title cause of action, although recovery of possession by an out-of-possession owner is usually included in the relief available in a quiet title action (see §7.20). *South Shore Land Co. v Petersen* (1964) 226 CA2d 725, 38 CR 392.

If the person in possession, however, holds under some claim of right, however tenuous, then quiet title is definitely the preferred remedy, and the reported cases indicate that pleading a separate cause of action for ejectment is not necessary. *Martin v Bartmus* (1922) 189 C 87, 207 P 550; *Taliaferro v Riddle* (1958) 166 CA2d 124, 332 P2d 803. On ejectment generally, see chap 10.

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§7.16 5. Restoration of Lost or Destroyed Instrument

This is a rather narrow cause of action, which applies only to plaintiffs who can prove through extrinsic evidence the existence of a written memorialization of title. It is, for that reason, not regularly used. As the relevant statute indicates, a person with an interest in a written instrument that has been lost or destroyed may maintain an action to prove its existence or to compel issuance of a duplicate. CC §3415. To establish the execution and contents of a lost instrument, the evidence must be clear, satisfactory, and convincing. Whether the evidence in a particular case meets those standards must be left largely to the trial court; and if substantial evidence supports its findings, its judgment must be accepted as conclusive on appeal. *Von Hasseln v Von Hasseln* (1953) 122 CA2d 7, 12, 264 P2d 205.

PRACTICE TIP: For a plaintiff who claims title through a lost or destroyed instrument, this action is either an alternative to, or an essential additional course of action to, a quiet title action. Legal title is generally a prerequisite to quiet title relief (see §7.20), and establishing transfer of title under a lost or destroyed instrument may be a necessary preliminary to quieting title.

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§7.17 6. Damages

Because the court may grant relief consistent with the case for quieting title (*California Trust Co. v Cohn* (1932) 214 C 619, 7 P2d 297), the plaintiff may also recover damages for any withholding of possession of the property (*Keele v Clouser* (1928) 92 CA 526, 268 P 682). When legal title is acquired by fraud, "any number of remedies are available and appropriate"; relief may include quieting title, the imposition of a constructive trust, and damages, including offsets. *Warren v Merrill* (2006) 143 CA4th 96, 114, 49 CR3d 122 (court awarded plaintiff noneconomic and punitive damages; court allowed defendant credits for mortgage and other property costs and expenses).

When the plaintiff shows that a right to recover the property existed when the lawsuit commenced, but the right apparently terminated during the pendency of the action, the plaintiff can recover damages for the period the property was withheld (CCP §740), subject to a setoff for improvements made by a good faith improver in possession (CCP §741; see CCP §871.5; CC §1013.5; *Tremper v Quinones* (2004) 115 CA4th 944, 9 CR3d 672). On damages generally, see chaps 3-4.

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§7.18 7. Injunctive Relief

For several reasons, injunctive relief in quiet title actions is rarely used as a remedy. First, what is being sought is a clarification of title, which is an order or decree that usually does not amount to rectifying an emergency situation. Second, the remedy itself grants the certainty that everyone is seeking; interim orders rarely provide that peace or certainty. And third, courts are reluctant to grant interim relief in quiet title actions because the prerequisites for injunctive relief are usually lacking. See CCP §526(a)(1)-(5).

Injunctive relief, however, may be granted as part of the judgment quieting title to protect the owner against a multiplicity of suits by an adverse claimant. *Wolf v Gall* (1916) 174 C 140, 162 P 115; *Brewer v King* (1956) 139 CA2d 33, 293 P2d 126. Injunctive relief is specifically authorized in California to prevent such a multiplicity of actions. CC §3422; CCP §526(a)(6). An injunction may be granted whenever needed to fully achieve the relief granted in a quiet title action (*Kittle v Bellegarde* (1890) 86 C 556, 25 P 55), and it may be granted if warranted by the facts even if not specifically prayed for (*City of Los Angeles v Los Angeles Farming & Milling Co.* (1908) 152 C 645, 93 P 869).

An action to quiet title may be brought in conjunction with one to enjoin an encroachment when adjoining landowners dispute the location of the boundary line or the encroaching party claims adverse possession or a prescriptive easement. See *Kapner v Meadowlark Ranch Ass'n* (2004) 116 CA4th 1182, 11 CR3d 138; *Harrison v Welch* (2004) 116 CA4th 1084, 11 CR3d 92, cited in chap 11. For further discussion of prescriptive easements, see California Easements and Boundaries: Law and Litigation, chaps 1, 8, 10 (Cal CEB 2008).

For discussion of injunctive relief generally, see California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB 2004).

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§7.19 8. Slander of Title

A tort cause of action for slander of title is frequently joined with a quiet title action. See *Fearon v Fodera* (1915) 169 C 370, 148 P 200; *Cavin Mem. Corp. v Requa* (1970) 5 CA3d 345, 85 CR 107; *Hill v Allan* (1968) 259 CA2d 470, 66 CR 676. The purposes of the two actions are different and complement each other: A quiet title action is brought to resolve all conflicting claims to the property and settle the plaintiff's title, while the purpose of a slander of title action is to recover damages for defamation of title to the property that affects its marketability. The proof problems associated with a slander of title cause of action can be difficult; economic damage or loss of use of the property because of the false representation of ownership (or the lack of it) often do not exist. On slander of title, see chap 9.

PRACTICE TIP: Whether the real estate market is rising or falling may also affect the choice because damages may not lie if the property's value rose while the action was pending.

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III. REQUISITES OF A QUIET TITLE ACTION

§7.20 A. Plaintiff Must Stand on Strength of Own Title

A cardinal legal principle in quiet title actions is the rule that the plaintiff can prevail only on the strength of his or her own title, not on the weakness of the adverse party's title. *Winter v McMillan* (1890) 87 C 256, 25 P 407; *Kunza v Gaskell* (1979) 91 CA3d 201, 154 CR 101; *Millyard v Faus* (1968) 268 CA2d 76, 73 CR 697; *Settlors Corp. v City of San Diego* (1967) 254 CA2d 631, 62 CR 347. A plaintiff who lacks title cannot maintain an action based on the contention that a defendant, who also lacks title, is asserting an interest in the property. *Sears v Willard* (1913) 165 C 12, 130 P 869; *Williams v City of San Pedro* (1908) 153 C 44, 94 P 234.

Thus, when the court decrees that the plaintiff is without title to or interest in the property, the case is over unless the defendant seeks affirmative relief. The plaintiff's lack of title makes it unnecessary to examine the nature of the defendant's title. *Wagner v Worrell* (1946) 76 CA2d 172, 172 P2d 751. A plaintiff with questionable title should therefore use causes of action other than quiet title. See, *e.g.,* §§7.11-7.19.

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§7.21 B. Legal Title Generally Required

As a rule, the plaintiff in a quiet title action must allege and be able to prove a legal ownership interest in the property in order to prevail; the owner of an equitable interest cannot maintain a quiet title action against the holder of legal title. *G.R. Holcomb Estate Co. v Burke* (1935) 4 C2d 289, 48 P2d 669; *Lewis v Superior Court* (1994) 30 CA4th 1850, 1866, 37 CR2d 63; *Stafford v Ballinger* (1962) 199 CA2d 289, 294, 18 CR 568. See also *O'Keefe v Aptos Land & Water Co.* (1955) 134 CA2d 772, 286 P2d 417. But a legal owner who acquires the property through fraud only has bare legal title and holds it as a constructive trustee for the defrauded party. A buyer of real property who loses title because of fraud, therefore, may quiet title against the defrauding party. *Warren v Merrill* (2006) 143 CA4th 96, 114, 49 CR3d 122.

Title obtained by adverse possession or prescription constitutes legal title (*Myers v Berven* (1913) 166 C 484, 137 P 260) and may be the basis of a quiet title action (*Baker v Clark* (1900) 128 C 181, 60 P 677; *Bennett v Lew* (1984) 151 CA3d 1177, 199 CR 241).

If both parties merely claim equitable interests, a quiet title action can decide which party has superior equity. *Horn v Govan* (1959) 172 CA2d 77, 341 P2d 784; *Dement v Pierce* (1932) 122 CA 254, 9 P2d 884. Even if a third party actually holds legal title, the court may adjudicate the priorities of adverse equitable claims. *O'Keefe v Aptos Land & Water Co., supra; Dement v Pierce, supra*.

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§7.22 C. Remedy Applies to Both Legal and Equitable Interests

Under the quiet title statutes (CCP §§760.010-765.060), a "claim" that provides the basis for a quiet title action may include a legal or equitable right, title, estate, lien, or interest in property. This inclusive definition is consistent with previous case and statutory law under which an owner in fee (see, *e.g., McKinnie v Shaffer* (1888) 74 C 614, 16 P 509) or an owner of an estate or interest that is less than the fee interest (see, *e.g., Pierce v Felter* (1878) 53 C 18) could maintain an action against an adverse claimant. Specific types of interests that support a quiet title action include:

- A leasehold interest or estate for years. *German-American Bank v Gollmer* (1909) 155 C 683, 102 P 932; *Langstaff v Mitchell* (1931) 119 CA 407, 6 P2d 546.
- A remainder interest, whether contingent or vested. *Akley v Bassett* (1924) 68 CA 270, 228 P 1057.
- A right of way. *Welsh v County of Plumas* (1889) 80 C 338, 22 P 254; *Jones v Deardorff* (1906) 4 CA 18, 87 P 213.
- Riparian and appropriative rights to beneficial use of water in a stream. *Turner v East Side Canal & Irrig. Co.* (1915) 169 C 652, 147 P 579.
- A right to a water pipe and the water running through it. *Standart v Round Valley Water Co.* (1888) 77 C 399, 19 P 689.
- A homestead right. *McKinnie v Shaffer, supra*.

Some interests in real property are insufficient to provide the basis for a quiet title action. The holder of a mere inchoate right to redeem real property from a tax sale does not have an interest in which title may be quieted (*Sears v Willard* (1913) 165 C 12, 130 P 869); nor is the right of a landowner to lateral support a sufficient interest in the supporting land to be subject to a quiet title action (*Sargent v Jaegling* (1927) 83 CA 485, 256 P 1116). For a list of potential quiet title plaintiffs, see §7.27.

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§7.23 D. Possession Not Required

The quiet title statutes (CCP §§760.010-765.060) provide that an action may be brought against a person who claims an interest or estate in the plaintiff's property. It does not specifically require that the plaintiff be in possession of the property (CCP §760.020). A quiet title action, therefore, may be maintained by one out of possession, and becomes, in effect, an action to recover possession (see §§7.20-7.21). *Keele v Clouser* (1928) 92 CA 526, 268 P 682.

Possession as an issue is related to the rule that legal title is generally required (see §7.20), because it is clearly legal title and not possession that is crucial to obtaining a judgment quieting title. Mere occupancy of real property is not a sufficient interest to enable the occupant to quiet title unless it has ripened into title by adverse possession (see §7.4). CC §1006; CCP §§322-325; see *Langstaff v Mitchell* (1931) 119 CA 407, 6 P2d 546. Most likely, the claim of adverse possession will wind up being litigated anyway; the quiet title action will have, as its factual basis, the "color of title" allegations based on the factual requirements in the adverse possession statute. See CCP §§318 (5-year requirement), 325 (requirements of enclosure, payment of taxes, improvement).

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IV. LITIGATING A QUIET TITLE ACTION

§7.24 A. Factual Investigation; Litigation Guaranty

A fundamental part of a quiet title action is a comprehensive, prelitigation factual investigation that the lawyer undertakes, thoroughly documents, and completes before filing the action. Prerequisites are interviewing witnesses, visiting the property, carefully examining title records, studying surveys, and comparing their contents to the site. The careful attorney, and the one that renders the best long-term advice to the client, is the one who completes the investigation with sufficient results to render a preliminary opinion of the chances of the action's success. Many times, the prelitigation investigation will turn up, before any formal discovery, facts or testimony that will significantly influence the decision. Little of the information is usually obtained by pretrial discovery; much of it is public record or within the purview of the client or the witnesses. For further discussion of prelitigation strategies, see California Easements and Boundaries: Law and Litigation, chaps 9-10 (Cal CEB 2008).

One of the most important acts the attorney should do is meet in person with a title officer, preferably with an assessor's parcel map, a tract map, and/or a survey, and explain the scope of the problem and the intended remedy as a prerequisite to ordering a litigation guaranty. The visual aids are essential for both the attorney and the title officer; each understands the focus of the problem and other monuments and physical impediments or features that affect the litigation and its chances of success. Boundary lines, off-record easements that may have accrued through constant use, and points of access all bear directly on the degree of familiarity and knowledge that both the lawyer and the title officer will have with the problem and on the usefulness and accuracy of the title officer's work.

In any litigation involving title to or interests in real property, counsel must know of all possible interest holders or claimants disclosed by those records that impart constructive notice in order to properly name all parties. An omission may render the judgment useless. The litigation guaranty furnishes this information and transfers liability to the issuer for errors of omitted information. Specifically, a litigation guaranty shows how title is vested, gives a description of the property, and lists title exceptions and all necessary defendants to an action concerning the property. See California Title Insurance Practice §§9.9-9.12 (2d ed Cal CEB 1997).

PRACTICE TIP: For an attorney prosecuting a quiet title action, the litigation guaranty is the single most valuable document available from a title company. By working with a title company on their issuance of a litigation guaranty, counsel sets up lines of communication that make it easier to obtain title insurance from that company on successful completion of the litigation. See §7.60.

Given the danger of a competing claim based on adverse possession, the attorney or a paralegal should clearly investigate and photograph the site and the surrounding area, and take notes of what uses and visual information existed at the time and date of the visit. Once the site visit is complete, the photographs are developed and examined, and the notes reviewed, the attorney can compare that information with what the documents indicate. Depending on the nature of the property and the known facts, the attorney or investigator should measure or estimate distances and note where buildings are located with reference to lot lines, what utility meters appear on the property and where they are located, where telephone and power lines enter the property, and what signs or names appear on mailboxes, including the adjoining ones. The big question the attorney needs to resolve is: Is the property being occupied for *any* purpose consistent with its character? The lawyer should interview any witnesses to ascertain the nature and length of any evident occupancy or use of the property.

Once the lawyer has identified likely defendants from the document search, the visual inspection, the meeting with the title officer, and the preliminary work on the litigation guaranty, the lawyer should evaluate carefully the strength and validity of their respective claims. Close consultation with the title officer will be important here; the carrier may ultimately make the decision based on the facts available to it what interests they will or will not insure and what level of proof they are satisfied with concerning the existence or nonexistence of a claim. The choice of remedy may change, too. If a defendant claims under a specific deed or other instrument, the lawyer may have to bring a separate action or join a cause of action to cancel that instrument under CC §3412 (see chap 6). Potential adverse claims concerning the

boundary between the client's property and adjacent property will probably require the lawyer to obtain a survey with a metes and bounds description and a specific plotting of the corrected boundaries highlighted for clarity. On using surveys in litigating boundary and easements disputes, see California Easements and Boundaries: Law and Litigation, chaps 8-10 (Cal CEB 2008).

WARNING: An important fact for the lawyer to investigate is whether the client's interest in the property is covered by a title insurance policy. If so, the lawyer can evaluate the possibilities of whether an error occurred in the creation or issuance of the policy, whether the underlying claim is covered and should be tendered to the carrier, and whether the policy grants the client the right to seek indemnity and or other relief from the carrier. See §7.10. For further discussion of title coverage, see Easements, chap 10.

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B. Procedural Considerations

§7.25 1. Jurisdiction and Venue

The superior court has jurisdiction of actions brought under the quiet title statutes (CCP §760.040(a)) and the authority to grant whatever equitable relief is appropriate in a particular case (CCP §760.040(c)). See CCP §§85-88. Actions brought under other quiet title statutes (see §7.2) will also usually be properly brought in superior court under its jurisdiction over equitable actions. Cal Const art VI, §10; *Thomson v Thomson* (1936) 7 C2d 671, 62 P2d 358; *Campbell v Rustigian* (1943) 60 CA2d 500, 140 P2d 998. See California Civil Procedure Before Trial §8.34 (4th ed Cal CEB 2004). If federal jurisdiction is otherwise proper, nothing in the nature of a quiet title action prevents the federal courts from exercising jurisdiction. *Devine v City of Los Angeles* (1906) 202 US 313, 50 L Ed 1046, 26 S Ct 652.

The proper county for trial under the quiet title statutes (CCP §§760.010-765.060) is the county in which all or a portion of the real property is located (CCP §760.050(a)). This provision is consistent with CCP §392(a)(1), which would otherwise govern venue of an action to quiet title to real property. *Kejr v Construction Eng'rs, Inc.* (1952) 111 CA2d 817, 245 P2d 21. See Civ Proc Before Trial §8.34.

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§7.26 2. Lis Pendens

The most effective enforcement tool the plaintiff has to maintain the status quo and prevent an adverse claimant or others to solidify their legal position or do damage to the plaintiff's case is the recordation of a lis pendens, or notice of pending action. Statutorily, the plaintiff in a quiet title action *must* record, immediately on commencement of the action, a lis pendens with the county recorder of each county in which any real property described in the complaint is located. CCP §761.010(b). See procedures in CCP §§405-405.61. See also chap 13.

PRACTICE TIP: The value of recording a lis pendens in a quiet title action, separate and apart from the statutory prerequisite, cannot be overstated. It effectively preserves the state of the record, thereby permitting the court to enter a judgment that binds all claimants and avoids duplication or the threat of a later, inconsistent claim. Because it gives constructive notice to all that the action is pending (CCP §405.24), a recorded lis pendens prevents anyone who subsequently acquires an interest in the property from being a bona fide purchaser or encumbrancer. It enables the claimant to retain the priority of his or her real property claim over interests in the property that are acquired while the action is pending. Otherwise, third parties without actual or constructive notice who take interests in the affected property while the action is pending are not bound by the judgment.

The recordation of a lis pendens will often cure service defects and other procedural irregularities. Service by publication on unknown defendants, for example, is ineffective unless the plaintiff has recorded a lis pendens (CCP §763.020(b)), and failure to record a lis pendens can result in subsequent bona fide purchasers and encumbrancers of record not being bound by the judgment quieting title (see CCP §§764.030, 764.045(a)). If the quiet title action is to be governed by one of the other authorizing statutes (see §7.7), the attorney should check the applicable statute to determine whether recording a lis pendens is required. See, *e.g.,* CCP §751.13, requiring the recordation of a lis pendens in action under the McEnerney Act (Destroyed Land Records Relief Law) (CCP §§751.01-751.28).

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3. Parties

§7.27 a. Plaintiffs

Any person or entity with sufficient interest or estate in real property (see §§7.20-7.23) can bring a quiet title action. The quiet title statutes (CCP §§760.010-765.060) are intended to provide the "broadest possible forum for clearing title to the fee or any other interest in property." See Comment to CCP §760.020. The inclusiveness of the statute and its intent are demonstrated by the breadth of plaintiffs included, such as:

- A tenant in common (*Ross v Heintzen* (1868) 36 C 313);
- A purchaser at an execution sale (*Bourn v Kidd* (1928) 203 C 450, 264 P 1099);
- An executor or administrator (CCP §377.30);
- An heir or a devisee (Prob C §9654);
- A beneficial owner who has executed a deed of trust giving legal title to another (the trustee) (*Bishop v Morrow* (1936) 12 CA2d 720, 55 P2d 1216).

See also the list of potential interests protected under the quiet title remedy in §7.22.

A cotenant or any other person or entity claiming any estate or interest in the land under a source of title common to that of the plaintiff may (and probably should, to clarify title, unless that person or entity is adverse to your client) be joined as a plaintiff in a quiet title action. *McCleary v Broaddus* (1910) 14 CA 60, 111 P 125. Growing out of this point, a co-owner is entitled to intervene in a quiet title action even when the plaintiff is purporting to act on his or her behalf. *Cummings v Cummings* (1921) 55 CA 433, 203 P 452. A person with a claim adverse to those of both the plaintiff and the defendant is also entitled to intervene. *Lapique v Kelley* (1927) 82 CA 586, 256 P 229. Creditors have a sufficient interest in a quiet title action brought by an assignee for their benefit to be entitled to intervene. *Moore v Schneider* (1925) 196 C 380, 238 P 81.

On one hand, because of the difficulty of establishing the requisite identity of factual and legal issues, it is unlikely that a class action to quiet title on behalf of other owners deriving independent title from the same source as the plaintiff could meet the class action requirements of CCP §382. See *Gerhard v Stephens* (1968) 68 C2d 864, 69 CR 612. On the other hand, it is proper for several plaintiffs who acquire title to parcels of land from the same source to maintain a single action to quiet title to their holdings. The cost and attorney fee savings are obvious. See *Superior Cal. Fruit Land Co. v Grossman* (1916) 32 CA 357, 162 P 1046.

A bona fide purchaser can assert his or her status affirmatively in actions to quiet title or remove a cloud from title. He or she is not limited to pleading it as a defense. *Reiner v Danial* (1989) 211 CA3d 682, 690, 259 CR 570. The plaintiff in a quiet title action, however, need not be a bona fide purchaser. For example, a buyer with prior knowledge of existing time-barred liens on property is entitled to quiet title against lienholders. See *Mix v Sodd* (1981) 126 CA3d 386, 178 CR 736.

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§7.28 b. Defendants

In any action brought under the quiet title statutes (CCP §§760.010-765.060) the plaintiff must name as defendants all persons having adverse claims to the property on which a determination is sought. CCP §762.010.

PRACTICE TIP: This is fertile ground for attorney malpractice and requires close cooperation between counsel and the title officer in generating and preparing the litigation guaranty. See §7.24.

Persons unknown to the plaintiff may be joined in the action (CCP §762.060(a)), may appear and defend (CCP §762.070), and may be served by publication in the court's discretion (CCP §§763.010-763.020; see §7.42). The statutory scheme is inclusive; all persons known and unknown who are made parties to the action are bound by any judgment entered. CCP §764.030. Persons not made parties to the action are not bound by the judgment if they had a claim of record in the property at the time the lis pendens (see §7.56) was recorded (CCP §§764.030(b), 764.045(a)), or if they had an unrecorded claim that was known to the plaintiff or apparent from an inspection of the property (CCP §764.045(b); *Carr v Kamins* (2007) 151 CA4th 929, 60 CR3d 196). Subsequent transferees may attempt to set aside the judgment if their predecessors were not made defendants in the action. See *Wool v Scott* (1956) 140 CA2d 835, 296 P2d 17. The importance of a thorough check of the chain of title and visual inspection for adverse claims (see §7.24) cannot be overemphasized; failure to join a necessary defendant can result in a judgment that will not bind persons with claims that conflict with those of the plaintiff. See, *e.g., Gerhard v Stephens* (1968) 68 C2d 864, 69 CR 612; *Taliaferro v Riddle* (1958) 166 CA2d 124, 332 P2d 803.

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§7.29 4. Entitlement to Jury

The complexity of the lawsuit and the interrelationship of other issues will, to a great extent, govern the decision about whether to try the case with a jury. For example, it is not unusual to have a quiet title action containing allegations of waste and damage to real property, issues that may, for tactical reasons, be better brought in front of a jury than a court. Tactical considerations, including the identity and sympathy of the parties, the level of proof and availability of evidence, and the right to treble damages for waste may play a significant part in this decision. Whether the court will permit a jury trial will depend, ultimately, on the characterization of the issues as equitable or legal; equitable issues are tried by the court and legal issues by a jury (see §7.9). *Davis v Judson* (1910) 159 C 121, 113 P 147; *Medeiros v Medeiros* (1960) 177 CA2d 69, 1 CR 696.

In an action alleging mixed causes of action, a jury trial may be unnecessary if the court first decides the equitable issues in favor of the defendant and thus effectively disposes of the legal issues. *Nwosu v Uba* (2004) 122 CA4th 1229, 19 CR3d 416.

PRACTICE TIP: Whether the plaintiff (or the defendant) wants a jury trial is a decision that each party must consider when the complaint (or responsive pleading) is drafted. This is clearly a point at which the specificity of the facts supporting the theory of recovery becomes necessary. An attorney who wishes to preserve jury trial as an option will clearly have to plead more than a mere claim of title to the property.

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C. Preparing Complaint

§7.30 1. Essential Allegations

The contents of a quiet title action complaint are relatively simple, but are dictated by statute. See CCP §§761.020-762.030. The complaint must be verified and must contain specific allegations about the property, the disputed title claims, and the parties. See §§7.31-7.35. For a form complaint, see §7.41.

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§7.31 a. Real Property Description

A quiet title complaint must include both the legal description of the subject real property and its street address or common designation. CCP §761.020(a). This requirement gives the defendants sufficiently precise information to enable them to identify the property and defend the claim. See 15 Cal L Rev'n Comm'n Reports 1198 (1980); *Aalwyn's Law Inst. v Martin* (1916) 173 C 21, 159 P 158.

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§7.32 b. Nature and Basis of Plaintiff's Title

The plaintiff must plead the nature of its title (*i.e.,* allege the type of interest the plaintiff holds; *e.g.,* a fee simple or a trust deed beneficiary) and specific facts supporting the basis of that title (*e.g.,* adverse possession or a purchase). CCP §761.020(b). The plaintiff can claim any interest in the property; a fee interest is not required (see §§7.20-7.23). See 15 Cal L Rev'n Comm'n Reports 1198 (1980). (This pleading requirement seems more stringent than the earlier statutes. See, *e.g., Martin v Hall* (1933) 219 C 334, 26 P2d 288 (general allegation of ownership sufficient); *Daly v Sorocco* (1889) 80 C 367, 22 P 211 (plaintiff need not plead source of title).) Various parcels of real property and items of personal property may be joined in one action. 15 Cal L Rev'n Comm'n Reports 1198 (1980). If the plaintiff is in possession of the property, that fact can be added to this paragraph, but possession is not required to maintain a quiet title action (see §7.23).

PRACTICE TIP: This is an excellent place for the attorney to plead with specificity; doing so will avoid demurrers and act as a road map for preparing the matter for trial. Material discovered in the prelitigation investigation phase can be included here unless it is unnecessary and tactically unwise or unsound to reveal it at the pleading stage.

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§7.33 c. Adverse Claims

The complaint must specify the disputed title claims on which the plaintiff seeks the judgment quieting title (CCP §761.020(c)), including claims that are of record, known to the plaintiff, or reasonably apparent from an inspection of the property (CCP §762.060(b); see *Carr v Kamins* (2007) 151 CA4th 929, 60 CR3d 196), and name the persons making the claims (CCP §§762.010-762.030). The complaint must also list any claims whose validity the plaintiff admits. CCP §762.060(c); 15 Cal L Rev'n Comm'n Reports 1198 (1980). Although CCP §761.020(c) does not expressly require an allegation that the defendant has no right, title, or interest in the property, such an allegation clarifies the plaintiff's assertion of superior title over the claim of each defendant. See §7.30. On joining unknown defendants to achieve an in rem judgment, see §§7.38-7.39. On allegations when the interest of a known defendant is unknown, see §7.40.

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§7.34 d. Effective Date of Plaintiff's Title

The complaint must allege "the date as of which the determination [of title] is sought" and may specify a date other than that on which the action is filed. CCP §761.020(d). The legislative intent behind this section (not apparent from its language) is to enable the plaintiff to obtain a judgment establishing the plaintiff's title that is effective on a date earlier than the filing date of the complaint but that does not permit the plaintiff to quiet title to after-acquired property (*i.e.,* the date alleged in the complaint limits the court's jurisdiction in that any interest plaintiff acquires after that date, whether under color of title, adverse possession, or other means, cannot be litigated and should not be pleaded in the underlying action). See 15 Cal L Rev'n Comm'n Reports 1198 (1980).

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§7.35 e. Prayer

The complaint must also include a specific prayer for a decree that establishes the plaintiff's title against the disputed adverse claims. CCP §761.020(e). If other causes of action are pleaded, the prayer must, of course, also specify what other relief is sought. See §§7.11-7.19 on related causes of action. See also California Civil Procedure Before Trial §§15.7-15.12, 15.35 (4th ed Cal CEB 2004) on general requirements for the prayer. In a statutory action to quiet title, it is not necessary to include a prayer to cancel or set aside a deed or other instrument clouding title, although such a prayer is necessary in an action under CC §3412 to cancel an instrument. *Fay v Norquist* (1943) 60 CA2d 218, 140 P2d 141.

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2. Miscellaneous Allegations

§7.36 a. Equitable Title; Fraud of Defendant

The attorney drafting the complaint should take note of several miscellaneous allegations that the courts had required in interpreting former CCP §738, the predecessor to the present quiet title statutes (CCP §§760.010-765.060). For example, if the plaintiff relies on estoppel or some related equitable theory as the basis for the quiet title action, facts giving rise to the equitable theory had to be alleged in the complaint. *Sly v Abbott* (1928) 89 CA 209, 264 P 507. If the plaintiff fails to plead facts showing the validity of the equitable claim, the complaint probably will be demurrable.

Decisional law suggests that, when the plaintiff's quiet title action is based on the defendant's fraud, facts constituting fraud must be specifically alleged. *Moss Estate Co. v Adler* (1953) 41 C2d 581, 261 P2d 732. This rule might apply more to an action to cancel an instrument under CC §3413, in which grounds for the instruments' voidness or voidability must be alleged. On cancellation of instruments, see chap 6. See *Kroeker v Hurlbert* (1940) 38 CA2d 261, 101 P2d 101. In any event, sound practice usually calls for pleading with specificity facts giving rise to fraud because the complaint may be specially demurrable, if not generally demurrable, for failure to do so, and the plaintiff may want to seek punitive damages if fraud is involved. See *Aalwyn v Cobe* (1914) 168 C 165, 142 P 79.

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§7.37 b. State Lands Contracts

Before a quiet title action can be brought regarding land subject to an agreement entered into under Pub Res C §6307 or §6357, the State Lands Commission must approve the agreement after a public hearing. CCP §764.080. Note, however, that CCP §761.020 does not require that complaints in actions affected by CCP §764.080 must plead that the State Lands Commission has approved the agreement after hearing. Nonetheless, such an allegation would appear to be advisable to avoid the possibility of demurrer on this issue.

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§7.38 c. Caption; Fictitious Parties; Unknown Defendants

The complaint must name as defendants all persons having adverse claims to the plaintiff's title on which judgment is sought. CCP §762.010(c). The plaintiff's attorney must make sure that all potential defendants whose disputed claims are of record or are actually known to the plaintiff at the time of filing are expressly named in the complaint and properly served, or they will not be bound by the judgment. See CCP §§762.060(b), 764.030, 764.045; *Carr v Kamins* (2007) 151 CA4th 929, 60 CR3d 196. Fictitiously named defendants (Does) are a standard feature of nearly all complaints to cover the possibility of later discovery (and eventual joinder) of previously unknown defendants by an amendment to the complaint before trial. See CCP §474. See also California Civil Procedure Before Trial §15.3 (4th ed Cal CEB 2004).

To join all unknown claimants as defendants and thus give the quiet title judgment in rem effect, however (see §7.39), CCP §762.060(a) requires the plaintiff to name the unknown claimants in the manner set forth in the caption and in paragraph 5 to the form complaint (see §7.41). Names of unknown claimants may never be discovered during the course of litigation, and there may be large numbers of them, but they will still be bound by the judgment because of its in rem effect. See CCP §§764.030, 764.045. Neither CCP §762.060(a) nor the Law Revision Commission comments to it (15 Cal L Rev'n Comm'n Reports 1202 (1980)) mention using Doe allegations, and prudent practice calls for using the precise statutory wording and not designating unknown defendants exclusively as "Does."

PRACTICE TIP: Both Doe allegations (see paragraph 3) and the statutory unknown claimant allegations (see paragraph 5) can be used to cover unknown defendants in the event that the identity of an unknown claimant is discovered after the complaint is filed but before trial and entry of judgment.

If a person required to be named as a defendant has died, the plaintiff must join the personal representative as a defendant (CCP §762.030(a)); otherwise, if the personal representative is unknown, the complaint must name "the testate and intestate successors of the deceased, and all persons claiming by, through, or under such decedent" (CCP §762.030(b)).

On formal requisites of the caption, see California Civil Procedure Before Trial §15.3 (4th ed Cal CEB 2004).

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§7.39 d. In Rem Effect Against All Unknown Defendants

The purpose of the unknown defendants' allegation in form paragraph 5 is to enable the plaintiff to obtain an in rem judgment (see §7.5) that will make title marketable. See CCP §§764.030, 764.045. The language in the second sentence of paragraph 5 is taken from CCP §762.060(a), which requires that unknown defendants be named in that manner. The court may allow unknown defendants to be served by publication during the course of the action, which effectively would not limit the number of potential unknown defendants to be bound by the judgment. See §7.42. The plaintiff, however, should also use fictitious defendants allegations (paragraph 3; see §7.38) to provide for ease of amendment if the identities and interests of unknown defendants are discovered during the course of the litigation; that way they may be brought into the lawsuit by personal service.

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§7.40 e. Named Party's Claim Unknown or Uncertain

If the claim of a named defendant is unknown, uncertain, or contingent, the complaint must allege that fact. If the lack of knowledge, uncertainty, or contingency is caused by a transfer to an unborn or unascertained person or class member, or by a transfer in the form of a contingent remainder, vested remainder subject to defeasance, executory interest, or similar disposition, the complaint should state, as far as is known to the plaintiff, the name, age, and legal disability, if any, of the person in being who would be entitled to the claim if the contingency had occurred before the complaint was filed. CCP §762.020.

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Source: Real Property/California Real Property Remedies and Damages/7 Quieting Title/§7.41 3. Form: Complaint to Quiet Title

§7.41 3. Form: Complaint to Quiet Title

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**COMPLAINT TO QUIET TITLE** _ _[*AND*]_ _ _ _[*ADD OTHER CAUSE(S) OF ACTION AS APPROPRIATE*]_ _ **(CCP §§760.020, 761.020)**
_ _[*Name(s) of known defendant(s)*]_ _, **and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the Property adverse to Plaintiff's title, or any cloud on Plaintiff's title to the Property, and Does 1 through 100, Defendant(s)**	

Plaintiff alleges:

1. The real property (Property) that is the subject of this action is located in _ _ _ _ _ _ **County, California, is commonly known as** _ _[*street address or other common designation*]_ _**, and is more particularly described as** _ _[*quote exact legal description, including assessor's parcel number, or refer to exhibit with complete legal description; see §7.31*]_ _**.**

2. At all times relevant to this action, Plaintiff held and now holds an interest in the Property as a _ _[*specify interest; e.g., fee simple owner, beneficiary under deed of trust, lessee, easement holder; see §§7.22, 7.32*]_ _**. The basis of Plaintiff's title is** _ _[*specify instrument, such as deed, deed of trust, or lease, or other basis of tile, such as adverse possession, prescriptive easement; see §7.32*]_ _**.** _ _[*Specify further facts that support the plaintiff's title, such as delivery of instrument and recording information, or other contracts on/uses of the property that support the claim to title.*]_ _ _ _[*If desired, add an allegation that the plaintiff is in possession of the property.*]_ _

3. Plaintiff does not know the true names, capacities, basis for liability, or interests in the Property of defendants sued in this action as Does 1 through 100, inclusive, and will amend this complaint when that information is discovered. At all relevant times, each defendant, including any defendant fictitiously named, claims an interest in the Property or was acting as the agent, servant, employee, partner, or joint venturer of each other defendant in doing the things alleged and is responsible in some manner for the damages and disputes alleged in this complaint.

4. Plaintiff seeks to quiet title against the following claims of the following named defendants: _ _[*Name each known defendant and describe the claim held by each, identifying any alleged supporting document or assertions made*

by that defendant regarding title, the nature of the interest it purports to affect or create, including recording information, etc.; see §7.33.]_ _ **Defendants' claims are without any right, and defendants have no right, title, estate, lien, or interest in the Property or any part of it** _ _[*except the following:* _ _[*Describe claims that the plaintiff admits to be valid, such as utility and roadway easements, and any other claims that the plaintiff does not contest; see CCP §762.060(c)*]_ _]_ _**.**

[*Although the next paragraph is optional under CCP §762.060(a), it should be included if the plaintiff desires to join all unknown claimants to obtain a judgment with in rem effect; see §§7.38-7.39*]

5. Plaintiff does not know the exact names, capacities, or interests in the Property of certain defendants, which plaintiff designates for this action as "all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the Property adverse to plaintiff's title, or any cloud on plaintiff's title to the Property." Plaintiff seeks to quiet title in the Property against the claim of each such defendant, and each such defendant has no right, title, estate, lien, or interest in the Property or any part of it. Plaintiff will serve this class of defendants by publication as the court allows.

[*Continue*]

[6.] Plaintiff seeks to quiet title against all defendants and each of them as of _ _[*date*]_ _**.** _ _[*If the date sought is different from the filing date of the complaint, allege reasons for seeking a determination as of that date; see §7.34.*]_ _

[*If applicable, add one or both of the following options*]

[*Option 1: If claim of named defendant is unknown, uncertain, or contingent*]

[7.] The claim of defendant _ _[*name*]_ _ **is** _ _[*unknown/uncertain/contingent*]_ _ **in that** _ _[*specify any facts showing the uncertainty of the claim; see §7.40*]_ _**.**

[*Option 2: If lack of knowledge, uncertainty, or contingency is caused by a transfer described in CCP §762.020*]

[8.] _ _[*Name*]_ _**, age** _ _ _**, is the person who would be entitled to an adverse claim if** _ _[*describe contingency*]_ _ **had occurred before this action was commenced.** _ _[*Specify legal disability, if any, of named person.*]_ _

[*Continue*]

WHEREFORE, plaintiff prays for

1. Judgment quieting title in plaintiff's favor as _ _[*specify interest, e.g., owner in fee simple; see §7.35*]_ _ **of the property described in Paragraph 1 and that defendants and each of them have no right, title, estate, lien, or interest in the property adverse to plaintiff;**

2. Costs of suit _ _[*if a contractual or statutory basis exists, include a request for attorney fees*]_ _**; and**

3. Other or further relief that the Court considers proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Verification is required; CCP §761.020*]

Copies: Original (filed with court clerk); copies for service (one for each defendant who is to be served); office copies.

Comment: A quiet title complaint is a complicated pleading even if it is the sole cause of the action, particularly if unknown persons hold interests or some interests are unknown. Before preparing the complaint, counsel should review at a minimum §§7.20-7.26, 7.41 for practical and procedural issues, and §§7.27-7.29, 7.30-7.40 on selecting parties to the action and pleading their interests properly. If a litigation guaranty or other title company product or service is being used in connection with the action (see §7.24), it is a good idea to ask the title company's legal department to review a draft of the complaint before it is finalized, filed, and served.

On preparing a quiet title complaint, including discussion of essential and miscellaneous allegations, see

§§7.30-7.40. On general pleading requirements and governing statutes and rules, including those in limited civil cases, see Comment to form complaint in §1.45.

It appears from case law that the plaintiff in a quiet title action may also obtain injunctive relief to make effective the basic relief granted. See §7.18. A quiet title judgment on behalf of a plaintiff who is out of possession of the property may also include an order for possession (*Keele v Clouser* (1928) 92 CA 526, 268 P 682) or a judgment in ejectment (*South Shore Land Co. v Petersen* (1964) 226 CA2d 725, 38 CR 392). Depending on the circumstances, the attorney might want to include a demand for possession in the prayer.

Attorney fees are not usually awardable in a quiet title action, but if the action is one to enforce rights under a written instrument that provides for attorney fees, then they may be recovered. See §§1.49, 4.16, 7.58, 12.71. See also California Attorney Fee Awards (3d ed Cal CEB 2010).

The complaint must be verified (CCP §761.020) unless the plaintiff is a public entity (see *Murrieta Valley Unified Sch. Dist. v County of Riverside* (1991) 228 CA3d 1212, 279 CR 421). On verification, see California Civil Procedure Before Trial §§15.14-15.21 (4th ed Cal CEB 2004).

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Source: Real Property/California Real Property Remedies and Damages/7 Quieting Title/§7.42 D. Service of Process

§7.42 D. Service of Process

For named defendants, service of process in an action under the quiet title statutes (CCP §§760.010-765.060) is the same as for civil actions generally with respect to form, content, and manner of service. CCP §763.010(a). Thus, the form summons described in CCP §412.20 must be used for named defendants and served in accordance with CCP §§413.10-417.40. See generally California Civil Procedure Before Trial, chaps 17-18 (4th ed Cal CEB 2004). The Judicial Council summons is a mandatory form. The list of forms can be found in Division III of the Appendix to the California Rules of Court and may also be accessed at http://www.courtinfo.ca.gov/forms and in the California Judicial Council Forms Manual (Cal CEB 1981).

PRACTICE TIP: Because CCP §412.20 requires that the summons contain the names of all parties to the action, a problem may arise, as well might be the case in a quiet title action, that the number of named defendants is too great to fit in the block provided on the summons form. Counsel should consult Judicial Council forms approved for that purpose, such as the Additional Parties Attachment, Judicial Council Form SUM-200(A).

The plaintiff may obtain an order for service by publication on persons named as unknown defendants (see §7.39) by filing an affidavit that satisfies the court that the plaintiff used reasonable diligence to ascertain the identity and residence of, and to serve, unknown defendants. CCP §763.010(b). The court may appoint a referee to determine whether the plaintiff exercised due diligence and may rely on the referee's report rather than the plaintiff's affidavit. CCP §763.010(b). Service by publication may not be authorized for an unknown defendant in actual and open possession of the property. CCP §763.010(c). If ordered, publication is governed by CCP §415.50 and is subject to the following conditions: (1) posting, within 10 days after the order is issued, of a copy of the summons in a conspicuous place on the property (CCP §763.020(a)); (2) recordation, if not already accomplished, of a lis pendens (CCP §763.020(b); see §7.26); and (3) a description of the property in the publication by both street address or common designation and legal description, if any (CCP §763.020(c)). When the court orders service by publication, it must require proof that the summons has been served, posted, and published as required, and that the lis pendens has been recorded and filed. CCP §763.040. On lis pendens, see chap 13.

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E. Defendant's Responsive Pleadings

§7.43 1. Answer

Before preparing an answer to a quiet title complaint, the defendant's attorney should research and inquire whether a policy of title insurance exists that would provide a defense of the action or indemnify the defendant. See §7.10. The answer in an action under the quiet title statutes (CCP §§760.010-765.060) must be verified, must state any claim the defendant has to the property, must allege any facts tending to controvert the allegations of the complaint that the defendant does not want to be taken as true, and must include a statement of any new matter constituting a defense (CCP §761.030(a)). (These requirements are in part more stringent than those imposed on defendants under the earlier quiet title statute (former CCP §738), under which the defendant could simply deny the plaintiff's ownership and right to possession without factually alleging the nature of the defendant's own claim. See, *e.g., United Land Ass'n v Pacific Improvement Co.* (1903) 139 C 370, 72 P 988; *South Shore Land Co. v Petersen* (1964) 226 CA2d 725, 38 CR 392. The defendant could, of course, plead and prove the validity of his or her own title. *Hinds v Clark* (1916) 173 C 49, 159 P 153; *Burris v Kennedy* (1895) 108 C 331, 41 P 458.)

Under the existing quiet title statutes, the defendant should also plead any applicable affirmative defenses (see §§7.44-7.48) and may also cross-complain for affirmative relief establishing title on the defendant's own claim (see §7.49). CCP §761.040. If the defendant does not claim an interest in the property (*e.g.,* trustee of a deed of trust), it can include a disclaimer or a statement of no contest in its answer. If any defendant does this, or allows judgment to be taken without filing an answer, the plaintiff is not entitled to recover costs. CCP §761.030(b). See §7.58.

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§7.44 2. Defenses

The basic defense to a quiet title action, of course, is that the plaintiff lacks title; the plaintiff can obtain a judgment quieting title in himself or herself only on the strength of his or her own title and not the weakness of the defendant's title (see §7.20). See *Winter v McMillan* (1890) 87 C 256, 25 P 407; *Kunza v Gaskell* (1979) 91 CA3d 201, 154 CR 101. Although the plaintiff cannot prevail by asserting an equitable interest against the defendant's title, the converse is not true; the defendant may assert an equitable interest defensively against the plaintiff's legal title (*Baucum v LeBaron* (1955) 136 CA2d 593, 289 P2d 266; *Wade v Howe* (1934) 2 CA2d 435, 38 P2d 439). A defendant asserting an equitable defense may be required to do equity as a condition to receiving a judgment, and should therefore allege that he or she has done, or offered to do, equity. See, *e.g., Bloom v Bloom* (1929) 207 C 70, 276 P 568.

Specific defenses that may be pleaded in the answer are discussed in §§7.44-7.48. Other defenses that may be available in a particular quiet title action, and that counsel for the defendant should consider, include the following:

- Equitable estoppel. *Sly v Abbott* (1928) 89 CA 209, 264 P 507.
- Community property rights preempted. See Fam C §§2500-2660 (division of property), 2251-2252 (quasi-marital property).
- Another action pending involving the same property. *Chapman v Moore* (1907) 151 C 509, 91 P 324.
- Intervening interests; *e.g*., mechanics' lien barred quiet title action. *Wachovia Bank v Lifetime Indus., Inc.* (2006) 145 CA4th 1039, 52 CR3d 168.
- Res judicata. *Walker v Hansen* (1933) 218 C 619, 24 P2d 764. But see *Stein v Braum Inv. & Dev.* (9th Cir 2007) 244 Fed Appx 816 (res judicata may not be available after unlawful detainer verdict if court record is insufficient to show existence of full and fair adversary hearing on issue alleged to be barred by res judicata).
- Unclean hands. See chap 5.
- Adverse possession. See *Sevier v Locher* (1990) 222 CA3d 1082, 1084, 272 CR 287 (easement obtained by grant may be extinguished by adverse possession by servient owner).
- The defendant's lease of the property, or an executory contract to enter into a lease. *Gavina v Smith* (1944) 25 C2d 501, 154 P2d 681.
- Disclaimer in court pleadings of the disputed interest. *Linthicum v Butterfield* (2009) 175 CA4th 259, 270, 95 CR3d 538.

Another defense is the defendant's right to purchase the property under an installment land contract (*Williams v Rush* (1933) 134 CA 554, 25 P2d 888) or (if the contract contains a power of sale) a defense in which the plaintiff's only remedy on the buyer's default is to exercise the power of sale. See chap 4. Note, however, that if the installment land contract is not specifically enforceable it cannot form the basis of a valid interest and thus defeat a quiet title action. *Sheehan v Vedder* (1930) 108 CA 419, 292 P 175.

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§7.45 a. Statute of Limitations

No statute of limitations specifically governs a quiet title action, but different limitation periods might apply, depending on the underlying facts and theories of the case. *Muktarian v Barmby* (1965) 63 C2d 558, 47 CR 483. For example, if the action is based on fraud or mistake, the court will look to CCP §338(d) and impose a 3-year limit. See *Leeper v Beltrami* (1959) 53 C2d 195, 1 CR 12. For a quiet title action based on mistake, the 3-year period of former CCP §338(4) (now CCP §338(d)) begins to run when the mistake is discovered. *Arthur v Davis* (1981) 126 CA3d 684, 178 CR 920.

If the plaintiff claims a present interest in the property, the defendant might be able to rely on CCP §318 as a bar. An action to recover real property cannot be maintained under §318 unless the plaintiff was either "seised or possessed" of the property within 5 years before commencement of the action. See *Safwenberg v Marquez* (1975) 50 CA3d 301, 123 CR 405. The plaintiff can establish this by proving that he or she has legal title, even if someone else is in possession. "Seised or possessed" of the property within the requisite time means only that the plaintiff holds legal title. It does not mean that the plaintiff has to be in actual possession. *Harrison v Welch* (2004) 116 CA4th 1084, 11 CR3d 92; *Tobin v Stevens* (1988) 204 CA3d 945, 251 CR 587; *Schoenfeld v Pritzker* (1967) 257 CA2d 117, 64 CR 592.

A plaintiff in possession is not subject to any limitation period as such, on the rationale that he or she cannot know of any dormant adverse claims. The plaintiff is therefore not required to take any action until an adverse claim is asserted. *Muktarian v Barmby, supra*. Delay that prejudices the defendant may give rise to the defense of laches, however, even for a plaintiff in possession (see §7.46). *Muktarian v Barmby, supra*.

When the defendant induces the plaintiff to refrain from bringing a timely quiet title action, the defendant will be equitably estopped from relying on a statute-of-limitations defense. In *Kleinecke v Montecito Water Dist.* (1983) 147 CA3d 240, 195 CR 58, the plaintiff had filed a quiet title action erroneously naming the county sanitary district instead of the water district as the defendant. The defendant's attorney was also the attorney for the water district and was aware that the plaintiff should have named the county water district. He filed an answer on behalf of the sanitary district, but did not inform the plaintiff of the error. When the plaintiff discovered the error, the defendant asserted the statute of limitations. Under the circumstances, the court held that the defendant was estopped from asserting the defense of the statute of limitations.

A quiet title action following a tax sale is governed by Rev & T C §3275, which requires the action to be brought within 1 year of sale. That 1-year period is subject to tolling until the owners receive notice of the right to recover excess sale proceeds and the notice correctly identifies the owners by name. *Mayer v L & B Real Estate* (2008) 43 C4th 1231, 78 CR3d 62.

Before a quiet title action can be brought regarding land subject to an agreement entered into under Pub Res C §6307 or §6357 (see §7.7), the State Lands Commission must approve the agreement following a public hearing. Such actions must be set on the trial calendar within 1 year after the filing of a memorandum to set, unless the court extends this time for good cause. CCP §764.080(a).

A federal court action against the United States to quiet title to real property in which the United States claims an interest is subject to a 12-year limitations period. 28 USC §2409a(g). The limitations period begins to run when the claimant knew or should have known of the claim of the United States. 28 USC §2409a(g). See *McFarland v Norton* (9th Cir 2005) 425 F3d 724 (neither federal government's mild interference with use of easement nor action regulating access to easement commences running of statute of limitations).

For discussion of statutes of limitations in easement litigation, see California Easements and Boundaries: Law and Litigation, chap 10 (Cal CEB 2008).

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§7.46 b. Laches

Laches may be asserted against a quiet title complaint even when the plaintiff is in possession, although prejudice to the defendant must be shown. *Muktarian v Barmby* (1965) 63 C2d 558, 47 CR 483. To assert laches as a defense, the defendant must be able to show that he or she was in adverse possession of the property during the period of delay. *Gerhard v Stephens* (1968) 68 C2d 864, 69 CR 612. Whether laches is an available defense depends on the facts and the extent to which they show unreasonableness of the plaintiff's delay in bringing the action and prejudice to the defendant. *Lundgren v Lundgren* (1966) 245 CA2d 582, 54 CR 30.

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§7.47 c. Fraud

Fraud is a defense to a quiet title action, but it is an affirmative defense that must be pleaded specifically. *Moss Estate Co. v Adler* (1953) 41 C2d 581, 261 P2d 732. On fraud, see chap 3. When the plaintiff's title depends on an instrument that the defendant knows to be voidable, the defendant cannot prove grounds for rescission of the instrument without pleading them. *Davies v Symmes* (1942) 49 CA2d 433, 122 P2d 102. On rescission, see chap 1; on cancellation of instruments, see chap 6. Fraud cannot be pleaded in terms of legal conclusions; each fact supporting the claim must be set forth. See *California Trust Co. v Gustason* (1940) 15 C2d 268, 101 P2d 74. Note that these type of affirmative defenses may also be the basis of a cross-action for damages, restitution, or quiet title. See §7.49.

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§7.48 d. Estoppel

Estoppel is a defense to a quiet title action that also must be specifically pleaded. See *Sly v Abbott* (1928) 89 CA 209, 264 P 507. The only exception to the requirement that estoppel be pleaded occurs when the complaint fails to allege that the plaintiff will rely on particular items of proof, *i.e.,* when the defendant cannot be required to anticipate the plaintiff's unstated contentions. *Bush v Rogers* (1941) 42 CA2d 477, 109 P2d 379. Estoppel is generally sufficiently pleaded if the answer sets forth the entire transaction and the facts relied on for the claim that plaintiff is estopped. *Burrow v Carley* (1930) 210 C 95, 290 P 577.

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§7.49 e. Cross-Complaint

The defendant in a quiet title action may seek affirmative relief by filing a cross-complaint. CCP §761.040(a). See, *e.g., Saum v Reppert* (1995) 35 CA4th 1766, 42 CR2d 454. This provision modifies prior case law. 15 Cal L Rev'n Comm'n Reports 1199 (1980); see, *e.g., Winter v McMillan* (1890) 87 C 256, 25 P 407. The defendant may alternatively bring affirmative relief claims in the answer to the complaint or in a complaint in a separate action.

PRACTICE TIP: The better practice in most instances is to seek affirmative relief in a cross-complaint in the same action to avoid conflicting rulings on law and facts. Although offsetting affirmative defenses may be pled in an answer to the complaint, a cross-complaint guarantees the court will fully adjudicate defendant's claims even if the plaintiff voluntarily dismisses the complaint before trial.

The cross-complaint may seek affirmative relief against the plaintiff, against other defendants, or against third parties as long as the cross-complaint arises out of the same transaction or asserts a claim, right, or interest in the property that is the subject of the original action. CCP §428.10. On cross-complaint requirements generally, see California Civil Procedure Before Trial, chap 26 (4th ed Cal CEB 2004). As a rule, affirmative relief must be sought by way of a cross-complaint and may not be claimed in the answer. CCP §431.30(c).

A defendant who seeks to quiet title by way of a cross-complaint should plead all the allegations that must be included in the complaint (see §7.30). See CCP §761.020. If the defendant seeks to quiet title on an effective date other than that specified in the complaint (see §7.34), the cross-complaint must state the desired date and the reasons a decree effective on that date is sought. CCP §761.040(b) (which parallels provisions for the complaint in CCP §761.020(d)).

A defendant in a quiet title action who merely claims an interest adverse to that of the plaintiff, however, need not assert any claim for affirmative relief. A judgment in favor of the defendant that the plaintiff take nothing by the complaint and that the defendant recover costs (1) establishes title as between those parties, (2) estops the plaintiff, and (3) protects the defendant from any further claims by the plaintiff as fully as would an affirmative judgment quieting title in the defendant's favor. *Hudson v West* (1957) 47 C2d 823, 306 P2d 807; *Warden v Stoll* (1930) 210 C 374, 291 P 835. Such a judgment does not, of course, give the defendant the benefit of an in rem quiet title judgment. See §§7.5, 7.39. If a defendant needs a specific judgment establishing its rights, therefore, he or she must cross-complain and should request a statement of decision (defined in §7.55). See *San Jose Land & Water Co. v San Jose Ranch Co.* (1900) 129 C 673, 62 P 269. See also *Sevier v Locher* (1990) 222 CA3d 1082, 1084, 272 CR 287 (in action to quiet title to easement obtained by grant, defendant cross-complained and proved that easement was extinguished by adverse possession).

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F. Trying the Case

§7.50 1. Default Judgment Requires Evidentiary Hearing

The court must adjudicate both the plaintiff's claim of title against the claims of all defendants and any of the defendants' claims raised by their answers or cross-actions. A plaintiff does not have a right to entry of judgment as a matter of course following entry of the defendant's default; the court must require evidence of the plaintiff's title. See CCP §764.010; *Winter v Rice* (1986) 176 CA3d 679, 683, 222 CR 340. If properly served defendants have not appeared, their default may be entered by the clerk, and judgment entered after a default prove-up hearing with competent testimony. CCP §585(b). See *Yeung v Soos* (2004) 119 CA4th 576, 14 CR3d 502; *Sherman Villas Homeowners Ass'n v Azargin* (Feb. 27, 2004, B156427; not certified for publication) 2004 Cal. App. Unpub Lexis 1822.

PRACTICE TIP: All proof that plaintiff would have had to present at trial must be presented at the prove-up hearing; a declaration or other summary procedure will not be permitted. Live witnesses must testify, and complete authentication of the underlying real property records is essential. In fact, courts usually require as a witness the title officer who prepared the litigation guaranty to examine the officer on the scope and adequacy of the search that he or she performed, as well as authenticity of the underlying documents. In certain cases, the surveyor preparing the attendant survey to locate boundaries and lot lines may also be required to appear and testify.

The court must then render its judgment in accordance with the evidence and the law. CCP §764.010. The importance of §764.010 is clear: A plaintiff in a quiet title action must be able to prove the validity of his or her claim of title in every case. Moreover, the plaintiff can prevail only on the strength of his or her own title; the defendant's inability to establish title does not suffice. See §7.20.

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§7.51 2. Court's Special Powers

A court in a quiet title action has extraordinary and plenary powers; on its own motion the court may order the joinder of additional parties (CCP §762.040(a)) and may order the plaintiff to procure a title report and designate a place where it is to be kept for inspection, use, and reproduction by the parties (CCP §762.040(b)). If either order is requested on motion of a party to the action, the court must grant the order. These powers are patterned after the partition statute (CCP §§872.010-874.240; see chap 8).

NOTE: "Title report" is broadly defined in the partition statute, CCP §872.010(e), to include a preliminary report, guaranty, binder, or title insurance policy. On the differences between these products, see §8.20. See also California Title Insurance Practice (2d ed Cal CEB 1997).

The court may also order the appointment of guardians ad litem as appears necessary to protect the interest of any party. Such an order is within the court's discretion, unless sought on motion of a party, in which case it becomes mandatory. CCP §762.080. This provision, also derived from the partition statute (CCP §§872.010-874.240), is of particular importance because a judgment in a quiet title action is binding even on a party under a legal disability (CCP §764.030). On appointment of guardians ad litem, see CCP §§372-373.5; California Civil Procedure Before Trial §§9.52-9.75 (4th ed Cal CEB 2004).

The court in which a quiet title action is pending may grant an order, on motion of any party and a showing of good cause, permitting any party to enter on the property to survey and measure it for the purpose of the action. CCP §742. Each party may then enter on the property with the necessary surveyors and assistants to make his or her own survey; each party is liable for any unnecessary injury to the property caused by such an entry. CCP §743.

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§7.52 3. Burden of Proof

The plaintiff in a quiet title action has the burden of establishing his or her claim of title. *Coffin v Odd Fellows Hall Ass'n* (1937) 9 C2d 521, 71 P2d 266. Because of the rule that the plaintiff must stand on the strength of his or her own title and not the weakness of the defendant's title, the plaintiff can prevail only by meeting the burden of proving by sufficient evidence ownership of the claimed interest (see §7.20). See *Gerhard v Stephens* (1968) 68 C2d 864, 69 CR 612; *Kunza v Gaskell* (1979) 91 CA3d 201, 154 CR 101.

A plaintiff who relies on paper title alone (*i.e.,* who is not in possession) must, when the defendant also asserts paper title, trace title back to one of four sources: (1) the government, (2) a grantor in possession, (3) a grantor common to plaintiff and defendant, or (4) a grantor who had obtained a judgment quieting title. *Ernie v Trinity Lutheran Church* (1959) 51 C2d 702, 336 P2d 525; *Helvey v Sax* (1951) 38 C2d 21, 237 P2d 269; *San Diego Improvement Co. v Brodie* (1932) 215 C 97, 8 P2d 1027. After the plaintiff asserts paper title to the property, the burden shifts to the defendant to show adverse possession. *Tobin v Stevens* (1988) 204 CA3d 945, 251 CR 587.

When the defendant's claim rests on title derived from the plaintiff, the plaintiff need not trace title to any other source. See *Thiele v Security Trust & Sav. Bank* (1927) 202 C 758, 262 P 308. When the plaintiff has established a prima facie case for his or her title, it is still necessary to show that the plaintiff's interest is superior to that of the defendant. *Crane v French* (1940) 39 CA2d 642, 104 P2d 53.

If the plaintiff proves possession of the property, a prima facie case has been established (*Davis v Crump* (1912) 162 C 513, 123 P 294), but the presumption of ownership based on possession (see §7.23; Evid C §§637-638; CC §§1006-1007) may be rebutted (Evid C §630; see *Bond v Aickley* (1914) 168 C 161, 141 P 1188). A defendant who admits the plaintiff's possession must meet the burden of proving title in him- or herself. *City of Fort Bragg v Brandon* (1919) 41 CA 227, 182 P 454.

Once the plaintiff has established a prima facie case, the defendant must prove that he or she is a bona fide purchaser of the property or otherwise has a valid adverse claim. *Crook v Forsyth* (1866) 30 C 662; *Oaks v Renshaw* (1946) 74 CA2d 144, 168 P2d 199; *President & Presiding Elder v Goodwin* (1931) 119 CA 37, 5 P2d 973. The burden of producing evidence shifts back to the plaintiff if the defendant is able to establish a claim of right by introducing evidence such as a deed that predates the plaintiff's deed (*Douglass v Willard* (1900) 129 C 38, 61 P 572) or a lease of the property (*Cuddy v O'Brien* (1921) 55 CA 469, 204 P 37).

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§7.53 4. Presumptions

In meeting the requisite burden of proof (see §7.52), the plaintiff may rely on any favorable presumptions. See *Pilkington v Fausone* (1970) 11 CA3d 349, 90 CR 38. The following presumptions, rebuttable unless otherwise indicated, might be useful in some situations:

- The facts recited in a written instrument (except a recital of consideration) are conclusively presumed to be true between the parties to the instrument and their successors in interest. Evid C §622; see *Carpenter v Smallpage* (1934) 220 C 129, 29 P2d 841; *Plaza Freeway Ltd. Partnership v First Mountain Bank* (2000) 81 CA4th 616, 96 CR2d 865.
- A person who exercises acts of ownership over property is presumed to own it. Evid C §§637-638; see *Lowe v Penn* (1930) 105 CA 366, 287 P 509.
- A tenant may not deny the title of his or her landlord as of the time at which the relationship began (conclusive presumption). Evid C §624.
- A deed or instrument in the grantee's possession is presumed to have been delivered (*Ward v Dougherty* (1888) 75 C 240); a signed, acknowledged, dated, and recorded deed is presumed to have been delivered on its specified date (Evid C §1600; CC §1055; *McGorray v Robinson* (1902) 135 C 312, 67 P 279).
- A writing is presumed to have been truly dated. Evid C §640.
- A trustee or other person whose duty it is to convey real property to a particular person is presumed to have actually conveyed it to that person when that presumption is necessary to perfect title of the person or a successor in interest. Evid C §642.
- A deed, will, or other writing purporting to create, terminate, or affect an interest in real property is presumed to be authentic if it is at least 30 years old, is in a condition that creates no suspicion concerning its authenticity, was kept or found in a place where such a writing would be kept, and has generally been acted on as authentic by persons having an interest in the matter. Evid C §643.
- The owner of the legal title to property is presumed to be the owner of full beneficial title; this presumption can be rebutted only by clear and convincing proof. Evid C §662.
- A certificate of the acknowledgment of a writing other than a will, or a certificate of the proof of such a writing, is prima facie evidence of the facts recited in the certificate and the genuineness of the signature of each person by whom the writing purports to have been signed if the certificate meets the requirements of CC §§1180-1207. Evid C §1451.
- A signature is presumed to be genuine and authorized if it purports to be the signature in the official capacity of a public employee of the federal government, a public employee of any public entity in the United States, or of a notary public within any state. Evid C §1453.
- The record of an instrument or other document purporting to establish or affect an interest in property is prima facie evidence of the existence and content of the original recorded document and of its execution and delivery by each person by whom it purports to be executed, if the record is that of an office of a public entity and a statute authorized recordation of the document in that office. Evid C §1600; see also Evid C §§1601-1605.
- When a proposal is made to dedicate real property for public improvement, there is a conclusive presumption that the proposed dedication was not accepted if the proposal was made by filing a map only, no acceptance was made and recorded within 25 years after filing the map, the real property was not used for the purpose for which the dedication was proposed within 25 years, and the property was sold to a third person after the map was filed, and was used as if free of the dedication. CCP §771.010.

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§7.54 5. Dismissal and Nonsuit

If the defendant disclaims any interest in the property, the quiet title action may be dismissed either by the court (*Martin v City of Stockton* (1919) 39 CA 552, 179 P 894) or by the plaintiff (*Jeffords v Young* (1925) 197 C 224, 239 P 1054). Nevertheless, the plaintiff may desire to have a judgment entered quieting title despite the defendant's disclaimer, in which case the plaintiff should file a motion for summary judgment. The action cannot be dismissed if the defendant's responsive pleadings deny the plaintiff's ownership (*Johnston v Baker* (1914) 167 C 260, 139 P 86) or seek affirmative relief.

The court can grant an order nonsuiting the plaintiff when the plaintiff's evidence does not show the existence of title or an interest in the plaintiff. *Castro v Adams* (1908) 153 C 382, 95 P 1027; *Collins v Follette* (1923) 62 CA 684, 217 P 556. A nonsuit is also appropriate if the evidence shows that the defendant has legal title and the plaintiff has merely equitable title (see §7.20). *Shanahan v Crampton* (1891) 92 C 9, 28 P 50.

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G. Judgment

§7.55 1. Statement of Decision

The parties may obtain a "statement of decision" by the trial court explaining the factual and legal bases for its decision. CCP §632. On procedures for requesting and preparing a statement of decision, see Cal Rules of Ct 3.1590.

PRACTICE TIP: This is a crucial part of the case; the plaintiff needs to make sure that all concerns that he or she had before the action was filed are adequately resolved in the judgment. Close cooperation with the court and multiple hearings, if necessary, should take place to ensure that these concerns are adequately addressed.

If the court does not reach the issues raised by the affirmative allegations of the answer, but disposes of the case entirely on the finding that plaintiff has no title to be quieted, the defendant cannot complain about the lack of specific findings on his or her title or adverse claims. *San Jose Land & Water Co. v San Jose Ranch Co.* (1900) 129 C 673, 62 P 269. When a party's claim of title rests on allegations both of a deed and adverse possession, a finding on the former is all that is required. *Wolf v Gall* (1917) 176 C 787, 169 P 1017. Findings on the elements required for adverse possession are unnecessary if the court makes a finding of the ultimate fact of ownership. *Den v Spalding* (1940) 39 CA2d 623, 104 P2d 81.

After a court receives evidence in an action to quiet title to land subject to an agreement under Pub Res C §6307 or §6357, the court *must* render a statement of decision. (For discussion of §§6307 and 6357, see §7.7.) For agreements under Pub Res C §6357, the statement of decision must include a recitation of the underlying facts and a determination of whether the agreement meets the criteria of the statute and other laws applicable to boundary line agreements. For agreements under Pub Res C §6307, the statement of decision must recite the relevant facts and contain a ruling on whether the requirements of Pub Res C §6307, Cal Const art X, §§3-4, and other applicable laws were met. If the court finds the agreement to be valid, the judgment must quiet title in the parties named in the agreement in accordance with the agreement. If the judgment is entered before the agreement's effective date, the judgment must provide that on the effective date title is quieted in the parties in accordance with the agreements. CCP §764.080(a).

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§7.56 2. Effect

The binding effect of a judgment quieting title may depend on any special statute authorizing the action. See §7.7 for discussion of the various special statutory quiet title actions. Generally, however, under the quiet title statutes (CCP §§760.010-765.060), the judgment in a quiet title action can have an in rem effect, and most such actions are likely to be pursued to achieve that result (see §7.5). When the plaintiff uses the statutory procedure for joining "all persons unknown" (CCP §762.060; see §7.39), the judgment will have an in rem effect and thus be binding and conclusive on the following persons, regardless of any legal disability:

- All persons known and unknown who were made parties to the action and who have any claim to the property, present or future, vested or contingent, legal or equitable, several or undivided. CCP §764.030(a).
- All persons not parties to the action whose claims to the property were not of record when the lis pendens was filed (see §7.26) or, if none was filed, when the judgment was recorded. CCP §764.030(b).

One who succeeds to the claim of a party to the action after the action has begun, who had actual or constructive knowledge of the action, however, also is bound by the judgment. CCP §§764.045, 1908(a)(2). A judgment in a quiet title action, however, does not affect the claim of one who was not a party to the action if (1) that claim was recorded before the lis pendens (or, if none, before the judgment) was recorded; (2) the plaintiff knew of the claim; or (3) the claim would have been reasonably apparent from an inspection of the property. CCP §764.045. This provision reemphasizes the importance of physically inspecting the property to guard against the possibility of persons in adverse possession who will not be bound by the judgment (see §7.24). Regardless of whether the plaintiff conducted an inspection, however, a person with an unrecorded claim (such as adverse possession) cannot impair the rights of a bona fide purchaser or encumbrancer for value. See CCP §764.045(b).

Any later action or proceeding attacking the judgment either directly or collaterally "shall not impair the rights of a purchaser or encumbrancer for value" who relies on the judgment (CCP §764.060); the marketability of the property covered by the judgment, and, perhaps more important, the finality of the sale or conveyance transaction is protected.

A judgment in an action under the quiet title statutes does not bind the state or the United States unless the public entity is individually joined as a party to the action. CCP §764.070. Statutes authorizing quiet title actions against the state include Pub Res C §§6461-6465 (state lands administration), Rev & T C §3951 (tax-deeded property), and Str & H C §9012 (refunding of bonds). Actions in state court to quiet title to real property on which the United States has or claims a mortgage or other lien are authorized by 28 USC §2410. When the United States claims an interest other than a security interest, it appears that an action joining the federal government must be brought in federal court. 28 USC §2409a.

Code of Civil Procedure §760.020(b) now authorizes quiet title actions on land subject to agreements entered into under Pub Res C §6307 or §6357 (see §7.7). See also CCP §764.080(a). Nothing in either CCP §760.020 or §764.080 may be construed to limit the public's right to bring or participate in actions challenging the validity of agreements entered into under Pub Res C §6307 or §6357. CCP §§760.020(c), 764.080(b).

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§7.57 3. Scope

When the plaintiff prevails in a quiet title action, the relief afforded is usually a decree fixing and settling the plaintiff's title to the property and declaring him or her to be the owner of the property. *Wolf v Gall* (1916) 174 C 140, 162 P 115; see *Perkins v Wakeham* (1890) 86 C 580, 25 P 51. See also CCP §764.010. The court may also grant additional equitable relief as proper in the circumstances of the case. CCP §760.040. See, *e.g.,* restitutional relief awarded in quiet title cases cited in §§4.48, 4.53. Thus, the plaintiff may also be able to recover possession of the property and damages (*Keele v Clouser* (1928) 92 CA 526, 268 P 682) and obtain an injunction against any further adverse claims by the defendant (*Wolf v Gall, supra*).

A plaintiff who is out of possession, and seeks possession, may also obtain a writ of possession under CCP §1166a. Purchase of title by the defendant after judgment is entered will not bar issuance or enforcement of a writ of possession. *Landregan v Peppin* (1892) 94 C 465, 29 P 771. Damages for the ancillary causes of action (*e.g.,* waste) may also be recoverable. See, *e.g., Jensen v Ritter* (1960) 185 CA2d 473, 8 CR 263.

In a judgment to quiet title against a secured lender and to cancel a promissory note that was fully paid, the court may award damages, including punitive damages, to the borrower against the lender for wrongfully refusing to clear title by reconveying the deed of trust. *Kachlon v Markowitz* (2008) 168 CA4th 316, 85 CR3d 532.

Forms of relief that may be pleaded as additional causes of action in a quiet title action are discussed in §§7.11-7.19. The judgment must be drafted to provide for these additional forms of relief if the plaintiff has prevailed on them at trial.

If the defendant does not appear to contest the action, the court cannot enter judgment establishing title in the defendant. *Hungarian Hill Gravel Mining Co. v Moses* (1881) 58 C 168; *Schaefer v Dinwiddie* (1919) 44 CA 405, 186 P 617. If the defendant, by cross-complaint or answer, however, alleges title in him- or herself, the court may enter a judgment determining that the defendant is the owner of the property. *Kitts v Austin* (1890) 83 C 167, 23 P 290. See §§7.43, 7.49. Judgment for the defendant normally decrees that the plaintiff take nothing and the defendant recover costs. *Warden v Stoll* (1930) 210 C 374, 291 P 835. Such a judgment estops the plaintiff from further asserting claims. See *Hudson v West* (1957) 47 C2d 823, 306 P2d 807; *Warden v Stoll* (1930) 210 C 374, 291 P 835.

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§7.58 4. Costs; Attorney Fees

As a general rule, costs are recoverable by either a plaintiff or a defendant who prevails in an action involving title to or possession of real property. CCP §1032(a)-(b). An exception to this rule arises if the defendant disclaims any interest in the property or fails to answer (see §7.43); in either instance, the plaintiff may not recover costs. CCP §761.030(b). See *San Mateo Community College Dist. v Half Moon Bay Ltd. Partnership* (1998) 65 CA4th 401, 76 CR2d 287 (suggesting that defendant's disclaimer must be unequivocal); 15 Cal L Rev'n Comm'n Reports 1199 (1980).

Cases interpreting a predecessor statute to CCP §761.030(b) held that the plaintiff may recover costs if the defendant, in addition to disclaiming, files an answer denying the plaintiff's right to possession. *Brooks v Calderwood* (1868) 34 C 563. See also *McMorris v Pagano* (1944) 63 CA2d 446, 146 P2d 944. A defendant who disclaims is entitled to recover only the costs of the disclaimer from the plaintiff (*e.g.,* filing fee for answer) but, if made a defendant in a cross-complaint, may recover full costs on obtaining judgment against the cross-complainant. *Summerville v March* (1904) 142 C 554, 76 P 388. An intervenor who neither gains nor loses by the judgment is not entitled to the costs of intervening. *Guaranty Realty Co. v Recreation Gun Club* (1910) 12 CA 383, 107 P 625.

Attorney fees are not recoverable in California unless provided for by statute, contract, or other law. See CCP §§1021, 1033.5(a)(10); *Santisas v Goodin* (1998) 17 C4th 599, 606, 71 CR2d 830. If a contract provides for an award of attorney fees to the prevailing party, all conditions precedent, including attempted mediation before litigation, must be met. *Leamon v Krajkiewcz* (2003) 107 CA4th 424, 132 CR2d 362.

The nature of quieting title means that attorney fees will not be awarded in most quiet title actions, but if the action seeks to determine the validity of (or to enforce) a contract with an attorney fee clause, fees may be awarded to the prevailing party. See, *e.g., Kachlon v Markowitz* (2008) 168 CA4th 316, 85 CR3d 532 (affirmed award of attorney fees in quiet title action against lender who had wrongfully refused to reconvey deed of trust after receiving full payment and repeated requests for reconveyance); *San Mateo Community College Dist. v Half Moon Bay Ltd. Partnership, supra* (affirmed award of attorney fees in quiet title action arising from mineral lease). See also *Blackburn v Charnley* (2004) 117 CA4th 758, 768, 11 CR3d 885 (affirmed attorney fee award in specific performance action; mediation requirement contained express exception allowing plaintiffs to file action to enable recording of lis pendens); *Leamon v Krajkiewcz, supra* (denial of attorney fees upheld because condition precedent of mediation before litigation not fulfilled).

Attorney fees are fully recoverable by the plaintiff in a quiet title action if the defendant is granted relief on a cross-complaint as a good faith improver, who must "protect the owner of the land upon which the improvement was constructed against any pecuniary loss." CCP §871.5; CC §1013.5; *Tremper v Quinones* (2004) 115 CA4th 944, 9 CR3d 672.

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Source: Real Property/California Real Property Remedies and Damages/7 Quieting Title/§7.59 5. Form: Judgment Quieting Title

§7.59 5. Form: Judgment Quieting Title

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Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**JUDGMENT QUIETING TITLE** _ _[*AND _ _[SPECIFY OTHER RELIEF GRANTED*]_ _]_ _
_ _[*Name(s) of known defendant(s)*]_ _, **and all persons unknown, claiming any legal or equitable right, title, estate, lien, or interest in the Property adverse to Plaintiff's title, or any cloud on Plaintiff's title to the Property, and Does 1 through 100, Defendant(s)**	**Dep't:** _ _[*number*]_ _ **Trial judge:** _ _[*name*]_ _ **Trial date:** _ _[*date*]_ _

This action to quiet title was regularly tried on _ _[*date*]_ _, before the Hon. _ _[*name*]_ _ sitting without a jury. Appearing as attorneys were _ _[*name*]_ _ for plaintiff and _ _[*name*]_ _ for defendants. Having considered the evidence admitted and written and oral argument of counsel, _ _[*having already filed its statement of decision on _ _[date]_ _,/a statement of decision not having been requested*]_ _, and good cause appearing therefor, the court enters its judgment as follows:

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. This judgment affects that real property (Property) located in _ _ _ _ _ _ County, California, commonly known as _ _[*street address or other common designation*]_ _ and more particularly described as _ _[*quote exact legal description, including assessor's parcel number, or refer to attached exhibit with complete legal description; see §§7.31, 7.60*]_ _.

2. As of _ _[*date*]_ _, Plaintiff _ _[*name*]_ _ held and continues to hold _ _[*his/her/its*]_ _ interest in the Property as a _ _[*specify interest; e.g., fee simple owner, beneficiary under deed of trust, lessee, easement holder; see §§7.22, 7.32*]_ _, the basis of which is _ _[*specify instrument, such as deed, deed of trust, or lease, or other basis of title or interest, such as adverse possession, prescriptive easement; see §7.32*]_ _. _ _[*Specify further facts, such as recording information, or other contracts on or uses of the Property that support a decree establishing title.*]_ _ _ _[*If applicable, add order that plaintiff is entitled to possession of the Property.*]_ _

[*Add if concurrent ownership*]

3. Plaintiffs own undivided interests in the Property as follows: _ _[*Specify names and interests*]_ _.

[*Add if property remains subject to certain claims*]

[4.] Plaintiff's title to the Property remains subject to the following interests: _ _[*Describe claims, such as utility and roadway easements, that plaintiff does not contest or that have been found by the Court to be valid*]_ _.

[*Continue*]

[5.] Defendant(s) _ _[*name(s)*]**_ _ own no right, title, estate, lien, or interest in the Property.**

[*Add if injunction appropriate*]

[6.] Defendant(s) _ _[*name(s)*]**_ _ are enjoined from making any further claim to the Property adverse to plaintiff _ _**[*name*]**_ _, by legal action or otherwise, on the basis of any fact or facts that were asserted, or that might have been asserted or proved, in this action.**

[*Continue*]

[7.] Plaintiff _ _[*name*]**_ _ shall recover costs _ _**[*if provided for in contract or statute and awarded by court, include award of attorney fees*]**_ _.**

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Copies: Original (presented to judge for signature, then filed with proof of service); conformed copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: The judgment must usually be custom tailored to the facts of the case. Often, the judgment must also be specially drafted to include other relief if other causes of action were pleaded and proved. See §§7.11-7.19. The judgment may also be made conditional on the plaintiff's performance of specified acts, and, if the plaintiff fails to perform, the judgment may provide for a sale of the property or other relief favoring the defendant. See *Stein v Simpson* (1951) 37 C2d 79, 230 P2d 816; *Dool v First Nat'l Bank* (1929) 207 C 347, 278 P 233; *Bloom v Bloom* (1929) 207 C 70, 276 P 568.

After drafting the judgment and before submitting it to opposing counsel for approval as to form, or to the trial judge for execution, counsel should have a title insurance company review the judgment and ascertain whether the company would be willing to insure title. This step may avoid delay or other impediments to transferring title imposed by a potential title insurer.

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§7.60 6. Recording the Judgment

The plaintiff should record a certified copy of the judgment in the county in which the real property is located. From the time it is filed with the recorder, the certified copy is notice to all persons of its contents, and any subsequent purchaser, mortgagee, or lien holder is charged with the same notice that he or she would have had if the judgment were a duly recorded deed or other instrument of conveyance. Govt C §27326; CC §1213.

PRACTICE TIP: Most title insurance companies insist on recordation of the judgment as a prerequisite to issuing or amending their title policies on the property. Sometimes, particularly in default actions, title carriers will institute a "cooling off" or waiting period of between 2 and 7 years to permit any adverse claims to be instituted and litigated before issuing a final policy insuring clear title. Shopping around among title insurance companies or continuing with the company that issued the litigation guaranty, as well as a thorough search to locate all potential adverse claimants (see §7.24), may shorten this period.

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8

Partition

J. Michael Phelps
Andrew J. Wiegel

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§8.1 I. INTRODUCTION

Partition is the division of real or personal property between or among two or more co-owners, such as joint tenants or tenants in common. In this chapter, discussion of partition is limited to the division of real property between or among co-owners (see §8.3). In the absence of a waiver (see §8.58), a tenant in common or a joint tenant has an absolute right to sever his or her interests from those of other co-owners. *Lazzarevich v Lazzarevich* (1952) 39 C2d 48, 244 P2d 1; *De Roulet v Mitchel* (1945) 70 CA2d 120, 160 P2d 574.

The use of the remedy of judicial partition has been reduced somewhat by the drafting of contractual provisions for acquisition or sale of the undivided interests in real property transactions to avoid its consequences—for example, the conditional purchase and sale agreement, the option and first right of refusal relating to undivided interests in property, and the use of a trust to hold the entire estate in the property under trust terms. See generally California Real Property Sales Transactions, chap 4 (4th ed Cal CEB 2007). Reform of the quiet title statutes (CCP §§760.010-764.060) to provide in rem relief also has reduced the use of judicial partition. See chap 7.

This chapter discusses the nature of the remedy in §§8.2-8.18, initiating a partition action in §§8.19-8.34, preparing and filing the complaint in §§8.35-8.53, responsive pleadings in §§8.54-8.58, obtaining a judgment in §§8.59-8.72, and proceedings after entry of interlocutory judgment in §§8.73-8.90.

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II. NATURE OF REMEDY

§8.2 A. Governing Statutes

Partition is governed by CCP §§872.010-874.240, which became operative on January 1, 1977, and was enacted substantially as recommended by the California Law Revision Commission. Stats 1976, ch 75, §6. Related statutes also were changed to conform to the partition law. See, *e.g.,* CC §1359; CCP §392; Prob C §11953; Rev & T C §3965. The former partition statutes (former CCP §§752-801) were repealed on January 1, 1977.

CAUTION: Owing to the substantial 1977 statutory changes, counsel must exercise care in relying on any pre-1977 partition case law to support an argument made in a current partition lawsuit. But because the statutory revision left intact many of the prior basic principles and there are few reported partition cases, many of the pre-1977 cases may still be valid even when the procedural law has been changed or amended.

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§8.3 B. Methods and Purpose

The Code of Civil Procedure specifies the following three basic methods of partition (13 Cal L Rev'n Comm'n Reports 413-414 (1976)):

- Physical division of the property (CCP §§873.210-873.290; see §8.75);
- Sale of the property and division of the proceeds (CCP §§873.510-873.850; see §8.76); and
- Partition by appraisal under which any of the parties may acquire the interests of others at their value as assessed in a court-ordered appraisal (CCP §§873.910-873.980; see §8.60).

Partition may be effected either by voluntary agreement of the co-owners (see §§8.8, 8.59) or by judgment in a partition lawsuit (see §§8.63-8.72). The object is to enable each party to obtain title to and use of some definite portion of the property in severalty. *McGillivray v Evans* (1864) 27 C 92. In a partition, there is no change of title between the tenants in common—it is simply dividing up what the parties already own. After the partition, each tenant in common has exactly the same proportional interest in the property that he or she had before partition. The only difference is that now his or her interest is in severalty, whereas before it was in common. *Rancho Santa Margarita v Vail* (1938) 11 C2d 501, 81 P2d 533. Thus, partition transforms the right to common possession of the entire parcel into a right of exclusive possession of some portion of the property held in severalty. *Bennett v Potter* (1919) 180 C 736, 183 P 156; *Rancho Santa Margarita v Vail, supra*. A partition rather than a claim for adverse possession is the remedy to establish the right of exclusive possession between cotenants. See, *e.g., Preciado v Wilde* (2006) 139 CA4th 321, 42 CR3d 792.

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§8.4 C. Court's Authority to Grant Relief

The authority created by the partition statute enables the court to take protective steps without having to resort to its contempt power or to invoke the general provisions on restraining orders and injunctions. CCP §§525-534. See Comment to CCP §872.130. In fact, the broad powers granted to the court under the partition law sometimes obviate the need to join other causes of action in order to obtain complete relief. Among other things, the court is empowered:

- To hear and decide all motions, reports, and accounts (CCP §872.120);
- To make any decrees or orders necessary or incidental to carrying out the purposes of the partition statutes and effect its decrees and orders (CCP §872.120);
- To issue temporary restraining orders and injunctions, with or without bond, to prevent waste, to protect the property or title to it, and to restrain unlawful interference with the partition (CCP §§872.120-872.130); and
- To appoint a receiver (CCP §564(b); see §8.5).

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§8.5 D. Appointment of Receiver

A receiver may be appointed in a partition action, on the application of any interested party, when it is shown that the property is in danger of being lost or materially injured. CCP §564(b)(1); *Blodgett v Haddock* (1949) 95 CA2d 17, 212 P2d 26. Receivership is ancillary to the partition action and is a more drastic measure than injunction. *Chalta v Biller* (1931) 212 C 745, 300 P 821; *Bank of Woodland v Stephens* (1904) 144 C 659, 79 P 379; *Lent v H. C. Morris Co.* (1938) 25 CA2d 305, 77 P2d 301. The appointment may be made ex parte and without notice if "imperative necessity or emergency is shown in the petition or supporting affidavits." *Lent v H. C. Morris, Co., supra*. On procedures for (and confirmation of) an ex parte appointment of a receiver, see Cal Rules of Ct 3.1175-3.1176. On appointment of a receiver generally, see California Civil Procedure Before Trial, chap 33 (4th ed Cal CEB 2004); California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 6 (4th ed Cal CEB 2009).

Although a receiver is usually appointed before entry of judgment, a receiver may also be appointed after judgment to implement the judgment or preserve the property during the pendency of an appeal. CCP §564(b)(3)-(4). Mere availability of other remedies does not preclude appointment of a receiver in every instance. *Neider v Dardi* (1955) 130 CA2d 646, 279 P2d 598. See CCP §564(b)(11) (receivership in action by secured lender for specific performance of assignment of rents), which contains specific authority to continue the receivership after entry of judgment. A receiver also may be appointed in a case brought by an assignee under an assignment of leases, rents, issues, or profits under CC §2938(g). See CCP §564(b)(12).

PRACTICE TIP: In some circumstances, including but not necessarily limited to the examples below, the application for appointment of a receiver should be considered if (1) partners cannot agree on which one of them should control the property, thus making appropriate the appointing of a neutral third party; (2) partners disagree over whether (or how) to carry out repairs or improvements to the property and the receiver could provide professional, neutral guidance to the parties and the court; (3) a defendant partner has been in charge of collecting rents for the property and the plaintiff partner wants a more complete and accurate accounting of the income and expenses from the property, as well as additional protection from "leakage" of the rental income; (4) the property has been under financial pressure from creditors and the receiver could impose some court-sanctioned prioritization or prorata sharing among the various creditors until additional funds can be obtained to pay creditors through refinancing or sale of the property.

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§8.6 E. Physical Division of Property Versus Sale

As a rule, the law favors physical division of the property, called "partition in kind," and forced sales are strongly disfavored. The burden of proof remains on the party endeavoring to force a sale as against unwilling co-owners to prove that the case is not a proper one for partition in kind. *Richmond v Dofflemyer* (1980) 105 CA3d 745, 757, 164 CR 727.

The party objecting to physical division must show that the land cannot be divided equally. It is insufficient to present evidence that a portion of the property is not equal to the whole or that the land is not fungible or uniform in character. *Butte Creek Island Ranch v Crim* (1982) 136 CA3d 360, 186 CR 252.

A forced sale may, however, be appropriate, in the following two situations (see 136 CA3d at 366):

- The major value of the property is derived from a water well, and physical division of the land requires awarding the well to one party, resulting in manifest prejudice to the other. *Sting v Beckham* (1949) 94 CA2d 823, 211 P2d 586.
- The property is small and has structures located in such a manner as to preclude equal physical division. *Priddel v Shankie* (1945) 69 CA2d 319, 159 P2d 438.

One court of appeal affirmed an order for the sale of hotel property rather than a division in kind. Based on significant evidence found by the trial court of breaches of fiduciary duty and other acts of wrongdoing by the majority partners, the court ruled that an outright sale of the property was "more equitable" in light of factors favoring the minority partner who had sought the sale of the property. *Jacoby v Feldman* (1978) 81 CA3d 432, 445, 146 CR 334.

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§8.7 F. Equitable Proceeding

Although authorized by statute (see §8.2), judicial partition is an equitable proceeding controlled by the broad principles of equity jurisprudence. *Akley v Bassett* (1922) 189 C 625, 647, 209 P 576; *Elbert, Ltd. v Federated Income Props.* (1953) 120 CA2d 194, 261 P2d 743. In partition actions, the court may award relief under equitable principles, including ordering allowance, accounting, contribution, or other compensatory adjustment. CCP §872.140. See, *e.g.*, paragraph 13 in form complaint, §8.51. All controversies over title to the property may be adjudicated in the partition action in order to apportion the property equitably. *Middlecoff v Cronise* (1909) 155 C 185, 100 P 232; *Blodgett v Haddock* (1949) 95 CA2d 17, 212 P2d 26.

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§8.8 G. Voluntary Partition

Voluntary partitions are recognized under California law (*Gonzalez v Gonzalez* (1917) 174 C 588, 163 P 993; *Tuffree v Polhemus* (1895) 108 C 670, 41 P 806; *Gates v Salmon* (1873) 46 C 361), but because they depend entirely on the parties' voluntary compliance, they are of limited use in all but simple situations. See *Bank of Healdsburg v Hitchcock* (1888) 76 C 489, 18 P 648. Additional limitations are:

- An unexecuted parol agreement is not binding on the parties (*Woodbeck & Matter v Wilders* (1861) 18 C 131).
- Subsequent purchasers are not bound by agreements of which they had no notice (*Gates v Salmon, supra*).
- To be specifically enforceable, an agreement must satisfy requirements of certainty and fairness. On specific performance, see chap 5.
- Voluntary partition agreements may be construed as proposing an illegal subdivision (see §8.18).
- A voluntary partition will not work if contingent or defeasible future interests exist. If an interest is owned by a minor or an incapacitated person, counsel must ascertain whether the guardian or conservator has authority to enter into a voluntary partition. See Prob C §2463(b). The Probate Code is silent on the authority of executors or administrators to enter into a partition agreement. But see Prob C §§10502, 10531, 10553 (authority of personal representative under the Independent Administration of Estates Act (Prob C §§10400-10592) to "partition") and Prob C §9823 (authority for personal representative to initiate or be made a defendant in a partition action). See also Comment to Prob C §10531.
- A voluntary partition will not be allowed if it is not carried out in strict compliance with other pertinent statutory requirements, such as a sale that includes common areas of a condominium complex, on which there must be full compliance with CC §§1358-1359. Compare *14859 Moorpark Homeowner's Ass'n v VRT Corp.* (1998) 63 CA4th 1396, 74 CR2d 712 (sale barred by noncompliance with statutory procedures), with *Foothill Village Homeowners Ass'n v Bishop* (1999) 68 CA4th 1364, 81 CR2d 195 (association filed partition action as safety net for distribution of sale proceeds for "bulk sale" of complex).

PRACTICE TIP: Despite the various limitations on voluntary partitions, parties seeking a partition may be wise to consider alternatives to a contested partition action. Given the many procedural requirements and the attendant increase in litigation costs, parties should exhaust all reasonable possibilities of a voluntary partition or a settlement by stipulation (see §8.59) before filing a partition lawsuit. Even if co-owners cannot agree on every matter, such as the value of the property, they might consider the alternative of a partition by appraisal (see §8.77). Under such a procedure, the court-appointed referee would resolve the dispute between the parties as to the value of their respective interests, thereby possibly allowing the parties to reach an agreement whereby one party will buy out the other. The more counsel can help the client reach a satisfactory agreement on at least some of the matters in dispute, the more likely it is that he or she will be able to achieve a full resolution that will be acceptable to the client.

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III. PROPERTY INTERESTS SUBJECT TO PARTITION

§8.9 A. Cotenancies

Partition actions most often arise when property is held in joint tenancy or tenancy in common; cotenants clearly have the right to partition. CCP §872.210; *Jameson v Hayward* (1895) 106 C 682, 39 P 1078; *Bradley v Harkness* (1864) 26 C 69. Partition was an incident of cotenancy at common law as adopted in California and still reflects a vestige of the common law. *Riley v Turpin* (1956) 47 C2d 152, 301 P2d 834; *Gunn v Gunn* (1929) 102 CA 606, 283 P 80. The required cotenancy need not be created by express grant or transfer; it may arise by operation of law. *Watson v Sutro* (1890) 86 C 500, 24 P 172, 25 P 64.

In tight urban housing markets, owner-occupied multiunit property, held as a tenancy in common (TIC), fills a need for affordable housing. As a middle ground between single-family home ownership and condominiums, this approach offers a vehicle for inexpensive group home ownership. Irreconcilable disputes in such groups often lead to partition actions. On special considerations in resolving TIC partitions, see §8.62.

PRACTICE TIP: Alternative remedies for partition, such as an unlawful detainer action for possession, should be considered in cotenancy disputes when the agreements among the parties are written in a way that permits the court to apply another remedy without a full partition. See, *e.g., Rossetto v Barross* (2001) 90 CA4th Supp 1, 110 CR2d 255 (TIC agreement was also a lease).

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§8.10 B. Life Tenant and Remainder Interests; Successive Estates

Code of Civil Procedure §872.210(a)(2) gives the owner of a remainder interest the power to seek partition against a life tenant. A life tenant, particularly one with a less than absolute life estate that continues only as long as he or she lives on the property might well take steps to prevent forced sale and permit continued enjoyment of the life estate, rather than take his or her chances on what the probate court, exercising its broad equity powers, might decide was a reasonable sum for the satisfaction of such an estate on a forced sale. *Estate of Kolda* (1982) 133 CA3d 283, 287, 184 CR 49.

PRACTICE TIP: It is important to note the distinction between a life tenant's right to bring a partition action and the court's decision regarding the value, if any, of that life estate. In one case, the plaintiff holder of a life estate who also held an ownership interest in the property filed an action against his three co-owner siblings, seeking partition and sale of the property. The court found that, by bringing the partition action, the plaintiff had extinguished his life tenancy, thereby giving it zero value. *Forrest v Elam* (1979) 88 CA3d 164, 151 CR 591.

The owner of a successive interest in a fee or an estate for life or years who seeks partition must show that partition is economically feasible and in the best interests of all parties. CCP §872.710(c). The court must consider:

- The character of the property and any changes in the character of the property since the creation of the successive estates;
- The circumstances under which the successive estates were created and any changes in the circumstances since their creation;
- The expense of ordinary and extraordinary repairs;
- Whether taxes or other annual charges have made the possessory interest unduly burdensome; and
- The intent of the creator of the estates and the interests and needs of successive estate holders.

When partition of successive estates is appropriate but hardship might result from sale and division of the proceeds, the court may establish a trust of the proceeds for the benefit of the successive interest holders. CCP §873.840(c). See *Estate of Giacomelos* (1961) 192 CA2d 244, 13 CR 245.

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§8.11 C. Liens

Although the holder of a lien "on a parity" with the lien on which the owner's title is based was entitled to sue for partition under former law (former CCP §752; Stats 1934, ch 892, §1), that language was excluded from CCP §872.210, and former §752 was repealed when the legislature enacted the comprehensive partition statutes in 1977 (see §8.2). Thus, someone whose only claim is that of a lienholder may not bring a partition action. A plaintiff bringing a partition action, however, must include all lienholders as defendants. See §8.31.

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§8.12 D. Rights to Use and Enjoyment; Easement Rights

Usufructuary rights (rights to use or enjoyment) in real property and easement rights have been held not the proper subject of a partition action. *Darbee & Immel Oyster & Land Co. v Pacific Oyster Co.* (1907) 150 C 392, 88 P 1090 (right to plant and harvest oysters); *Smith v Cooley* (1884) 65 C 46, 2 P 880 (mining rights); *Porto v Vosti* (1955) 136 CA2d 395, 288 P2d 618 (right to well water). Easements must be apportioned when real property itself is partitioned. *Parker v Swett* (1922) 188 C 474, 205 P 1065 (riparian rights); *Hughes v Devlin* (1863) 23 C 501 (mining rights). An easement is not itself an estate capable of partition. *Porto v Vosti, supra*.

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§8.13 E. Community Property

Community and quasi-community property are not subject to division under the partition law. CCP §872.210(b); *Jacquemart v Jacquemart* (1956) 142 CA2d 794, 299 P2d 281. A spouse or a putative spouse, however, can have community, quasi-community, or quasi-marital property divided under the Family Code. See Fam C §§2500-2660 (division of property), 2251-2252 (quasi-marital property). See also Comment to CCP §872.210.

Code of Civil Procedure §872.210(b), however, does not prohibit partition of spouses' or putative spouses' noncommunity estates or interests in property. It is therefore important to ascertain the exact form of ownership when property co-owned by spouses or putative spouses is to be divided. The Family Code provides that, for purposes of dividing property on dissolution of marriage or legal separation, any property acquired during marriage in joint form (*i.e.*, tenancy in common, joint tenancy, tenancy by the entirely, or as community property) is presumed to be community property. Fam C §§2580-2581. This presumption can be rebutted either by a clear statement in the deed or other title document that the property is separate property or by proof that the parties have agreed in writing that the property is separate property. Fam C §2581. These Family Code sections apply to all property held in joint title regardless of when the property was acquired or the date of any agreement affecting the character of the property. These sections apply in all proceedings commenced on or after January 1, 1984, but do not apply to property settlement agreements executed before January 1, 1987, or to proceedings in which judgments were rendered before January 1, 1987, regardless of whether those judgments have become final. See Fam C §2580(c). For detailed discussion of the character of spouses' property, see Practice Under the California Family Code: Dissolution, Legal Separation, Nullity, chap 5 (Cal CEB Annual).

PRACTICE TIP: Because the record form of ownership between husband and wife is not necessarily controlling, and because the community property presumption arising from joint title may be rebutted, counsel must investigate whether property is presumed to be community property or is in some other form of ownership.

In addition, with the proliferation of unmarried couples (both homosexual and heterosexual) cohabiting and buying property together, sometimes marrying later and sometimes not, there is likely to be an increase in reported case law pertaining to partition in the context of such "nontraditional" relationships. It is noteworthy that the courts sometimes look beyond the wording of deeds to conclude how the parties actually intended to acquire the property. Among the reported cases dealing with such situations are the following:

- *Milian v DeLeon* (1986) 181 CA3d 1185, 226 CR 831, was a partition action between an unmarried heterosexual couple who became engaged but never married and had never cohabited. They purchased real property as "joint tenants," and although the male occupied the house, the female refused to move in without marriage. The court enforced the implied agreement it found to exist between the parties to divide the property equally, regardless of the exact dollar amounts of the contributions of each.
- *Marriage of Leversee* (1984) 156 CA3d 891, 203 CR 481, involved a husband and wife who had purchased property as "joint tenants" before their marriage, and thus the property had to be divided under a partition action, rather than under the former Family Law Act (now see the Family Code (Fam C §§1-20043)), which provided jurisdiction only over community property assets.
- *Marriage of Weaver* (2005) 127 CA4th 858, 26 CR3d 121, involved a home in which the owner gave a joint tenancy interest to her married son as a gift. Later, they changed the title to add his wife as a joint tenant. In a subsequent dissolution action, the court ruled that although the form of title raised a presumption of a community property interest between the spouses that the husband did not rebut by written evidence, he was entitled to equitable reimbursement for his contribution of separate property to their community property interest. 127 CA4th at 870.

For further discussion of property acquired in joint form during marriage, see Practice Under Fam Code §5.20.

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§8.14 F. Partnerships

If the used property sought to be partitioned is also the location of a partnership business by the parties (*e.g.,* retail store, restaurant, travel agency), the plaintiff will probably need to seek dissolution of partnership, as well as partition of the real property. This process will require an accounting of the partnership assets and liabilities.

Partition of partnership real property is not a matter of right; the trial court may decide that all or some of the provisions of the partition statute are a suitable remedy in an action for partnership accounting or dissolution or for partition of real property owned by the partnership. CCP §§872.210, 872.730. Partition may not be granted when the rights of unsecured creditors will be prejudiced. CCP §872.730; *Hughes v Devlin* (1863) 23 C 501. Physical division of partnership real property may be appropriate in some circumstances (*Logoluso v Logoluso* (1965) 233 CA2d 523, 43 CR 678) and inappropriate in others (*Brown v Fairbanks* (1953) 121 CA2d 432, 263 P2d 355; see *Swarthout v Gentry* (1943) 62 CA2d 68, 144 P2d 38). If the relief sought is partition by sale of joint venture real property held in cotenancy, the partition by sale procedures should be followed. See CCP §§872.510-873.850; *Larson v Thoresen* (1951) 36 C2d 666, 226 P2d 571. See also §8.76.

PRACTICE TIP: The attorney should consider whether to engage an accountant to review the partnership books and records, prepare a report to evidence the client's position on the value of the partnership, and prepare income/expense statements or asset/liability statements for any partnership business conducted on the property for which partition is sought.

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§8.15 G. Homesteads

When the right to maintain a partition action otherwise exists, the general rule is that a declared homestead (CCP §§704.910-704.995) does not destroy this right. See also CCP §§703.010-704.850. *Priddel v Shankie* (1945) 69 CA2d 319, 159 P2d 438. When one or both spouses, however, record a homestead declaration during marriage, the property may not be partitioned as long as it is subject to the homestead. *Kaupe v Kaupe* (1955) 131 CA2d 511, 280 P2d 856; *Walton v Walton* (1943) 59 CA2d 26, 138 P2d 54. But see *Wiltrakis v Wiltrakis* (1966) 244 CA2d 257, 53 CR 97 (homestead declared after legal separation). There is no case law on the effect of a claim of the automatic homestead exemption (CCP §§704.710-704.850) on an action to partition property owned by a husband and wife.

Under the partition statute (see §8.2) relating to the discretionary partition of successive estates (CCP §872.210(a)(2)), it appears that partition relief could be sought against the person awarded a probate homestead for a limited period (Prob C §6524), and the court, applying equitable principles and the factors set forth in CCP §872.710(c), might find partition appropriate. During probate administration, the court awarding the probate homestead may modify the term or conditions of the homestead right or terminate it. Prob C §6527(a)-(b). Seeking partition relief becomes important only after final distribution of the probate estate and the occurrence of events affording a basis for relief under CCP §872.710(c).

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Source: Real Property/California Real Property Remedies and Damages/8 Partition/§8.16 H. Condominiums

§8.16 H. Condominiums

An owner of a cotenancy in a condominium can effect the partition of that specific cotenancy interest under current law. See CC §1359(a). See also CCP §872.210(a)(2). The owner of a separate interest in a condominium project, however, may maintain a partition action on the entire project only after satisfying all conditions of CC §1359. CC §1359(b). Under §1359, the owner of a separate interest in a condominium may maintain a partition action as if the owners of all units in the project were tenants in common in the entire project in the same proportion as their interests in the common areas. Moreover, under the restrictions of §1359, the court is empowered to order partition only by sale of the entire condominium project and only on proof of one of the following (CC §1359(b)(1)-(4)):

- More than 3 years before the action was filed, the condominium project was so damaged or destroyed that a material part was rendered unfit for its prior use, and it has not been rebuilt or repaired substantially to its state before the damage or destruction occurred;
- Three-fourths or more of the project is destroyed or substantially damaged and owners of separate interests holding in the aggregate more than a 50 percent interest in the common areas oppose its repair or restoration;
- The project has been in existence more than 50 years, is obsolete and uneconomic, and owners of separate interests holding in the aggregate more than a 50 percent interest in the common areas oppose its repair or restoration;
- The conditions for such a sale, set forth in the declaration, have been met.

Compliance with CC §§1358-1359 is necessary. See *14859 Moorpark Homeowner's Ass'n v VRT Corp.* (1998) 63 CA4th 1396, 1410, 74 CR2d 712. For further discussion of condominium partition, see Forming California Common Interest Developments (Cal CEB 2004).

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§8.17 I. Property Subject to Trust

As a general rule, a trust beneficiary may not use a partition action to terminate an express trust, defeat its purpose, or usurp the functions of the trustee. See *Varni v Devoto* (1909) 10 CA 304, 101 P 934. Trust provisions commonly vest in the trustee the right to partition trust property. This right may also be granted to the trustee as an additional power under Prob C §§16226-16227. Thus, the effect of CCP §872.840, authorizing the court in its discretion to order a sale of property subject to an express trust, is not clear.

One appellate decision rejected the contention that, whenever an express trust holds an undivided interest in the property, the court should order partition by sale rather than by division. *Richmond v Dofflemyer* (1980) 105 CA3d 745, 164 CR 727. The history of CCP §872.840 indicates that it was directed to a more limited situation and is not to be interpreted as changing the rule that a trust beneficiary does not have a property interest in trust assets during the life of the trust, or as mandating a special preference for partition by sale when an express trust owns an undivided estate. See Comment to CCP §872.840.

If a trust becomes a "dry trust" because of full performance, and equitable ownerships and tenancy in common result, then a partition action will lie. *Gardiner v Cord* (1904) 145 C 157, 78 P 544. See also *Cappucio v Caire* (1922) 189 C 514, 525, 209 P 367 (statutory trustees' duties in corporate liquidation fully performed).

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§8.18 J. Limitations Imposed by Subdivision Map Act

The parties may not use partition to create a subdivision with individual lots and streets laid out in circumvention of the Subdivision Map Act (Govt C §§66410-66499.37). *Pratt v Adams* (1964) 229 CA2d 602, 40 CR 505; see CCP §872.040. In fact, a court-ordered physical division of real property in a partition action is subject to the Act and to local ordinances adopted under it, zoning ordinances adopted under the State Zoning Law (Govt C §§65800-65912), and the general plan (Govt C §§65300-65403) for the area where the property is located (64 Ops Cal Atty Gen 762 (1981)). When property acquired by an improvement district for unpaid assessments is declared by statute to be held in public trust, bondholders, suing as tenants in common for partition, may not have the property divided among them. *Clough v Compton-Delevan Irrig. Dist.* (1938) 12 C2d 385, 85 P2d 126.

In *Pescosolido v Smith* (1983) 142 CA3d 964, 191 CR 415, the court voided the conveyance by a deed gift of separate portions of a property to the owner's children (instead of granting undivided interests in the property) because the owner violated the Subdivision Map Act (see Govt C §66424). One probate court, however, ordered a portion of the estate property set aside as a probate homestead despite the fact that the homestead violated a local subdivision ordinance. In a narrow holding, the court noted that local ordinances must yield to the extent that they materially interfere with achieving the purposes of a general state law such as a probate court's exercise of its statutory discretion. See *Wells Fargo Bank v Town of Woodside* (1983) 33 C3d 379, 391, 189 CR 41.

On the Subdivision Map Act generally, see California Subdivision Map Act and the Development Process (2d ed Cal CEB 2001).

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IV. INITIATING A PARTITION ACTION

A. Practical Considerations

§8.19 1. Factual Investigation

Before filing a partition action, counsel must gather a substantial amount of relevant information. Most pressing is the need to ascertain all possible co-owners, who must be made parties to the action (see §§8.30-8.34). These include, *e.g.,* lienholders, buyers at a tax sale, lessees, and persons with unrecorded interests. Frequently, it is advisable to obtain a title report before commencing the action (see §8.20). A copy of each document referred to in the title report (*e.g.,* any lien, mortgage, deed of trust, lis pendens, or abstract of judgment) should be obtained and examined. It might also be necessary to make a physical inspection of the property, particularly if off-record interests are suspected. See chap 7 on inspecting for possible adverse possessors. As a practical matter, the court may want to see a copy of an updated title report as assurance that everyone with a recorded interest in the property who is required to be joined, named as a defendant, or given notice of the action is properly accounted for.

Counsel must also find out whether the parties have entered into any agreements, written or oral, that might affect, bar, or temporarily suspend the right to partition. Although a cotenant's right to have the jointly owned real property partitioned is usually absolute, the right can be altered or waived by agreement. *Harrison v Domergue* (1969) 274 CA2d 19, 78 CR 797 (right of first refusal given to other cotenants implies agreement not to partition). See also *LEG Investments v Boxler* (2010) 183 CA4th 484, 2010 Cal App Lexis 442 (right of first refusal in tenancy in common agreement without express waiver of partition right is not absolute waiver of right to partition, but requires only that selling owner first comply with right of first refusal by offering its interest to other owner before seeking partition); *Schwartz v Shapiro* (1964) 229 CA2d 238, 253, 40 CR 189 (right of first refusal modifies absolute right to partition); *Asels v Asels* (1919) 43 CA 574, 185 P 419 (agreement by joint tenant to farm land, distribute money received from crops, and not divide property). The terms of all agreements must be examined carefully to assess any changes in ownership of the interests, because the benefits of the agreement may not inure to subsequent owners. See *Harrison v Domergue, supra*.

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§8.20 2. Preliminary Report and Litigation Guaranty

Title companies offer a variety of products and services that may be used in a partition action, such as title insurance policies, preliminary reports, litigation guaranties, and endorsements. "Title report" is broadly defined in the partition statute, CCP §872.010(e), to include a preliminary report, guaranty, binder, or title insurance policy. In ordering any one of these, the party to a partition action must first inform the title company of the party's needs and particular requirements. The preliminary report does not insure title, and a title company's liability under it is extremely limited, both to the person ordering the report and to others relying on it. See California Title Insurance Practice, chap 5 (2d ed Cal CEB 1997). The litigation guaranty, however, is a form of indemnity, which can give specific, limited assurances on the status of title, liens, and other matters of record, with certain exceptions. For further discussion, see Title Ins, chap 9.

WARNING: Standard title policies, preliminary reports, and litigation guaranties do not give evidence of information that has not been recorded. They often also fail to reveal important matters discoverable by inspection or survey. California Real Property Sales Transactions §11.10 (4th ed Cal CEB 2007).

A plaintiff who procures a preliminary report or a litigation guaranty before commencing the partition action must indicate in the complaint that this has been done and designate a place where it will be available for the parties' inspection, use, and copying. CCP §872.220(a). When the action has been filed without first obtaining a report or a guaranty, the court may authorize a party to procure one and designate a place where it will be kept for inspection, use, and copying. CCP §872.220(b).

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B. Procedural Considerations

§8.21 1. Applicability of Civil Statutes and Court Rules

Partition actions are governed by the statutes and by court rules for practice in civil actions generally unless they are inconsistent with California's partition statute (see §8.2). CCP §872.030. On procedural rules for civil actions, see generally California Civil Procedure Before Trial (4th ed Cal CEB 2004). The partition statute cannot be used to avoid the effects of any applicable laws governing property sales, transfers, or divisions (see §8.18). CCP §872.040.

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§8.22 2. Jurisdiction and Venue

The superior court has subject matter jurisdiction over all actions to partition real property. CCP §§88, 872.110(a). A partition action must be filed as an "unlimited," rather than a "limited," civil case under CCP §§85-86.

The proper county to try an action to partition real property is the county where some or all of the property is located. CCP §872.110(b)(1). The real property venue rule applies even when the action involves both real and personal property. CCP §872.110(b)(1). The court has the authority, on motion, to change the site of the trial to another county that is a proper county under the venue rules, either for the witnesses' convenience or for an expeditious adjudication of the action. CCP §872.110(b); see *Hecker v Ross* (1960) 183 CA2d 30, 6 CR 438. See generally California Civil Procedure Before Trial, chap 8 (4th ed Cal CEB 2004).

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§8.23 3. Joinder of Additional Causes of Action

The general rule for civil actions is that any cause of action the plaintiff has against any defendant may be joined in the complaint. CCP §427.10. Owing to the nature of the cause of action for partition and the court's broad power to grant complete relief (CCP §§872.120-872.140; see §§8.2-8.4), including ordering contribution or other compensatory adjustment under CCP §872.140 (see paragraph 13 in complaint, §8.51), there is less need to plead additional causes of action. See *Larson v Thoresen* (1951) 36 C2d 666, 226 P2d 571.

In light of particular facts or tactical considerations, however, the plaintiff might consider additional causes of action for accounting, specific performance, declaratory relief, judicial foreclosure of encumbrance or lien on property or interest of another owner in the property, quiet title, and contribution from co-owners for expenditures relating to the property. Thus, the plaintiff should plead sufficient facts to outline the claims for any such other claims. Likewise, if the plaintiff relies on equitable title, specific facts supporting the claim of equitable ownership should be alleged. *Spader v McNell* (1900) 130 C 500, 62 P 828. For sample allegations of additional causes of action, see §8.51.

For general discussion of joinder of causes of action, see California Civil Procedure Before Trial §15.24 (4th ed Cal CEB 2004).

PRACTICE TIP: Although the complaint may state several causes of action (*e.g.,* conversion, constructive eviction, fraud) in addition to partition, counsel should keep in mind that causes of action seeking damages may entitle a party to a jury trial on those issues. If a jury trial is demanded, the court must decide whether to bifurcate the trial or to simultaneously hear the causes of action that the judge will decide with those that the jury will resolve.

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4. Plaintiffs

§8.24 a. Who Has Right to Maintain Action

When real property is owned by several persons concurrently or in successive estates, the owner of an estate of inheritance, an estate for life, or an estate for years in it has the right to maintain a partition action. CCP §872.210(a)(2). Partition is generally a matter of right (unless barred by waiver; see §8.58) (CCP §872.710(b)). The court, however, has discretion in partitioning successive estates (CCP §872.710(c)) and partnership property (CCP §872.730). A tenant in common may maintain a partition action while simultaneously being in possession under a lease. *Buhrmeister v Buhrmeister* (1909) 10 CA 392, 102 P 221.

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§8.25 (1) Life Tenant or Remainder Holder

Successive estates may be partitioned, and an action to do so may be undertaken either by the life tenant or the holder of the remainder interest. CCP §872.210(a)(2); 13 Cal L Rev'n Comm'n Reports 412 (1976); see §8.10. The owner of an equitable estate in real property that falls within the categories enumerated in the partition statutes may maintain an action to establish the equitable right and obtain a division of the property. *Watson v Sutro* (1890) 86 C 500, 24 P 172, 25 P 64. Compare *Varni v Devoto* (1909) 10 CA 304, 101 P 934, with *Clough v Compton-Delevan Irrig. Dist.* (1938) 12 C2d 385, 85 P2d 126.

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§8.26 (2) Trustee and Co-Owner

A person named trustee of real property, who is also a co-owner of the property, may bring a partition action if the trust has been carried out, even though a "trustee" is not a person specified in CCP §872.210(a)(2). *O'Bryant v Bosserman* (1949) 94 CA2d 353, 210 P2d 739. On partition of property subject to a trust, see §8.17.

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§8.27 (3) Executor or Administrator of Estate

The executor or administrator of an estate (*i.e.*, the personal representative) may bring a partition action against other cotenants of any property in which the decedent left an undivided interest. Prob C §9823. The heirs' rights to the decedent's real property are subject to administration of the decedent's estate, and the heirs have no interest in the property that entitles them to bring a partition action. *Bank of Ukiah v Rice* (1904) 143 C 265, 76 P 1020.

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§8.28 b. Actual Possession or Right to Possession

The plaintiff in a partition action need not have either actual possession or a present right to possession under California law. See CCP §872.210(a)(2).

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§8.29 c. Effect of Mortgage

A mortgage on the plaintiff's share does not bar a partition action. *Gardiner v Cord* (1904) 145 C 157, 78 P 544. When a cotenancy share is subject to a mortgage, the mortgagee has the right and duty to intervene in the partition action, plead the existence of the mortgage, and seek to have it adjusted in the partition decree. *Towle Bros. v Quinn* (1903) 141 C 382, 74 P 1046.

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5. Defendants

§8.30 a. All Persons Claiming Interests

If a plaintiff seeks to fully adjudicate all interests by means of a partition action, the complaint must join as defendants all persons claiming interests of record in the property or whose claims are actually known to the plaintiff or reasonably apparent from an inspection of the property. CCP §872.510. Any such person not joined in the action will not be bound by the judgment. CCP §874.225(b). Thus, all persons who claim ownership of the property or estate to be partitioned must be made defendants when not named as plaintiffs, because the action will be fruitless if one of the co-owners is not bound by the judgment. *Solomon v Redona* (1921) 52 CA 300, 198 P 643. A plaintiff who seeks partition of all interests in the property against the world must join as defendants "all persons unknown claiming any interest in the property," and so name them in the complaint. CCP §872.550. See paragraph 7 in form complaint, §8.51. Each defendant has the right to plead the nature and extent of his or her own interest and have that interest adjudicated. See, *e.g.,* CCP §§872.410, 872.430, 872.610.

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§8.31 b. Lienholders

All persons having liens that are of record, actually known to the plaintiff, or apparent from an inspection, should usually be joined in the action. CCP §872.510. The term "interest" as used in §872.510 includes liens. See Comment to CCP §872.510. To the extent necessary to effect relief, the court must resolve the status and priority of liens and may appoint a referee for that purpose. CCP §872.630.

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§8.32 c. Holders of Future Estates

Living persons whose future estates are subject to a contingency should be joined individually as defendants under the principle of virtual representation. See paragraph 8 in form complaint, §8.51. See generally *Garside v Garside* (1947) 80 CA2d 318, 181 P2d 665; *Curran v Pecho Ranch & Stock Co.* (1928) 95 CA 555, 273 P 126; *County of Los Angeles v Winans* (1910) 13 CA 234, 109 P 640. See also Prob C §§1003, 15804, 17105 (trust proceedings). If those persons are joined, the complaint must allege the uncertainty. CCP §872.520(a). Naming such defendants requires legal decisions on the adequacy of representation and whether guardians ad litem for unknown defendants should be appointed under CCP §§372-373.5. CCP §872.520(c). For discussion of guardians ad litem, see California Civil Procedure Before Trial §§9.52-9.75 (4th ed Cal CEB 2004).

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§8.33 d. Persons With Minor Interests

Unless a complete title adjudication is sought or particular facts make it necessary, persons having minor interests in the property need not be joined as defendants. If not joined, their interests will not be adjudicated. See *Pfeiffer v Regents of Univ. of Cal.* (1887) 74 C 156, 15 P 622 (claimants of easement interests omitted). Owners whose estates or interests will not be affected by the partition ordinarily need not be joined. See, *e.g., Southern Cal. Title Clearing Co. v Laws* (1969) 2 CA3d 586, 83 CR 8 (oil and gas interests when not joined will not be affected).

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§8.34 e. Lessees

When the property to be partitioned is subject to a lease, community lease, unit agreement, or other pooling arrangement for oil or gas, the plaintiff need not join as defendants those whose only interest in the property is that of lessee, royalty owner, lessor owner of other real property in the community, unit, or pooled area, or working interest owner, or anyone claiming under them. The judgment will not affect the interests of such persons if not joined as defendants. CCP §872.540. See *Southern Cal. Title Clearing Co. v Laws* (1969) 2 CA3d 586, 83 CR 8.

PRACTICE TIP: Counsel should review the lease to ascertain whether any provision limits a party's right to seek a partition of the property; *e.g.,* a right of first refusal implies an agreement not to partition. See §8.58.

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V. PREPARING AND FILING COMPLAINT

§8.35 A. Allegations

The required contents of a complaint for partition are specified in CCP §872.230 and are discussed in §§8.36-8.50.

PRACTICE TIP: A complaint that does not conform to the partition statute may still be sufficient to state a cause of action for partition under California common law. *Gunn v Gunn* (1929) 102 CA 606, 283 P 80. Nevertheless, prudent practice obviously calls for careful compliance with CCP §872.230. See §8.51 for a model complaint for partition.

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§8.36 1. Caption and Introductory Clause

A partition action must be filed as an "unlimited," rather than a "limited," civil case. See CCP §§85-86, 88. See also §8.22. On preparing court-filed papers, see Cal Rules of Ct 2.100-2.119. On the caption and the introductory clause, see California Civil Procedure Before Trial, chap 15 (4th ed Cal CEB 2004). An introductory clause is not required, but many attorneys begin the complaint with either a simple "Plaintiff alleges:" or a more formal opening.

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§8.37 2. Description of Property

A description of the property sought to be partitioned is a required allegation of the complaint. CCP §872.230(a). See paragraphs 1 and 10 in form complaint, §8.51. The order of paragraphs given in the suggested form below (see §8.51) roughly follows the order in CCP §872.230(a)-(e) (see §8.35). For further discussion of pleading party allegations, see generally California Civil Procedure Before Trial, chaps 14-15 (4th ed Cal CEB 2004).

PRACTICE TIP: Code of Civil Procedure §872.230 does not, however, require that the allegations be placed in any particular order, and counsel should structure the complaint in the manner that seems most suitable for the specific case.

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§8.38 3. Multiple Plaintiffs

If there is more than one plaintiff, paragraph 2 in the sample complaint below (see §8.51) can be adapted to allege multiple plaintiffs, or, if the interests vary sufficiently that inclusion in one paragraph becomes unwieldy, additional paragraphs may be added. The nature of each plaintiff's cotenancy interest should be specified.

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§8.39 4. Defendant Allegations

If the names of owners or claimants of interests in the property are not known to the plaintiff, such persons must be joined as "all persons unknown claiming any interest in the property." CCP §§872.510(a), 872.550. It is unclear whether such persons could, in the alternative, be sued as fictitiously named defendants under CCP §474. Compare, *e.g.,* paragraph 4 with paragraphs 5 and 7 in form complaint, §8.51. Note, however, that problems could arise in connection with dismissal of unserved fictitiously named defendants at the time of trial and in determining whether such allegations constitute an in personam approach to the action. Counsel may wish to seek the opinions of title company officers on the issue of using fictitiously named defendants. On fictitious name allegations generally, see California Civil Procedure Before Trial §§14.13-14.19 (4th ed Cal CEB 2004).

It is unclear whether "presumptive takers" in the contingent remainder example (see paragraph 8 of complaint) must all be joined as defendants in every case. See CCP §373.5 (appointment of guardian ad litem for a class). Title company advice should be sought.

A defendant who is named and served has an affirmative duty to specify in the answer the estates or interests owned or claimed. *Morenhout v Higuera* (1867) 32 C 289.

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§8.40 a. Defendants Dead or Believed Dead

If the plaintiff's affidavit required by CCP §872.530(b) states that the owner of the interest or claim is dead and that no personal representative is known to the plaintiff, allegations similar to those in paragraph 6 of the complaint (see §8.51) may be made, but the deceased person is not served. See CCP §872.530(b)(2).

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§8.41 b. All Persons Unknown

"All persons unknown" allegations are appropriate when the complaint seeks an adjudication of all interests in the property. CCP §872.550. See §§8.30, 8.39. For authority to join as defendants owners of particular interests whose names are unknown to the plaintiff, see CCP §872.520(a). For authority to include among "all persons" defendants who are unknown owners because of transfers in the form of contingent remainders, see CCP §872.520(b). The procedures for joining "all persons" defendants has yet to be subjected to judicial interpretation, and title company advice should be obtained.

On relevant allegations to plead for these situations, see paragraphs 5-8 in form complaint, §8.51.

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§8.42 5. Plaintiff's Interest

The complaint must allege all interests the plaintiff has or claims in the property. CCP §872.230(b). See paragraph 2 in form complaint, §8.51. When the plaintiff has multiple interests but fails to make a complete or accurate statement of them, the court will probably not rigidly interpret §872.230(b) and will liberally allow amendments to conform to proof. The court has the power to rule on the state of the title, as well as the status and priority of all liens. CCP §§872.620-872.630. To avoid estoppel or an implied admission, care must be taken in alleging the plaintiff's interests.

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§8.43 6. Interests That Will Be Materially Affected

The complaint must allege all interests of record or actually known to the plaintiff that other persons claim in the property and that the plaintiff reasonably believes will be affected by the action whether or not the plaintiff knows their identities. CCP §872.230(c). See paragraph 9 in form complaint, §8.51. The allegations regarding interests or claims may incorporate an exhibit or a title report. If needed, the title report can be supplemented by an exhibit. However, the title report will show only interests of record and will not show record interests in detail. See paragraph 12 in form complaint, §8.51.

Failure to allege the existence of all estates and interests in the property can result in a judgment that is not binding on all owners or claimants. CCP §874.225.

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Source: Real Property/California Real Property Remedies and Damages/8 Partition/§8.44 7. Estate on Which Partition Is Sought

§8.44 7. Estate on Which Partition Is Sought

To clarify whether the plaintiff seeks partition of the entire fee or only of an estate in the property, the complaint must state explicitly the estate on which partition is sought. CCP §872.230(d). See paragraph 10 in form complaint, §8.51.

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§8.45 8. Partition by Sale

When the plaintiff seeks partition by sale, the complaint must contain an allegation of the facts justifying a sale in ordinary and concise language. CCP §§872.230(e), 872.810. See paragraph 11 in form complaint, §8.51. Partition by sale may be ordered if the parties agree to such relief or when the court rules that a sale would be more equitable or practical under the circumstances. CCP §872.820. On factual situations in which partition may be appropriate, see §8.6. The court may appoint a referee to advise and assist the court in making this decision. CCP §872.820(b). See §§8.73-8.87.

A statement of the plaintiff's request or preference either for apportionment of the sales proceeds or for a trust of the entire proceeds may be included. See CCP §873.840.

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§8.46 9. Partition of Successive Interests

A complaint for partition of successive interests (see §8.10) should include allegations of facts to warrant the court's exercise of discretion. CCP §872.710. See *Forrest v Elam* (1979) 88 CA3d 164, 151 CR 591.

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§8.47 10. Partition by Appraisal

Even if the parties have already agreed to partition by appraisal (see §8.60), the complaint should follow the general framework of a partition complaint. The complaint should also allege that the interests of all parties in the property or estate have been adjudicated or are undisputed, that the agreement for appraisal exists, and that the terms of the agreement are being incorporated by reference. See CCP §§873.910-873.920.

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§8.48 11. Title Report

If necessary, the plaintiff may procure a title report before starting the action and must then indicate in the complaint where the other parties can obtain a copy of the report (see §8.20). CCP §872.220(a). See paragraph 12 in form complaint, §8.51.

PRACTICE TIP: Given the very narrow and limited coverage of a preliminary report, counsel would be wiser in most situations to purchase a litigation guaranty. The additional cost for this guaranty varies, depending on the value of the property in litigation and the nature of the action. The benefits of having a guaranty will far exceed the attorney fees and costs that would arise if a problem or dispute over title does arise. In any event, the client, not the attorney, should bear the cost of the guaranty, which provides cost-effective "insurance" for both of them.

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§8.49 12. Declaratory Relief

Sometimes a plaintiff should consider seeking a declaration of the parties' respective rights and obligations if, for example, disputes arise among the co-owners about:

- Their simultaneous use of different portions of the property (*e.g.,* parking spaces) or their desire for exclusive use during certain times.
- Who has primary authority for certain management decisions regarding the property (*e.g.,* to whom to rent available portions of the property, at what rates, and for how long).
- Their rights to use certain valuable but exhaustible natural resources of the property (*e.g.,* timber, minerals, oil, water).

On declaratory relief generally, see California Civil Procedure Before Trial, chap 35 (4th ed Cal CEB 2004).

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§8.50 13. Prayer for Relief

The complaint must contain a prayer for partition of the interests in the property (CCP §872.230(d)) and for any other requested relief. When the complaint also requests an accounting from the defendant, or a monetary award to the plaintiff for paying common expenses on the defendant's behalf, any default judgment that might be entered is subject to CCP §580 and must not award more than the amount prayed for in the complaint. *Finney v Gomez* (2003) 111 CA4th 527, 3 CR3d 604. Consequently, if the defendant will likely default, the complaint should estimate the amount defendant owes to the plaintiff, or plaintiff's expenses, as accurately as possible.

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Source: Real Property/California Real Property Remedies and Damages/8 Partition/§8.51 B. Form: Multitheory Complaint for Partition and Related Causes of Action

§8.51 B. Form: Multitheory Complaint for Partition and Related Causes of Action

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**COMPLAINT FOR PARTITION**
	)	**OF REAL PROPERTY**
vs	)	**(CCP §§872.210, 872.230);**
	)	**AND FOR ACCOUNTING,**
_ _[*Name(s)*]_ _, **and Does 1**	)	**PARTNERSHIP DISSOLUTION,**
through 50, _ _[*and all persons*	)	**CONSTRUCTIVE TRUST,**
unknown claiming any interest in	)	**COMMON COUNT, AND**
the property, inclusive,]_ _	)	**DAMAGES FOR BREACH OF**
Defendant(s)	)	**FIDUCIARY DUTY**
_____	)	

FIRST CAUSE OF ACTION
(Partition by Plaintiff _ _[*name*]_ _
Against Defendant _ _[*name*]_ _**)**

1. The real property that is the subject of this action and on which partition is sought (hereafter "Property") is located in _ _ _ _ _ _ **County, California, commonly known as** _ _[*street address or other common designation*]_ _ **and more particularly described as:** _ _[*Give legal description or refer to an attached exhibit giving the description*]_ _**.**

2. Plaintiff _ _[*name*]_ _ **is, and at all times relevant to this complaint was** _ _[*e.g., an individual, a corporation, a partnership, an LLC*]_ _**.** _ _[*Specify plaintiff's place of residence if plaintiff is an individual, or county where principal place of business is located if plaintiff is a business entity.*]_ _

[*Add one of the following alternatives as the next sentence in Paragraph 2*]

[*Alternative 1: If plaintiff has fractional interest in fee title*]

Plaintiff owns an undivided _ _[*specify, e.g., one-fourth interest as a tenant in common*]_ _ **in the fee title to the Property.**

[*Alternative 2: If plaintiff has an estate or other interest*]

Plaintiff owns an interest in the Property as follows: _ _[*Describe, e.g., an estate of inheritance, an estate for life, or an estate for years, whether plaintiff owns the whole estate or a fraction of it, and how plaintiff acquired it*]_ _**.**

[*If applicable, add the following option as the last sentence in Paragraph 2, so that all plaintiff's interests in the property are represented in the complaint*]

[*Option: If plaintiff has encumbrances, liens, or other claims*]

Plaintiff owns encumbrances, liens, and other claims on the Property as follows: _ _[*Describe, e.g., beneficiary of*

deed of trust, holder of equitable lien, judgment creditor, etc.]_ _

[*Continue*]

3. Plaintiff is informed and believes and on that basis alleges that Defendant _ _[*name*]_ _ **is, and at all times relevant to this complaint was _ _**[*e.g., an individual, a corporation, a partnership, an LLC*]_ _**.** _ _[*Specify defendant's place of residence if defendant is an individual, or county where principal place of business is located if defendant is a business entity.*]_ _

[*Add one of the following alternatives as the next sentence in Paragraph 3*]

[*Alternative 1: If defendant has fractional interest in fee title*]

Defendant owns an undivided _ _[*specify, e.g., one-fourth interest as a tenant in common*]_ _ **in the fee title to the Property.**

[*Alternative 2: If defendant has an estate or other interest*]

Defendant owns an interest in the Property as follows: _ _[*Describe, e.g., an estate of inheritance, an estate for life, or an estate for years, whether defendant owns the whole estate or a fraction of it, and how defendant acquired it.*]_ _

[*If applicable, add the following option as the last sentence in Paragraph 3, so that all defendant's interests in the Property are represented in the complaint*]

[*Option 1: If defendant has encumbrances, liens, or other claims*]

Plaintiff is informed and believes and on that basis alleges that Defendant owns encumbrances, liens, and other claims on the Property as follows: _ _[*Describe, e.g., beneficiary of deed of trust, holder of equitable lien, judgment creditor, etc.*]_ _

[*If appropriate, add additional paragraphs for other known owner/defendants whose specific interests are also known to plaintiff, as in Paragraph 3*]

[*Continue*]

[*On the use of fictitious defendant allegations, see §§8.30, 8.39, 8.41*]

4. Plaintiff does not know the true names, capacities, basis for liability, or interests in the Property of defendants sued in this action as Does 1 through 50, inclusive, and will amend this complaint when that information is discovered. Plaintiff is informed and believes and on that basis alleges that at all relevant times, each defendant, including any defendant fictitiously named, claims an interest in the Property, was acting as the agent, servant, employee, partner, or joint venturer of each other defendant in doing the things alleged, or is responsible in some manner for the damages and disputes alleged in this complaint.

[*If applicable, add one or more of the following options*]

[*Option 1: Unknown defendant; but interest identified; see §8.41*]

5. Plaintiff does not know the true names of persons who have or claim interests in the _ _[*estate in the*]_ _ **Property on which partition is sought, and whose interests are described as follows: _ _**[*Describe each specific undivided interest or estate, not involving a contingency or uncertainty, that are known to plaintiff and claimed by persons whose names are unknown, and state facts supporting the interest, such as a written claim, a claim apparent from an inspection, etc.*]_ _ **Such persons are named in Paragraph 7 as defendants "all persons unknown claiming any interest in the property," or on discovery will be named in this complaint by amendment and served under Paragraph 4 as a fictitious "Doe" defendant.**

[*Option 2: Defendant dead or believed dead*]

[6.] Plaintiff is informed and believes and on that basis alleges that Defendant _ _[*name of person dead or believed dead*]_ _**, believed to be deceased, has or had an interest or claim in the _ _**[*estate in the*]_ _ **Property on which partition is sought. Plaintiff incorporates by reference the statements made in Plaintiff's declaration filed with this complaint and marked Exhibit _ _. Plaintiff joins as defendants both _ _**[*name of person believed dead*]_ _ **and the testate and intestate successor(s) of _ _**[*name of person believed dead*]_ _ **and all persons claiming by, through, or under such persons.**

[*Option 3: If "all persons unknown" allegation applies; see §§8.30, 8.39, 8.41*]

[7.] Plaintiff is informed and believes and on that basis alleges that there are persons unknown who have or claim interests in the _ _[*estate in the*]_ _ Property on which partition is sought. Plaintiff joins such persons as defendants "all persons unknown claiming any interest in the property," who shall be served by publication. Such defendants include persons who have or claim an interest in the property by reason of transfer of a particular interest or contingency or otherwise in a manner that makes ownership of such interest uncertain, as alleged in this complaint.

[*Option 4: If a defendant owns a life estate with a known or an unknown remainder holder; see §§8.30, 8.32, 8.39-8.41*]

[8.] Plaintiff is informed and believes and on that basis alleges that additional persons own interests as the remainder holders of the life estate of Defendant _ _[*name*]_ _, under the will of _ _[*name*]_ _, deceased. The ownership, share, or quantity of interest of persons entitled to such remainder is uncertain in that it was created by a transfer in the form of a contingent remainder as follows: _ _[*State substance of provisions*]_ _. As far as is known to Plaintiff, the names, ages, and any legal disability of the persons in being who would be entitled to ownership of such remainder, if the above-described contingency had occurred immediately before commencement of this action, are: _ _[*Give information required, including fractional interests, if applicable. If the person is known, add him or her as a named defendant; if the person is incapable of being sued, identify other defendant as guardian or guardian ad litem.*]_ _. Plaintiff is informed and believes and on that basis alleges that such remainder interest is owned (a) by the persons whose names are listed immediately above in this paragraph or (b) by defendants named in Paragraph 7 as "all persons unknown claiming any interest in the property."

[*Continue*]

[9.] Plaintiff is informed and believes and on that basis alleges that the interests of record or actually known to Plaintiff that other persons have, or claim, in the Property that Plaintiff reasonably believes will be materially affected by this partition action are the interests of Defendant(s) _ _[*specify by name each defendant or interest alleged in the action in Paragraphs 3-8 that will be materially affected*]_ _.

[10.] The estate on which partition is sought is _ _[*specify whether the plaintiff seeks partition of the entire fee or a lesser estate in the Property, e.g., the estate constituting the fee title to the Property described in Paragraph 1*]_ _.

[*If applicable, add one or more of the following options*]

[*Option 1: If partition by sale*]

[11.] Plaintiff requests that the _ _[*Property described in Paragraph 1/estate described in Paragraph 10*]_ _ be partitioned by sale. Such mode of partition is more equitable in the circumstances than division for the following reasons: _ _[*State facts supporting contention that partition by sale would be more equitable.*]_ _

[*Option 2: If title report obtained*]

[12.] It has been necessary that Plaintiff obtain a title report on the Property in the form of a _ _[*describe type of report*]_ _, at an expense to Plaintiff of $_ _[*dollar amount*]_ _, which is a reasonable sum for such purpose. The title report will be kept at _ _[*specify location*]_ _ for inspection, use, and copying by the parties to this proceeding.

[*Option 3: If plaintiff spent money maintaining the Property on behalf of both plaintiff's and defendant's respective interests*]

[13.] Plaintiff _ _[*name*]_ _ spent considerable sums of money in maintaining and preserving the property for the benefit of both Plaintiff and Defendant(s) _ _[*name(s)*]_ _, and each of them, _ _[*in an amount according to proof, but at least the sum of $_ _[dollar amount*]_ _]_ _, with interest at the rate of _ _ percent per annum from the date of each expenditure. Under law, Plaintiff is entitled to a judgment against each Defendant and _ _[*his/her*]_ _ respective successors in interest for _ _[*his/her*]_ _ respective share of sums reasonably spent, on which judgment shall be secured by an equitable lien against the partition sale proceeds or against the interests of Defendant(s) and _ _[*his/her/their*]_ _ respective successors in the Property.

[*Continue*]

WHEREFORE, Plaintiff prays for relief as set forth below.

SECOND CAUSE OF ACTION
(Accounting by Plaintiff _ _[*name*]_ _
Against Defendant _ _[*name*]_ _)

[14.] Plaintiff incorporates by reference as if fully set forth in this cause of action the allegations in Paragraphs _ _ through _ _ above.

[15.] Before acquiring the Property, Plaintiff _ _[*name*]_ _ entered into a partnership agreement with Defendant _ _[*name*]_ _. The relevant terms _ _[*are stated in a written partnership agreement, a true and correct copy of which is attached to this complaint as Exhibit _ _ and incorporated by reference/were orally agreed on by Plaintiff and Defendant*]_ _. _ _[*Describe briefly obligations of the parties essential to support alleged breaches.*]_ _

[16.] In the course of the partnership transactions specified in Paragraph 15, Defendant received money _ _[*, including but not limited to rental money, lease payments, payments from promissory notes, and payments from the sale or real property and/or other assets*]_ _, real property, personal property, and other things of value in which Plaintiff had an ownership or other pecuniary interest. Defendant, as partner and co-owner, owed a duty to account in detail to Plaintiff of all specifics of these items of value and these transactions and to hold this money, real property, personal property, and other items of value in trust for Plaintiff. Among the matters on which Defendant owes an accounting to Plaintiff are the following: rental payments from the property at _ _[*address*]_ _, money from the sale of the property at _ _[*address*]_ _, money expended to remodel or otherwise improve the property at _ _[*address*]_ _, or any of the other properties that are the subject matter of this action.

[17.] Although Defendant represented to Plaintiff that all of the money, real property, personal property, and other items of value were used for purposes solely related to the real property that is the subject of the partnership specified in Paragraph 15, Defendant has failed and refused, and continues to fail and refuse, to provide any accounting for any money, real property, personal property, and other items of value received by Defendant in connection with these transactions. The amount of money, real property, personal property, and other items of value received by Defendant (as described in Paragraph 16) and spent on matters other than with regard to the partnership properties is unknown to Plaintiff and cannot be ascertained without Defendant's accounting of what _ _[*he/she/it*]_ _ did with it, but plaintiff believes it is at least the sum of $_ _[*dollar amount*]_ _, including interest.

[18.] Plaintiff has demanded a fair and accurate accounting of this money, real property, personal property, and other items of value received by Defendant, but Defendant has failed and refused, and continues to fail and refuse, to render any such accounting.

WHEREFORE, Plaintiff prays for relief as set forth below.

THIRD CAUSE OF ACTION
(Dissolution of Partnership by Plaintiff _ _[*name*]_ _
Against Defendant _ _[*name*]_ _)

Plaintiff incorporates by reference as if fully set forth in this cause of action the allegations in Paragraphs _ _ through _ _ above.

Because of Defendant _ _[*name's*]_ _ wrongful conduct, as alleged in Paragraphs _ _ and _ _, Plaintiff seeks the immediate and total dissolution of the partnership between Plaintiff and Defendant known as _ _[*specify name of partnership*]_ _ (the "Partnership"), as well as all attendant procedures and remedies available regarding the dissolution of the Partnership.

WHEREFORE, Plaintiff prays for relief as set forth below.

FOURTH CAUSE OF ACTION
(Constructive Trust by Plaintiff _ _[*name*]_ _
Against Defendant _ _[*name*]_ _)

Plaintiff incorporates by reference as if fully set forth in this cause of action the allegations in Paragraphs _ _ through _ _ above.

Because of Defendant _ _[*name's*]_ _ alleged wrongful conduct, including but not limited to Defendant's _ _[*breach of fiduciary duties owed to Plaintiff/negligent and/or fraudulent misrepresentations made to Plaintiff/failure or refusal to account to Plaintiff for the money, property, or other items of value received by defendant from the real and personal property owned by the Partnership*]_ _, Defendant is an involuntary trustee, holding the money, real property, personal property, and other items of value, as described in part in Paragraphs 16-17, as well as any interest or profits derived therefrom, for and on behalf of Plaintiff.

WHEREFORE, Plaintiff prays for relief as set forth below.

FIFTH CAUSE OF ACTION
(Common Count: By Plaintiff _ _[*name*]_ _ Against Defendant _ _[*name*]_ _ for Money Had and Received by Said Defendant)

Plaintiff hereby incorporates by reference as if fully set forth in this cause of action the allegations set forth in Paragraphs _ _ through _ _ above.

By means of the various transactions specified in Paragraphs _ _ through _ _, Defendant _ _[*name*]_ _ became indebted to Plaintiff in an amount ascertainable from the _ _[*rent money/royalty payments/promissory note payments/sale of assets of the partnership*]_ _, which sums remain unpaid in an amount according to proof, _ _[*but at least the sum of $_ _[dollar amount*]_ _]_ _, with interest, for money and other consideration had and received by Defendant, but that was intended for the use and benefit of Plaintiff.

The sum(s) alleged in Paragraph _ _ remain due and owing to Plaintiff, although demand for payment of the sums has been made, and there remains now due and owing and unpaid from defendant a sizeable amount, which exceeds the sum of $_ _[*dollar amount*]_ _, the total amount to be proved at trial.

WHEREFORE, Plaintiff prays for relief as set forth below.

SIXTH CAUSE OF ACTION
(Breach of Fiduciary Duty by Plaintiff _ _[*name*]_ _ Against Defendant _ _[*name*]_ _)

At all relevant times, Defendant _ _[*name*]_ _, as partner and co-owner, has jointly and severally owed to Plaintiff the duties of a fiduciary regarding the aforesaid money, real property, personal property, and other items of value received by Defendant, in whole or in part on behalf of and for the benefit of Plaintiff.

Because of Defendant's wrongful conduct as alleged in Paragraphs _ _ through _ _, Defendant has breached _ _[*his/her*]_ _ joint and several fiduciary duties owed to Plaintiff, and thus Plaintiff is entitled to a full, complete, and accurate accounting from Defendant of all money, real property, personal property, and other items of value.

As a direct and proximate result of Defendant's breach of fiduciary duties owed to Plaintiff, Plaintiff has been damaged in an undetermined total amount that is in excess of the jurisdictional minimum of this court, _ _[*in an amount according to proof, but at least the sum of $_ _[dollar amount*]_ _]_ _, with interest. These damages include, but are not limited to those alleged in Paragraph _ _ above.

In jointly and/or severally breaching respective fiduciary duties owed to Plaintiff and in willfully refusing to provide to Plaintiff the promised accounting, Defendant _ _[*name*]_ _ acted willfully and deliberately in a manner intended to injure and/or oppress Plaintiff; in particular, _ _[*specify facts supporting allegation of fraud, oppression, or malice; see §§3.11-3.35, 12.87*]_ _. For that reason, Defendant should be punished and be an example set for other persons similarly situated by an award of exemplary damages to Plaintiff in amounts to be proved at trial.

WHEREFORE, Plaintiff prays for the following relief:

ON FIRST CAUSE OF ACTION
(Partition by Plaintiff _ _[*name*]_ _ Against Defendant _ _[*name*]_ _)

[*Add one of the following alternatives*]

[*Alternative 1: If partition by division is sought*]

1. A judgment partitioning by division the _ _[*property/estate*]_ _ described in Paragraphs 1 and 10 of this complaint;

[*Alternative 2: If partition by sale is sought*]

1. A judgment partitioning by sale the _ _[*property/estate*]_ _ described in Paragraphs 1 and 10 of this complaint, and dividing the proceeds;

[*Continue*]

2. A judgment against Defendant and _ _[*his/her*]_ _ respective successors in interest for _ _[*his/her*]_ _ respective shares of sums reasonably spent by Plaintiff in maintaining and preserving the property, _ _[*in an amount according to proof, but at least the sum of $*_ _[*dollar amount*]_ _]_ _, with interest at the rate of _ _ percent per annum from the date of each expenditure, which judgment shall be secured by an equitable lien on the respective interests of Defendant and _ _[*his/her*]_ _ respective successors in interest in the property or sale proceeds;

3. An award of attorney fees spent for the common benefit of all owners;

[*If applicable, add the following option*]

[*Option: If title report expenses incurred*]

4. A judgment against Defendant and _ _[*his/her*]_ _respective successors in interest for their respective prorata shares of the expense of the title report, with interest at the rate of _ _ percent per annum from the date of filing the action, and prorata shares of other costs of partition, as determined by the Court, which judgment shall be secured by a lien on the respective interests of such defendants and their respective successors in interest in the property or sale proceeds and shall otherwise be enforceable as provided by law;

[*Continue*]

ON SECOND CAUSE OF ACTION
(Accounting by Plaintiff _ _[*name*]_ _
Against Defendant _ _[*name*]_ _)

1. An accounting from Defendant of all money, real property, personal property, and other items of value received by Defendant, relating in any way to any of the transactions alleged in Paragraphs _ _ through _ _ above;

2. Compensatory damages according to proof;

3. Special damages according to proof;

ON THIRD CAUSE OF ACTION
(Dissolution of Partnership by Plaintiff _ _[*name*]_ _
Against Defendant _ _[*name*]_ _)

1. The immediate and total dissolution of the partnership known as the _ _[*specify name of partnership*]_ _ Partnership;

2. Compensatory damages according to proof;

3. Special damages according to proof;

ON FOURTH CAUSE OF ACTION
(Constructive Trust by Plaintiff _ _[*name*]_ _
Against Defendant _ _[*name*]_ _)

1. A declaration from this Court that Defendant holds in trust for Plaintiff all money, real property, personal

property, and other items of value received by Defendant, relating in any way to any of the transactions alleged in Paragraphs _ _ through _ _ above;

2. Compensatory damages according to proof;

3. Special damages according to proof;

ON FIFTH CAUSE OF ACTION
(Common Count: By Plaintiff _ _[*name*]_ _ Against Defendant _ _[*name*]_ _ for Money Had and Received by Said Defendant)

1. Compensatory damages according to proof, _ _[*but at least in the sum of $*_ _[*dollar amount*]_ _]_ _, with interest, including but not limited to the return to Plaintiff of all money and other items of value that were received by Defendant, either directly or indirectly, as alleged in Paragraphs _ _ through _ _ above;

2. Special damages according to proof;

ON SIXTH CAUSE OF ACTION
(Breach of Fiduciary Duty by Plaintiff _ _[*name*]_ _
Against Defendant _ _[*name*]_ _)

1. Compensatory damages according to proof;

2. Special damages according to proof;

3. Exemplary damages according to proof;

ON ALL CAUSES OF ACTION

1. Plaintiff's costs of action incurred;

2. Such other and further relief as the Court deems proper.

Date: _ _ _ _ _ _ _ _[*Name of firm*]_ _

By: __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (filed with court clerk); copies for service (one for each defendant who is to be served); office copies.

Comment: A partition complaint is a complicated pleading even if it is the sole cause of the action, particularly if unknown persons hold interests or some interests are unknown. Before preparing the complaint, counsel should review at a minimum §§8.19-8.23, 8.52-8.53 for practical and procedural issues, and §§8.24-8.34, 8.38-8.43 on selecting parties to the action and pleading their interests properly. If a litigation guaranty or other title company product or service is being used in connection with the action (see §8.20), it is a good idea to ask the title company's legal department to review a draft of the complaint before it is finalized, filed, and served (see §§8.30, 8.39).

The court may award monetary relief under equitable principles, including contribution or other compensatory adjustment under CCP §872.140. See paragraph 13 of complaint. See also §§8.50, 8.61. If other causes of action have been joined with the partition action (see §8.23), the prayer will need to include requests for the other relief sought. On partition by sale, see §8.76; on apportionment of costs and the expense of the title report, see §§8.83-8.86; on prayers generally, see California Civil Procedure Before Trial §§15.7-15.12 (4th ed Cal CEB 2004) and California Civil Litigation Forms Manual §7.1 (Cal CEB 1980).

There is no requirement that the complaint be verified. On verification generally, see CCP §§431.30(d), 446. Code of Civil Procedure §128.7(a) (to be repealed by its own terms on January 1, 2006) confirms that verification of the complaint is seldom required. See also Civ Proc Before Trial §§15.14-15.21.

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§8.52 C. Service of Process

The form, content, and manner of service of a summons in a partition action are the same as in civil actions generally. See CCP §§412.10-417.40, 872.310(a). For Judicial Council basic summons form, see California Civil Litigation Forms Manual §9.1 (Cal CEB 1980). Service on deceased defendants (CCP §872.530(b)) and unknown persons (CCP §872.550) is made by publication (CCP §872.310(b)). Publication is subject to the general requirements of CCP §415.50 and to the additional requirements of CCP §872.320 that (1) a copy of the summons and complaint be posted on the property (CCP §872.320(a)); (2) a lis pendens be recorded (see §8.53; CCP §872.320(b)); and (3) the publication contain legal and common descriptions of the property (CCP §872.320(c)). The trial court has authority to order a particular method of service of process to be used when no provision is otherwise made. CCP §§413.30, 872.120. Counsel should consider asking the court's direction for service that will carry out the objectives of service by publication.

On service of process generally, see California Civil Procedure Before Trial, chap 17 (4th ed Cal CEB 2004).

PRACTICE TIP: In seeking direction from the court on service, counsel should be prepared to (1) identify what service problems have been encountered and (2) present a proposal to effect service.

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§8.53 D. Lis Pendens

In an action to partition real property, the plaintiff must record immediately on filing the complaint a lis pendens in each county where any of the real property is located. CCP §872.250(a). If other real property is added to the action by an amended complaint or a cross-complaint, the plaintiff or other party seeking the relief must record a supplemental lis pendens immediately on filing the amended or cross-complaint. CCP §872.250(b). If the required lis pendens is not recorded, the court must, on motion of a party or its own motion, order the plaintiff or another party to record a lis pendens and stay the action until it is recorded. CCP §872.250(c).

From the time it is recorded, the lis pendens constitutes notice to all persons of the pendency of the action on the property described in the lis pendens. CCP §872.250(d). Failure to record a lis pendens can result in an ineffective judgment; without a lis pendens, anyone who records an interest after the action is filed but before entry of judgment, if not made a party, will not be bound by the judgment. CCP §874.225. The rule that recording a lis pendens is not jurisdictional (*Rutledge v Rutledge* (1953) 119 CA2d 114, 259 P2d 79) is continued under the new partition statute. See Comment to CCP §872.250. On lis pendens procedures and a basic form of notice of lis pendens, see chap 13.

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§8.54 VI. RESPONSIVE PLEADINGS

A partition action is governed by the statutes and rules applicable to civil actions generally (see §8.21). CCP §872.030. Thus, defendant's counsel should analyze the complaint before deciding whether to answer, demur, or move to strike. For discussion of these responsive pleadings, see California Civil Procedure Before Trial, chaps 19-21 (4th ed Cal CEB 2004).

PRACTICE TIP: Because the purpose of the action is to adjudicate the interests of all parties (see §8.3), it is most likely that a defendant will choose to set forth his or her claims of interests in the property and preferred manner of partition in an answer rather than oppose the action entirely by a demurrer or motion to strike. The defendant's attorney should research whether any of the causes of action in the complaint are triable by a jury. If so, counsel will need to weigh the advantages and disadvantages of demanding a jury trial on those causes of action and the desirability of moving to bifurcate.

In an action to partition real property, a motion for change of venue may be made if appropriate (see CCP §872.110(b)(1); §8.22). If the complaint contains a separate cause of action seeking a personal judgment against the defendant, a motion to quash service of process or to stay or dismiss the action might be considered if appropriate, on the ground of improper service or inconvenient forum. CCP §418.10; see Civ Proc Before Trial, chaps 19, 21.

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§8.55 A. The Answer

As a rule, the requirements for the answer are those applicable to civil actions generally (see §8.21). CCP §872.030. Certain specific requirements, however, for the answer in a partition action are in CCP §§872.410-872.430. The answer must allege any interest the defendant has or claims in the property, including liens and other interests. CCP §872.410(a) and Comment to §872.410(a). When the defendant is a lienholder, the answer must set forth the date and character of the lien and the amount remaining due under it, and may allege related additional claimed costs, fees, and expenses. CCP §872.420 and Comment to §872.420.

The answer must also allege any facts tending to controvert the material allegations of the complaint that the defendant does not wish to be taken as true. CCP §872.410(b). In a partition action, the material allegations of the complaint not denied in the answer are considered adopted for trial. *Hughes v Devlin* (1863) 23 C 501. Because a defendant cannot reasonably be expected to know all the necessary facts at the time of answering, a denial for lack of information or belief will probably be considered sufficient. See CCP §431.30(f). On information and belief denials, see California Civil Procedure Before Trial §§25.28-25.29 (4th ed Cal CEB 2004).

If the defendant seeks to have the property partitioned by sale, the answer must allege the facts justifying that relief in clear and concise language. CCP §872.410(c). At the time of answering, a defendant might not have sufficient information to be able to make this choice and should be permitted to amend the answer later in the litigation. On the allegations required to support a request for partition by sale (see CCP §§872.810-872.820), see §8.45.

Although affirmative relief generally cannot be sought in the answer (CCP §431.30(c)), in a partition action the answer may plead any claim the defendant has for contribution or other compensatory relief (CCP §872.430). Thus, a cross-complaint is not required when the relief sought is establishment of the defendant's interest in the property, the manner of partition, or a monetary award for contribution or other compensation. See *Banning v Banning* (1889) 80 C 271, 22 P 210. Because §872.430 does not provide a basis for pleading in the answer all the relief a defendant can seek, counsel should research the need for filing a cross-complaint on independent causes of action under general rules of pleading. See CCP §426.30; on cross-complaints, see Civ Proc Before Trial, chap 26.

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§8.56 B. Defendants With Less Than Ownership Interests

Defendants holding nonownership interests such as easements or possessory rights, minor liens, or claims clouding title must decide whether protection of their interests merits the expense of appearing in the action. A defendant whose interests are comparatively small, or remote under various contingencies, may be tempted to permit entry of a default. Whether this course is advisable depends on the facts of the particular case, and frequently some arrangement can be worked out with the plaintiff and other affected parties. In some instances, a simple answer and stipulation of the extent of participation or form of judgment may be sufficient to protect a party's interests. Unless all parties stipulate, however, filing an answer may subject the defendant to the burden and expense of responding to discovery requests.

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C. Defenses

§8.57 1. Statute of Limitations

As a general rule, statutes of limitations do not apply to partition actions. *Akley v Bassett* (1922) 189 C 625, 209 P 576; *Elbert, Ltd. v City of San Diego* (1953) 116 CA2d 660, 254 P2d 98. Even if the statute of limitations has run against a course of action for specific performance of an agreement to convey, the plaintiff's equitable title may be enforced in an action for partition. *Luco v De Toro* (1891) 91 C 405, 27 P 1082. The statute of limitations may, however, be asserted as a bar to the claim of a co-owner for contribution when the cotenancy has been repudiated (*Willmon v Koyer* (1914) 168 C 369, 143 P 694) or against a claim for a share of the proceeds of a sale ordered in a previous partition action (*Neustadt v Skernswell* (1955) 133 CA2d 163, 283 P2d 787). The statute may also be invoked in a partition action to establish an interest in the property by adverse possession, in which case it does not bar the partition action as such. *Akley v Bassett, supra*.

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§8.58 2. Waiver and Estoppel

The right to bring a partition action may be barred or suspended by a preexisting agreement (see §8.24) or acts of co-owners that amount to waiver or estoppel. Under CCP §872.710(b), which codified existing case law, the right to partition may be barred by a valid waiver. See *LEG Investments v Boxler* (2010) 183 CA4th 484, 2010 Cal App Lexis 442 (right of first refusal in owners' agreement without express waiver of partition right is not absolute or perpetual waiver of right to partition, but requires only that selling co-owner first comply with right of first refusal by offering its interest to other co-owner before seeking partition). But the validity of the waiver must still be decided by reference to case law. Comment to CCP §872.710.

An implied waiver or estoppel occurs when co-owners agree to use the property inconsistently with their rights to require partition. *Penasquitos, Inc. v Holladay* (1972) 27 CA3d 356, 103 CR 717 (land leased by co-owners under lease-option, with right of co-owners to receive shares of rents and sales proceeds, and to occupy undeveloped part of land); *Harrison v Domergue* (1969) 274 CA2d 19, 78 CR 797 (right of first refusal implies agreement not to partition); *Pine v Tiedt* (1965) 232 CA2d 733, 43 CR 184 (co-owners made 50-year lease for construction of a sanitarium, with party demanding partition becoming manager for tenant); *Schwartz v Shapiro* (1964) 229 CA2d 238, 40 CR 189 (right of first refusal as agreement not to partition); *Thomas v Witte* (1963) 214 CA2d 322, 29 CR 412 (oil leases placed under unitized development); *Nazzisi v Nazzisi* (1962) 203 CA2d 121, 21 CR 396 (property settlement agreement gave cotenant right to reside on property and responsibility for making repairs); *Rowland v Clark* (1949) 91 CA2d 880, 206 P2d 59 (resulting trust); *Miranda v Miranda* (1947) 81 CA2d 61, 183 P2d 61 (property settlement agreement creating trust in family home for minor children); *Asels v Asels* (1919) 43 CA 574, 185 P 419 (constructive trust or agreement varying joint tenancy title).

Case law defining conduct *not* sufficiently inconsistent with the right to partition to create a waiver includes *Williams v Williams* (1967) 255 CA2d 648, 63 CR 354 (negotiations for lease of property not consummated); *Heber v Yaeger* (1967) 251 CA2d 258, 59 CR 353 (waiver of income in exchange for release from operating expenses); *Squibb v Squibb* (1961) 190 CA2d 766, 12 CR 346 (act of joining in a declaration of homestead insufficient, when partition was proper despite homestead declaration); *Deacon v Deacon* (1929) 101 CA 195, 281 P 533 (right of one co-owner to manage property held insufficient reason).

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VII. OBTAINING JUDGMENT FOR PARTITION

A. Uncontested Actions

§8.59 1. Settlement by Stipulation

When the interests in the property and the mode of partition are undisputed or agreed on, a stipulated proposed form of interlocutory judgment (see §8.72) can be presented to the court. See, *e.g., Sullivan v Dorsa* (2005) 128 CA4th 947, 27 CR3d 547. This document should be carefully prepared and reviewed by counsel for all parties in order to avoid uncertainty and to provide a procedure for partition that will avoid conflicts of interest and meet title company requirements. As long as the stipulated procedures provide a sufficient record for the court's later actions or for title company review, there appears to be no public policy prohibiting the parties from agreeing to waive entry of an interlocutory decree and seeking immediate appointment of a referee to effect the agreed-on partition. See *Grannis v Superior Court* (1905) 146 C 245, 79 P 891.

Forms for a stipulation and judgment for general use are in California Civil Litigation Forms Manual §§38.1-38.2 (Cal CEB 1980). On stipulated judgments generally, see California Civil Procedure Before Trial, chap 48 (4th ed Cal CEB 2004).

PRACTICE TIP: Avoid asking the court to appoint as referee the real estate broker whom the parties wish to market the property. The court may be reluctant to do so because the broker's professional responsibilities are inconsistent with those of an independent, responsible third party acting on the court's behalf. On the risks of having the referee act as the broker on the sale, see *Sullivan v Dorsa, supra*.

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§8.60 2. Partition by Appraisal

When the interests of all parties are undisputed or have been adjudicated, the parties may agree on partition by appraisal. The partition by appraisal provisions (CCP §§873.910-873.980) afford an alternative to partition by division or sale for co-owners who can agree. One purpose of these provisions is to enable the parties to avoid tax liability. 13 Cal L Rev'n Comm'n Reports 414 (1976).

PRACTICE TIP: The authority relied on (Rev Rul 55-77, 1955-1 Cum Bull 339) seems somewhat tenuous, and counsel should be sure to thoroughly research the potential tax consequences of a contemplated partition. Under this method, a referee appraises the property, and any of the parties may acquire the interests of the others at their appraised value. Thus, the differences among the co-owners can be resolved expeditiously.

An agreement for partition by appraisal must be in writing and filed with the court, and must include a description of the property, the names and interests of the parties, the names of the parties who are willing to acquire the interests, the names of the referee or referees to whose appointment the parties consent, the date as of which the interests to be acquired are to be appraised, and other terms on which the parties agree. CCP §873.920(a)-(f). Other terms may provide for abandonment of the action if the appraised value of the interests to be acquired exceeds a certain amount, required deposits against the purchase price, terms of credit, title and objections to title, and payment of expenses. CCP §873.920(f).

Any party to the agreement may apply to the court for approval of the agreement by noticed motion. CCP §873.930(a). If the court finds that the agreement complies with CCP §873.920 and that its terms are equitable, it must approve the agreement and stay any pending division or sale of the property. CCP §873.930(b). The court must appoint one referee (or three if the agreement so provides) to appraise the property and the parties' interests. CCP §873.940. On proceedings before the referee, see §§8.74-8.77.

An agreement for partition by appraisal binds the heirs, executors, administrators, successors, and assigns of the parties, and may be specifically enforced in a default by further proceedings in the partition action or by resort to another available remedy. CCP §873.970. If interests are not transferred or acquired under the partition by appraisal sections, for default or for another cause, the parties may pursue their other rights to judicial partition. CCP §873.980.

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§8.61 3. Default Judgment

The partition statute (CCP §§872.010-874.240) has no special provision for obtaining a default judgment (see §8.21), and thus the parties should follow the procedures for obtaining judgment by default in civil actions (CCP §§585-587.5). On entry of default and default judgment procedures, see California Civil Procedure Before Trial, chap 38 (4th ed Cal CEB 2004). As in other actions, it is advisable to take the default of unknown defendants if they do not appear.

PRACTICE TIP: Before applying for entry of default, the attorney should review the files to make certain that (a) all necessary parties were joined, (b) service of process and appearances were regular, (c) any defendants who are minors or incapacitated are represented by guardians ad litem or otherwise, and (d) all requirements of the local court for default judgments were met.

When the complaint requests relief in the form of an accounting or a monetary award to the plaintiff for paying common expenses on the defendant's behalf, the default judgment is subject to CCP §580 and must not award more than the amount prayed for in the complaint. *Finney v Gomez* (2003) 111 CA4th 527, 3 CR3d 604. On the showing to be made at the default hearing, see generally Civ Proc Before Trial §38.57. The safest course is to offer evidence that makes a prima facie showing of all essential and other pertinent allegations. See §8.35. Expert testimony is often advisable. See also CCP §585(c) (proof of plaintiff's title required when summons served by publication). The court must provide in its decree for defendants who have contingent or uncertain interests. CCP §874.21. See *Garside v Garside* (1947) 80 CA2d 318, 181 P2d 665. Code of Civil Procedure §425.115 requires a specific statement if recovery of punitive damages is sought on default judgment.

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§8.62 B. Resolving Partition in Urban TICs

The dissolution of tenancies in common (TICs) make up a large portion of partition actions in urban courts. See §8.9. In considering the remedy of partition for an aggrieved TIC homeowner, the unique fact that the property is the home, and perhaps the only substantial asset, of each party can give rise to a dynamic similar to a contested divorce proceeding. Considerations of the client's physical and mental well-being need to be part of the dispute resolution strategy.

In home ownership tenancies in common, formal mediation proceedings should almost always be recommended to the client. See chap 14. The benefit of a negotiated resolution cannot be overstated when the participants have to live together or in different units of the same building.

A strategy that has proved useful in resolving such disputes is asking each party to commit to a particular dollar value amount for which they would be equally willing to both buy and sell. In other words, in a situation with two equal owners, each one should be asked to designate a price at which they would be willing to both purchase the other interest and also at which they would be willing to sell their own interest. Parties who are unwilling to buy for the same price they expect to sell may have difficulty justifying their position in mediation.

Frequently in this type of ownership, one or more parties may wish to retain the property, while the other may wish to sell. A party has the right to seek to purchase, either on its own, or with a co-purchaser, through the partition sale proceedings, and it is entitled to credit its equity as part of that purchase in the process. CCP §873.770. If the selling co-owner is unreasonable about valuation, the purchasing co-owner may be best served by allowing the sale to proceed, and then attempting to acquire the sold interest. See §8.76.

The order confirming sale (see §§8.79, 8.87), in addition to providing for close of escrow and disposition of proceeds, should address the issue of delivery of physical possession of the premises. It may sometimes be necessary to join any tenant occupants of the unit(s) at issue in order to completely resolve disputes over occupancy.

PRACTICE TIP: In an urban multiunit setting, counsel must consider whether any local rent control laws apply if there are tenants in the building, even as an owner's roommates. Tenants sometimes have the right to continue in possession of a unit, even after the owner who rented to them is dispossessed.

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C. Contested Actions

§8.63 1. Preparation for Trial; Requesting Appointment of Referee

As in other civil actions, summary judgment, discovery, pretrial, and settlement procedures apply to partition actions. See §8.21. On summary judgment, see generally California Civil Procedure Before Trial, chap 36 (4th ed Cal CEB 2004).

Because of the special nature of partition, the parties must consider before trial whether to do any of the following:

- Enter into a stipulation on the methods and terms of partition by sale (CCP §873.600; see *Sullivan v Dorsa* (2005) 128 CA4th 947, 27 CR3d 547);
- Request or oppose appointment of a referee to report to the court on whether to partition by division or by sale (CCP §872.820(b));
- Request or oppose appointment of a referee to enter into a sale agreement on behalf of the owners and report to the court on the sale (CCP §§873.510, 873.610(b));
- Request or oppose appointment of a referee to report on the status and priority of liens (CCP §872.630(b)); and
- Request or oppose appointment of a referee to take testimony on the rights of parties, known or unknown, to sale proceeds deposited in court for future allocation (CCP §873.850).

Other questions that might arise are the following:

- Whether the parties can agree on a person to act as referee for partition (CCP §873.040);
- Whether three referees are preferable (CCP §873.030); and
- Whether a motion for severance should be made or opposed when separate causes of action or issues are involved (CCP §1048(b)).

PRACTICE TIP: If the court decides to appoint a referee, counsel should be prepared with the names and curriculum vitae of persons to recommend for appointment.

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2. Trial

§8.64 a. Right to Jury

Given that a partition action is equitable in nature (see §8.7), the parties are not entitled to a jury trial as a matter of right. See Cal Const art I, §16; CCP §592. See also California Civil Procedure Before Trial §§41.3-41.8 (4th ed Cal CEB 2004). It is, however, within the court's discretion to submit factual issues to a jury in an equitable action, and the court may apparently allow a jury trial in a partition action. See *Lorenz v Jacobs* (1881) 59 C 262. Moreover, when causes of action for damages are included in the lawsuit, the plaintiff retains a constitutional right to a jury trial on those nonequitable causes of action.

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§8.65 b. Entry of Interlocutory Judgment

If the court finds that the plaintiff is entitled to partition, it enters an interlocutory judgment adjudicating the interests of the parties, ordering partition of the property, and, unless the matter is deferred, designating the manner of partition (CCP §872.720(a)). See §§8.71-8.72.

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§8.66 c. Conduct of Trial

The conduct of a trial in a partition action varies. When there are many parties, the court may make a preliminary partition before entering a definitive interlocutory judgment. CCP §872.720(b); *Emeric v Alvarado* (1884) 64 C 529, 2 P 418; *Richmond v Dofflemyer* (1980) 105 CA3d 745, 164 CR 727. The court also may defer, until after the interlocutory judgment, issues such as the manner of partition (CCP §872.720(a)) and adjudication of ownership of or liens on particular shares of sale proceeds that are ordered deposited in court (CCP §873.850). Initial trial of an issue that could dispose of the action has been upheld in the case of party's claim to undivided sole ownership. *Caldwell v Regents of Univ. of Cal.* (1917) 35 CA 639, 170 P 666.

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§8.67 d. Determination of Interests of Parties

To the extent necessary to grant relief, the court must adjudicate both the interests of the parties (CCP §872.610) and the state of title to the property (CCP §872.620; *Stoffer v Verhellen* (1925) 195 C 317, 231 P 233). It is usually advisable to try partition issues, claims to incidental relief, affirmative defenses, and related causes of action before the interlocutory judgment is entered. The court, however, has discretion in controlling the order of proof and in ordering separate trials. *Caldwell v Regents of Univ. of Cal.* (1917) 35 CA 639, 170 P 666. Postponement of claims for monetary adjustment after an accounting or for contribution could prejudice these claims unless a protective order is also made. For example, if partition is to be by sale, unless part of the sale proceeds is ordered deposited in court for the benefit of monetary claims, the party obtaining an award might have no means of collecting.

Although the court must ultimately determine the state of the title (CCP §872.620) and the status and priority of liens (CCP §872.630), there is no requirement that these issues be resolved before entry of the interlocutory judgment. Because the state of title and the interests of lienholders are important, however, these issues should be decided promptly, whether partition is by division or sale.

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§8.68 e. Deciding Manner of Partition

Counsel must consider whether to defer the court's decision on the manner of partition or have the issue decided in the interlocutory judgment. See CCP §872.720. On manner of partition, see §§8.75-8.77. In some cases, the report of a referee on this issue is beneficial. If a referee has not been appointed and a report has not been made before the initial trial hearing, it may be desirable to appoint a referee for this purpose and either defer the entire issue or request a continued hearing. In a dispute over whether partition should be by division or sale, expert testimony should be offered. If the case involves rights of unknown owners or holders of contingent interests, an adequate record should be made for persons who are presumptive takers and for life expectancies.

Gray v Superior Court (1997) 52 CA4th 165, 60 CR2d 428, demonstrates the significance of the commencement of an evidentiary hearing by the referee. In *Gray,* the parties could not agree on whether to partition by sale or by division, and thus they stipulated in writing to the appointment of a referee under CCP §872.820 to make a recommendation to the court on the most equitable manner of partition. After the referee held a 2-day evidentiary hearing, the plaintiff dismissed his partition complaint without prejudice. The defendant, however, successfully vacated that dismissal, because the court of appeal interpreted the referee's evidentiary hearing as the commencement of "trial" within the meaning of CCP §581, thus cutting off the plaintiff's right to a voluntary dismissal. 52 CA4th at 173.

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§8.69 f. Statement of Decision

The parties may obtain the trial court's statement of decision explaining the factual and legal bases for its decision. CCP §632. When a trial is concluded within 1 calendar day or in less than 8 hours over more than 1 day, the request for a statement of decision must be made before the matter is submitted for decision, and the statement of decision may be made orally on the record. CCP §632. In all other cases, the statement must be requested within 10 days after the court renders its tentative decision (CCP §632), and proposals for the content of the statement must be made within 10 days after the request (see Cal Rules of Ct 3.1590(d)).

The court may choose to prepare the proposed statement of decision itself or designate, in the tentative decision, one of the parties to prepare the proposed statement of decision. A party has 15 days after the proposed statement is served to serve and file objections for consideration by the court before the court files and serves its final statement. On procedures for requesting and preparing a statement of decision, see Cal Rules of Ct 3.1590(d)-(f); CCP §872.030.

Although the court may adopt a referee's report to serve as findings of fact on a particular issue (*Worcester v Worcester* (1966) 246 CA2d 56, 54 CR 436), counsel usually prefer to take part in preparing the statement of decision. For a form of statement of decision, see §8.70. For further discussion, see California Trial Practice: Civil Procedure During Trial §§24.34-24.50 (3d ed Cal CEB 1995).

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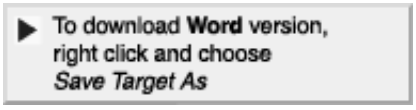
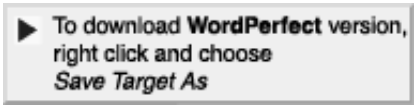
Source: Real Property/California Real Property Remedies and Damages/8 Partition/§8.70 g. Form: Statement of Decision

§8.70 g. Form: Statement of Decision





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for _ _[*e.g., plaintiff*]_ _, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**STATEMENT OF DECISION**
_ _[*Name(s)*]_ _, **and Does 1 through 50,** _ _[*and all persons unknown claiming any interest in the property, inclusive,*]_ _ **Defendant(s)**	**(CCP §632)** **Dep't:** _ _[*number*]_ _ **Trial judge:** _ _[*name*]_ _ **Trial date:** _ _[*date*]_ _

On _ _[*date*]_ _**, the instant action came on regularly for trial before the Honorable** _ _[*name*]_ _**. Owner #1** _ _[*name*]_ _**, Plaintiff, was represented by** _ _[*name of attorney and firm*]_ _**. Owner #2** _ _[*name*]_ _**, Defendant, was represented by** _ _[*name of attorney and firm*]_ _**. Having considered the evidence admitted and the oral and written argument of counsel, the Court issues this** _ _[*proposed*]_ _ **statement of decision.**

[*Add one of the following alternatives*]

[*Alternative 1: If partition by division is ordered*]

1. As to the First Cause of Action (Partition), the Court finds that partition by physical division is the most appropriate remedy and that the property at _ _[*address*]_ _**, California, shall be divided between Owner #1 and Owner #2 as recommended in the referee's final report, which was approved by this Court, after hearing, by its order dated** _ _[*date*]_ _**.**

[*Alternative 2: If partition by sale is ordered*]

1. As to the First Cause of Action (Partition), the Court finds that partition by sale is an appropriate remedy, sought both by Plaintiff and Defendant, and that each side has a _ _[*specify, e.g., 50 percent*]_ _ **ownership in the real property at** _ _[*address*]_ _**, California.**

[*Continue*]

[*Add one of the following alternatives*]

[*Alternative 1: If no accounting ordered*]

2. As to the Second Cause of Action (Accounting), the Court finds that Owner #1 failed to show that Owner #2 breached any duty, and thus Defendant is the prevailing party on these claims. The Court further finds that the testimony of _ _[*name*]_ _ **was credible and also that Exhibit** _ _ **provided an adequate accounting of the partnership's income and expenses.**

[*Alternative 2: If accounting ordered*]

2. As to the Second Cause of Action (Accounting), the Court finds that Owner #1 satisfied the burden of

proof and hereby orders Owner #2 to provide to Owner #1 within _ _[*number*]_ _ days a full and complete accounting, as recommended in the final report of receiver, specifically including the following items:

a. Originals or true and correct copies of all of the partnership's checking account statements and canceled checks from _ _[*date*]_ _, to the date of this statement of decision;

b. Originals or true and correct copies of all leases, contracts, or other agreements entered into on behalf of the partnership from _ _[*date*]_ _, to the date of this statement of decision;

c. Originals or true and correct copies of all balance sheets, income statements, general ledgers, and other accounting and financial records of the partnership from _ _[*date*]_ _, to the date of this statement of decision;

d. Copies of the all federal and state income tax returns filed on behalf of the partnership from _ _[*date*]_ _, to the date of this statement of decision.

[*Continue*]

3. As to the Third Cause of Action (Dissolution of Partnership, with emphasis on the _ _[*name*]_ _ business), the Court finds that the "net" proceeds from the sale of the _ _[*name*]_ _ business should be divided between the Owner #1 and Owner #2 on a _ _[*50 percent-50 percent*]_ _ basis after the sale of that business, with appropriate deductions for the equitable lien, if any, allowed under Paragraph 5.

4. As to the Fourth, Fifth, and Sixth Causes of Action (Constructive Trust, Common Count: Money Had and Received, and Breach of Fiduciary Duty) the Court finds that Plaintiff (Owner #1) failed to satisfy the burden of proving that Defendant is guilty of any wrongful conduct or misappropriation of partnership assets or breached any fiduciary duty to Plaintiff or to the partnership, and thus Defendant (Owner #2) is the prevailing party on these claims. Furthermore, the Court finds the testimony of Owner #2 to be credible and that, despite some errors in accounting, _ _[*he/she*]_ _ did an adequate job of keeping a reasonably fair and accurate accounting of the partnership's business dealings and that there was no evidence of any intent or effort by Defendant to misallocate any partnership income or assets.

[*Option: If plaintiff requested monetary relief under equity in the partition action, such as contribution or other compensatory adjustment, or if plaintiff pleaded additional causes of action*]

5. As to Owner #1's request for monetary relief in the First Cause of Action (Partition) and in the Seventh, Eighth, Ninth, and Tenth Causes of Action (Breach of Contract, Quantum Meruit, Account Stated, and Open Book Account), the Court finds that Owner #1 is owed the sum of $_ _[*dollar amount*]_ _ by the partnership for sums spent in maintaining and preserving the partnership property for the benefit of both Owners, and for _ _[*specify type*]_ _ services that _ _[*he/she*]_ _ rendered to the partnership under the partnership's agreement to pay for these services at the rate of $_ _[*dollar amount*]_ _ per hour. _ _[*This sum shall be secured by an equitable lien against the interest of Owner #2 in both the partition sale proceeds and the partnership property.*]_ _ The Court declines to award any interest on this amount because the Court finds that there was a good faith, bona fide dispute among the partners regarding the amount, if any, that remained due and owing to Owner #1.

[*Continue*]

6. In light of the foregoing, the net sums that the Court finds to be owed by the partnership to the partners for services rendered are:

a. $_ _[*Dollar amount*]_ _ is owed to Owner #1 for money that _ _[*he/she*]_ _ had advanced to or on behalf of the partnership;

b. $_ _[*Dollar amount*]_ _ is owed to Owner #2 for money that _ _[*he/she*]_ _ had advanced to or for the benefit of the partnership;

c. $_ _[*Dollar amount*]_ _ is owed to Owner #1 for _ _[*specify type*]_ _ services for the benefit of the partnership;

d. If sums from the sale of the partnership assets are inadequate to pay these sums, then payment of each item should be made on a prorata basis, with the denominator being the sum of items (a), (b), and (c).

7. If the sums from the sale of the partnership assets are adequate to pay in full the sums set forth in the preceding paragraph, then any money remaining after these payments shall be paid to Owner #1 and Owner #2 in accordance with their respective presale ownership shares in the property, as set forth in Paragraph 1.

8. The Court finds that, overall, neither side was the prevailing party and thus each side must bear its own attorney fees and costs. The Court further finds that the sums spent on attorney fees and costs were incurred by and for the individual partners and not for the common benefit of the partnership.

IT IS SO ORDERED.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

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3. Interlocutory Judgment

§8.71 a. Content

Under CCP §872.720(a), if the court finds that the plaintiff is entitled to partition, it must enter an interlocutory judgment determining the interests of the parties in the property and ordering partition accordingly. An appeal may be taken from such an interlocutory judgment. CCP §904.1(a)(9).

PRACTICE TIP: Some title insurers (*e.g.,* many in Los Angeles County) refuse to insure title on the basis of an interlocutory decree. Other title insurers are inclined to pass such decrees as sufficient in partition actions. Counsel should check local practice.

The content of interlocutory judgments in partition actions varies according to the issues that were adjudicated. The basic requirement is that the judgment set forth the ownership interests in the property or estate affected by the partition to be made and order partition. See CCP §872.720(a). Common additional provisions are as follows:

- An order that the property be partitioned by division or by sale (unless the mode of partition has not then been decided) (CCP §872.720(a));
- Appointment of a referee or referees (CCP §§873.010-873.030);
- Specification of the principal terms of sale (CCP §873.610);
- Specification of the manner of sale (public or private; CCP §873.520);
- Orders for payment of liens (if the property is not to be sold subject to liens; CCP §872.630);
- Protective provisions for unknown owners or parties having uncertain or contingent interests (CCP §872.640);
- An order to impound part of the sale proceeds for later awards for costs of partition or money judgments on claims for incidental relief (CCP §874.110);
- An order for a bond for the referee, if a bond is necessary (CCP §873.010(b)(1)); and
- A provision reserving jurisdiction on matters that would ordinarily be adjudicated at the time of the interlocutory judgment.

An order allocating costs should be contained in the final judgment rather than the interlocutory judgment. See Comment to CCP §874.110. If, however, an award for costs of partition is included in the interlocutory judgment, it may preclude a later challenge, in the absence of an appeal. See *Riley v Turpin* (1960) 53 C2d 598, 2 CR 457.

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Source: Real Property/California Real Property Remedies and Damages/8 Partition/§8.72 b. Form: Interlocutory Judgment

§8.72 b. Form: Interlocutory Judgment

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Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No. _ _ _ _ _ _**
Plaintiff(s)	)	
vs	)	**INTERLOCUTORY JUDGMENT**
_ _[*Name(s)*]_ _, **and Does 1**	)	**(Partition)**
through 50, _ _[*and all persons*	)	**(CCP §872.720)**
unknown claiming any interest in	)	
the property, inclusive,]_ _	)	**Dep't:** _ _[*number*]_ _
Defendant(s)	)	**Trial judge:** _ _[*name*]_ _
_____	)	**Trial date:** _ _[*date*]_ _

This action for partition was regularly tried on _ _[*date*]_ _**, before the Hon.** _ _[*name*]_ _**, presiding without a jury. Appearing as attorneys were** _ _[*name*]_ _ **for Plaintiff, and** _ _[*name*]_ _ **for Defendant. Having considered the evidence admitted and written and oral argument of counsel,** _ _[*having already filed its statement of decision on* _ _[*date*]_ _*/a statement of decision not having been requested*]_ _**, and good cause appearing therefor, the court enters its interlocutory judgment as follows:**

IT IS ORDERED, ADJUDGED, AND DECREED that:

1. Plaintiff is the owner as a _ _[*specify nature of interest, e.g., cotenant*]_ _ **of an undivided** _ _[*fraction*]_ _ **of a** _ _[*specify whether interest is a fee or a type of estate*]_ _ **in real property located in** _ _ _ _ _ _ **County, California, commonly known as** _ _[*street address or other common designation*]_ _**, hereafter referred to as "the property," and more particularly described as** _ _[*legal description*]_ _**.**

2. Defendant is the owner of _ _[*specify nature and extent of interest*]_ _**.** _ _[*If more than one defendant, list interests of each defendant in the property, including defendants holding liens.*]_ _

3. The property is subject to the following encumbrances: _ _[*List encumbrances on property, including the nature of the instrument and the amount due.*]_ _

[*Add one of the following alternatives*]

[*Alternative 1: If property is to be divided*]

4. The property be partitioned and the resulting portions of the property be awarded to the parties in severalty according to their respective interests;

5. _ _[*Name(s) and address(es) of one or three referees*]_ _ _ _[*is/are*]_ _ **appointed as referee(s) of this Court with full power to divide the property and allot the portions to the parties according to their respective interests and to do all things necessary to carry out the orders of this Court and make a report to the Court of all proceedings conducted.**

6. This Court retains jurisdiction to review the referee's report on the property division and to order equitable adjustments that the Court considers just and appropriate.

[*Alternative 2: If property is to be sold*]

4. Under the circumstances, sale of the property and division of the proceeds would be more equitable than division of the property; the Court therefore orders that the property be sold and the proceeds divided among

the parties according to their respective interests;

5. _ _[*Name(s) and address(es) of one or three referees*]_ _ _ _[*is/are*]_ _ appointed as referees with authority to sell the property at _ _[*public auction to the highest bidder for cash/a private sale*]_ _, which manner of sale is determined by the Court to be most beneficial to the parties. Notice of sale shall be given in the manner required for notice of sale of like property on execution and shall be given to the persons specified in Code of Civil Procedure §873.640. In all other respects notice of and procedure for sale shall be as provided in Code of Civil Procedure §§873.600-873.690.

6. The terms of sale shall include _ _[*list important terms and conditions of sale based on the parties' agreement or the court's determination, e.g., state of title, prorating, credit terms (if private sale)*]_ _. Notice of sale shall include reference to such terms and conditions or to a written statement available for inspection in accordance with Code of Civil Procedure §873.650.

7. The referees, after selling the property, are directed to report to this Court on the sale proceedings and, on confirmation of the sale by this Court and on payment of the purchase price, are authorized and directed to execute and deliver a deed of the property to the buyer.

8. Unless modified by subsequent order of this Court, the proceeds from the sale of the property shall be applied, after confirmation of the sale, as follows:

a. To pay the expenses of sale;

b. To pay other costs of partition or secure any cost of partition later allowed;

c. To pay Defendant _ _[*specify lienholders and sums due*]_ _; and

d. The residue is to be distributed among the parties in proportion to their shares as follows: _ _[*Specify parties and shares*]_ _.

9. This Court retains jurisdiction to review the referee's report on the property sale and to order equitable adjustments that the Court considers just and appropriate.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Copies: Original (presented to judge for signature, then filed with proof of service); conformed copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: This form is intended for use in uncomplicated actions for partition. As a rule, counsel must adapt this form to fit the particular case, and the court may exercise its discretion before ordering certain procedures, *e.g.,* to avoid prejudice to the interests of nonparties or to actions not appropriate for the court or referee.

The attorney preparing the interlocutory judgment must verify the correctness of the description of the property. If the description is not correct, a modification to the interlocutory judgment must be obtained promptly to avoid title complications.

On the interlocutory judgment, see §§8.71-8.72; on appointment of referees, see §8.74; on confirmation proceedings, see §§8.78-8.80; on allocation of costs, see §§8.83-8.86; on partition by division, see §8.75; on partition by sale, see §8.76.

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VIII. PROCEEDINGS AFTER ENTRY OF INTERLOCUTORY JUDGMENT

§8.73 A. Court's Supervision of Referee

After entry of the interlocutory judgment, partition is conducted by the referee under the court's supervision. CCP §§873.210, 873.510. But see *Richmond v Dofflemyer* (1980) 105 CA3d 745, 164 CR 727 (partial division by court). In addition to the statutory proceeding to confirm the referee's report of division or sale (CCP §§873.290, 873.720), hearings must be held on numerous other matters before final judgment is entered. The court is responsible for supervising the partition and the referee. See CCP §§872.120-872.130, 873.010, 873.110; 13 Cal L Rev'n Comm'n Reports 415 (1976).

Contracts the referee makes with third persons such as surveyors, engineers, attorneys, and real estate brokers must be authorized or approved by the court. CCP §873.110. The court also must pass on the claims of third persons (CCP §873.110) and fix the fees and allow the expenses of the referee (CCP §873.010(b)(3)). A third person who furnishes services in the partition action has a lien on the sale proceeds for partition costs (CCP §874.120), and enforcement of the lien can be obtained even before final judgment (CCP §874.130). The manner in which these matters are presented to the court and their sequence are left to the court and the parties. The court's postinterlocutory orders should be reviewed by the parties' attorneys for appealability and res judicata effect.

WARNING: Allowing the referee to act as the selling broker can create multiple problems. See *Sullivan v Dorsa* (2005) 128 CA4th 947, 27 CR3d 547. A referee who agrees to act as the listing or selling agent in a partition sale for a commission would be wise to keep track of time and expenses in the event that the commission is denied.

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§8.74 B. Proceedings Before the Referee

The court appoints one referee to divide or sell the property unless the parties agree to the appointment of three. CCP §873.030. When property is to be both divided and sold, the court may appoint a separate referee for each function or a single referee for both. CCP §873.020.

The referee is required to divide and/or sell the property, as directed in the interlocutory judgment or other order, and to submit a written report to the court. CCP §§873.210-873.280, 873.510-873.690. The referee may enter into contracts with third persons with the court's approval or authorization (CCP §§873.110-873.160), may petition the court from time to time for instructions (CCP §873.070), and may generally perform any acts necessary to exercise the authority conferred by the statute or court order (CCP §873.060).

When a sale is ordered, the court may request the referee to recommend whether it be at public auction or private sale. CCP §873.520. In closing a sale that has been confirmed, the referee may make, subject to court approval, adjustments with the purchaser, based on after-discovered defects. CCP §873.780. The referee is also authorized to make recommendations on new roads and streets and on closure of existing roads. CCP §873.080. Referees' reports are advisory, and the court may make its own findings and rulings in partitions by division. *Machado v Machado* (1944) 66 CA2d 401, 152 P2d 457; see CCP §§873.290, 873.610.

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§8.75 1. Partition by Division

When partition by division is ordered, the referee divides the property and allots to the parties the several portions according to their relative quality and quantity. CCP §873.210. In dividing the property, the general principles to be followed are as follows:

- Property on which one party has made improvements shall be allotted to that party, to the extent that other parties are not prejudiced; the value of improvements is excluded. CCP §873.220. The property should be divided, to the extent practicable, without material injury to other parties' rights, to allow a party any portions that embrace improvements made by that property. CCP §873.220; *Richmond v Dofflemyer* (1980) 105 CA3d 745, 765, 164 CR 727. On monetary credit for such improvements in a partition by sale, see §8.86.
- Subject to limited exceptions, the referee may recommend payment of compensation, known as "owelty," to equalize the division. CCP §§873.250(a), 873.280(b)(2). See *Randell v Randell* (1935) 4 C2d 575, 50 P2d 806.
- If the property consists of more than one distinct lot or parcel, the property is divided by the lots and parcels to the extent that the division can be made without material injury. CCP §873.240.
- Appurtenant water rights and easements are to be apportioned. CC §807; *Parker v Swett* (1922) 188 C 474, 205 P 1065.
- Outstanding encumbrances, liens, and contracts on particular parts of the property must be considered. See CCP §873.210; *Rich v Smith* (1915) 26 CA 775, 148 P 545. Existing land use and environmental laws, ordinances, and regulations must be considered. See CCP §873.080.

When the referee decides to recommend partition by drawing new internal boundaries, the proposed division should first be submitted to the court, by petition for instructions (CCP §873.070) or a preliminary report, before the expense of a physical survey is incurred. The referee's report to the court must specify the manner in which the referee has executed the referee's trust, describe the property divided and the share allotted each party, and specify any recommendation on owelty (compensation owing for unequal property division) and any recommendation on opening or closing public and private roadways and easements. CCP §873.280.

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§8.76 2. Partition by Sale

A referee for sale exercises powers comparable in general to those of a receiver or of a personal representative of a decedent's estate, but the partition statute's procedures must be followed. CCP §873.510.

All or part of the property can be sold at either public auction or private sale, whichever is more beneficial to the parties. CCP §§873.520-873.530. To decide which is more beneficial, the court may refer the matter to the referee and take into account the referee's report. CCP §873.520. In consummating a confirmed sale, the referee (subject to court approval) may make adjustments with the buyer based on any after-discovered defects. CCP §873.780. The disposition of proceeds of sale must comply with CCP §§873.810-873.850. The referee for sale is required by CCP §873.510 to sell the property in the manner of and following the procedures in CCP §§873.510-873.850. The required contents of the referee's report to the court are specified in CCP §873.710.

In one case, a trial court's decision to order a partition by sale without requiring a minimum bid in advance of sale was upheld because the price at which the property ultimately sold was close to the most favorable minimum bid that could have been set, and thus no prejudice resulted. *Hummel v First Nat'l Bank* (1987) 191 CA3d 489, 493, 236 CR 449.

On noticed motion, a buyer, the referee, or any party may move for an order from the court confirming or setting aside the sale. See CCP §§873.720-873.740. See form of order in §8.87.

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§8.77 3. Partition by Appraisal

A referee appointed for partition by appraisal is required to appraise the property and the interests in it and to report the valuations and other findings in writing to the court. CCP §873.940. In addition to setting forth the bases for the valuations, the report normally contains findings on the state of title to the property, on the interests proposed to be acquired, and on other matters relevant to the transfer of interests. The matters on which findings will be made depend on the particulars of the parties' court-approved agreement (CCP §§873.920-873.930) and on the conditions in the court's order to transfer interests (CCP §873.960).

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C. Confirmation of Referee's Report

§8.78 1. Partition by Division

The referee's report is reviewed by the court on a party's noticed motion. CCP §873.290(a). A party objecting to the report should serve and file written exceptions. For discussion of motion practice, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004). At the hearing, the court and counsel usually examine the referee about the recommended division. Independent evidence may be offered in support of or opposition to the report.

The court may confirm or modify the report or set it aside and request a new report from the same referee or a newly appointed referee. CCP §873.290. If the court confirms the report or a modified report, a judgment of partition is entered. Division of the property is effective, and title vests in accordance with the division when the partition judgment is entered. CCP §873.290(c).

Although there is no express provision in the partition statute for a statement of decision, the parties are entitled to one under rules generally applicable to civil actions (see §8.21). CCP §872.030. The statement of decision must explain the factual and legal basis for the trial court's decision on each principal controverted issue. See CCP §632; Cal Rules of Ct 3.1590.

PRACTICE TIP: If the parties do not need a statement of decision after the confirmation hearing on the referee's report, the safer course is to obtain an express stipulation from all appearing parties waiving their right to one. If any party wants a statement of decision, the statement issued before the interlocutory judgment (see §§8.69-8.70) may be used as the basis for an amended statement of decision. In that manner, all matters that are properly the subject of the statement of decision are included at such time in the case as they are needed, and the final result is a single, comprehensive statement of decision.

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§8.79 2. Partition by Sale

Usually, all sales made by the referee require the court's confirmation before title passes. CCP §§873.600-873.610. In a confirmation proceeding, the sale is reviewed by the court on noticed motion of a party, the buyer, or the referee. CCP §873.720. At the hearing, the court examines the referee's sales report and witnesses on the report. CCP §873.730. The court has discretion to approve the sale or set it aside and order a new sale, under stated criteria. See CCP §873.730(c). While a motion to confirm is pending, the court does not have the power to impose new terms on the sale and the owners do not have the right to veto a sale by imposing new terms. But the owner's belief that "the property can and should be sold on substantially more advantageous terms than those offered for confirmation, may and should be weighed by the court in deciding whether to confirm a sale." *Sullivan v Dorsa* (2005) 128 CA4th 947, 962, 27 CR3d 547.

Sitting as a court of equity, the judge can accept increased offers on a "net overbid" basis. CCP §873.740. The initial overbid must be 10 percent of the first $10,000, and 5 percent of the amount exceeding $10,000. If a party to the action who is not represented by an agent makes an overbid and a nonparty also makes an overbid, on agreement of the parties, or on order of the court, made before sale, such bids are to be judged on a "net" basis, excluding the agent's commission. Otherwise, competing overbids are to be judged on a "gross" basis, *i.e.,* without regard to the agent's commission. See CCP §873.740. Compare *Sting v Beckham* (1951) 105 CA2d 503, 233 P2d 591, with *Parker v Owen* (1950) 96 CA2d 78, 214 P2d 417 (involving overbids under former CCP §784, without agent's commission being in issue).

Under CCP §873.220, a cotenant is entitled to credit for improvements to real property made by the cotenant or that party's predecessor in interest, to the extent the credit can be given without material injury to other parties' rights. Although the statute specifically refers to partition by division, the cotenant's right to a credit is the same regardless of whether the property is sold or divided under CCP §872.820. The plaintiff is entitled to credit for any increase in value of the property caused by improvements made by his or her predecessor in interest. If, however, the plaintiff continues to occupy the property under a lease in which the plaintiff, as tenant, agrees to assume all costs of repairs and improvements, the court will deny any credit for improvements made during the plaintiff's tenancy. *Wallace v Daley* (1990) 220 CA3d 1028, 1039, 270 CR 85.

On preparing a statement of decision after the court's hearing on whether to confirm the referee's sale report, see Practice Tip in §8.78. For an order confirming the sale, see §8.87.

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§8.80 3. Partition by Appraisal

The referee's report is reviewed by the court on a noticed motion of a party or the referee. CCP §873.950. At the hearing, the court must examine the report and witnesses and make certain findings and rulings, including the existence of any facts that would make the transfer inequitable. CCP §§873.950-873.960. The referee is given no express duties after confirmation, which takes the form of a conditional order for transfer of interest. CCP §873.960.

On preparing a statement of decision after the court hearing on whether to confirm the referee's appraisal, see Practice Tip in §8.78.

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D. Orders After Confirmation of Referee's Report

§8.81 1. Interim and Final Accounts of Referee

The referee should be directed to file interim and final accounts with the court. See CCP §873.010(b)(5). In the final account, if all matters have been completed and the referee is not named in a security taken on sale as a trustee or agent for owners, the report may request a discharge. CCP §873.010(b)(5).

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§8.82 2. Orders Concerning Sale Proceeds and Successive Estates

If ownership of a share of sale proceeds is disputed and the share has been ordered deposited in court, a subsequent proceeding is necessary. The proceeding may require filing new pleadings (CCP §873.850) and may involve determination of claimed lien rights on the share (see CCP §873.260). If successive estates such as life tenant-remainder interests are partitioned by sale under the court's discretionary authority (CCP §872.710(c)), it may be necessary to complete the partition process by an order or orders relating to the disposition of sale proceeds. The court's authority to set the proportional value of the estate in possession and of remainder interests, to make protective orders concerning remainder interests, and to place the entire proceeds in a trust that will remain subject to the court's jurisdiction is in CCP §873.840. See *Estate of Giacomelos* (1961) 192 CA2d 244, 13 CR 245.

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3. Costs of Partition

§8.83 a. Compensation and Expenses of Referee and Third Persons

There is no fixed time for filing applications for compensation of the referee and third persons. Depending on the circumstances and the nature of the claim, arrangements for such compensation may be included in or accompany a petition for confirmation of the referee's division or sale, or may precede or follow the petition for confirmation.

With third persons, the contract terms provide the basis for allowance or rejection of the amount claimed. See CCP §§873.110-873.150. In *Melikian v Aquila, Ltd.* (1998) 63 CA4th 1364, 74 CR2d 739, the court of appeal affirmed the trial court's order approving a 5 percent commission to the real estate broker who had represented the purchaser of the property. However, noting that Prob C §10165, enacted in 1990, had changed the former law, the court of appeal reversed the denial of a commission to the broker who had represented the unsuccessful bidder, who had been outbid at the confirmation hearing. Instead, each broker was entitled to half the commission, regardless of who had the listing agreement with the receiver. 63 CA4th at 1371.

The court does not have the authority to award a brokerage commission on a partition sale that is not consummated. *Sullivan v Dorsa* (2005) 128 CA4th 947, 27 CR3d 547, interpreting CCP §873.745.

The referee is entitled to compensation for services and reasonable expenses. See CCP §873.010(b)(3). The court may award the referee compensation even if a pending sale falls through. *Sullivan v Dorsa, supra*. The amount of this compensation is largely within the court's discretion. *Treadwell v Treadwell* (1901) 134 C 158, 66 P 197; *Muller v Martin* (1953) 116 CA2d 431, 253 P2d 686. In *Sullivan,* for example, although the court denied the referee (acting as broker) a commission on a sale that was not confirmed, the court exercised its equitable powers and awarded reasonable compensation to the referee. Similarly, the trial court has the discretionary power to fix the amount of the fees awarded to a receiver, not to be reversed in the absence of abuse of discretion. In *Melikian v Aquila, Ltd., supra,* the trial court did not abuse its discretion in awarding a receiver his requested hourly fees of $125 per hour plus 4 percent of the gross sales price of the property (the latter being the sum of $5,050,000).

PRACTICE TIP: Even though the court may be expected to have first-hand knowledge of the services provided, it is advisable that the referee make a specific showing of time expended, results accomplished, degree of expertise required, and usual charges in the community for comparable work. See Warning in §8.73.

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§8.84 b. Expenses and Attorney Fees for Common Benefit

Permissible costs of partition include compensation and expenses allowed the referee, compensation and expenses allowed third persons for whose services the referee has contracted, expense of the title report made available to the parties, reasonable attorney fees paid or incurred by a party for services for the common benefit, and other expenses incurred for the common benefit. CCP §874.010. Reasonable expenses incurred for the common benefit in other actions affecting title or boundaries, including attorney fees, are also an element of the costs of partition. CCP §874.020.

In ruling on which attorney services are for the common benefit, the court should consider the services of the defendants' attorneys as well as the plaintiffs' attorneys. *Riley v Turpin* (1960) 53 C2d 598, 2 CR 457. The court may compensate an attorney who renders services to the referee. *Sullivan v Dorsa* (2005) 128 CA4th 947, 27 CR3d 547.

An allowance may be made for services connected with controversial issues if such services are for the common benefit. *Riley v Turpin, supra; Randell v Randell* (1935) 4 C2d 575, 50 P2d 806. Services pertaining to issues such as an accounting between the parties are excluded. See *Regalado v Regalado* (1961) 198 CA2d 549, 18 CR 468; *Deacon v Deacon* (1929) 101 CA 195, 281 P 533. Services of an attorney for a lienholder to establish the lien have been held not to be services for the common benefit. *Stutz v Davis* (1981) 122 CA3d 1, 5, 175 CR 701; *Regalado v Regalado, supra; Stewart v Abernathy* (1944) 62 CA2d 429, 144 P2d 844. But services provided by the referee's attorney may be compensable even if they do not serve the common benefit. *Sullivan v Dorsa, supra*.

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§8.85 c. Valuation and Apportionment

The trial judge has broad discretion in ruling on what portion of attorney services and costs are for the common benefit, and the judge may act on the basis of his or her knowledge of earlier steps in the action. CCP §874.010(e); *Muller v Martin* (1953) 116 CA2d 431, 253 P2d 686. The attorney should file and serve a declaration with the request for attorney fees to evidence the reasonable value of the services provided. The attorney's declaration should be made under penalty of perjury and should state the number of hours worked by the attorney, the hourly rate charged by the attorney, and the work tasks the attorney performed. The attorney may wish to attach an exhibit to the declaration showing these items in detail. One court declined to award attorney fees for a portion of one attorney's services, which were found not to have been rendered for the common benefit and to have advocated a position of limited merit. *Forrest v Elam* (1979) 88 CA3d 164, 174, 151 CR 591.

The court may compel the parties to bear the costs of partition in proportion to their interests (CCP §874.040) or order that the share of the costs apportioned to a future interest be paid by other parties to the action or by the presumptive owners of the future interest (CCP §874.050(a)). Noting that neither side had offered evidence on the amount of work done by their respective attorneys, or on its value, one court of appeal assessed two-thirds of the attorney fees and costs to the two-thirds owner of the property and assessed the remaining one-third against the one-third owner, noting that this ration should be applied to the total sales price of the property. *Stutz v Davis* (1981) 122 CA3d 1, 4, 175 CR 701. Such a payment ordered by the court is subject to a right of reimbursement, with interest, secured by a charge on the future interest. CCP §874.050(b).

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§8.86 d. Payment and Liens

The costs of partition as apportioned by the court may be ordered paid in whole or in part before entry of the final judgment. CCP §874.110(a). Any costs that remain unpaid must be included and specified in the judgment (CCP §874.110(b)) and are a lien on the share of the party specified (CCP §874.120(a)). This lien has priority over any other lien except one imposed for the same purpose. CCP §874.120(b).

On application of the holder of such a lien and on a showing of good cause, the court may order the sale of all or a portion of the property before or after judgment for the benefit of all such lien claimants without priority among them. CCP §874.130. A judgment for unpaid costs of partition may be enforced by execution (in the manner provided for enforcement of money judgments generally) against the share of the party specified in the judgment or against other property of the party. CCP §874.140.

PRACTICE TIP: When sale proceeds are sufficient and the issue of payment of partition costs is presented to the court in a timely fashion, the lien provisions ordinarily need not be invoked. When partition is by division or appraisal, however, the lien provisions should be studied carefully by attorneys for the parties and for holders of liens for costs.

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Source: Real Property/California Real Property Remedies and Damages/8 Partition/§8.87 4. Form: Order to Confirm Sale, Finalize Close of Escrow, Approve Fees of Referee and Referee's Attorney, and Discharge Referee

§8.87 4. Form: Order to Confirm Sale, Finalize Close of Escrow, Approve Fees of Referee and Referee's Attorney, and Discharge Referee

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Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Unlimited Civil Case*]_ _

_ _[*Name(s)*]_ _,	**No. _ _ _ _ _ _**
Plaintiff(s)	
vs	**ORDER TO CONFIRM SALE,**
_ _[*Name(s)*]_ _, and Does 1	**FINALIZE CLOSE OF**
through 50, _ _[*and all persons*	**ESCROW, APPROVE FEES OF**
unknown claiming any interest in	**REFEREE AND REFEREE'S**
***the property, inclusive,*]_ _**	**ATTORNEY, AND DISCHARGE**
Defendant(s)	**REFEREE (CCP §873.750)**

1. WHEREAS, on _ _[*date*]_ _, this Court, the Honorable _ _[*name*]_ _ presiding, caused to be issued and filed by the Clerk of the Court its _ _[*order/judgment*]_ _ appointing _ _[*name of referee*]_ _ as referee;

2. WHEREAS, under that _ _[*order/judgment*]_ _, the referee has prepared and caused to be filed with the Court the referee's final report to the Court and motion for confirmation of sale and discharge of referee, and the Court finding good cause,

IT IS HEREBY ORDERED that:

1. Confirmation of sale: The sale of all of the partners' interest in the business known as _ _[*name of business*]_ _ and sale of all of the partners' interest in the real property and improvements located in _ _ _ _ _ County, California, and commonly known as _ _[*address*]_ _ and under the terms and conditions as set forth in the contract for sale and purchase of real property (Exhibit _ _ to referee's final report) is hereby approved and confirmed as being the highest bid received for the property.

2. Close of escrow: The parties shall proceed immediately to sign all documents and do all acts that are necessary to effect the close of the escrow at _ _[*name of title company*]_ _ Title Company, for the sale of the real property and improvements at _ _[*address*]_ _ from the Owner #1 to Owner #2. Under the terms of the contract for sale (Exhibit _ _ to the Referee's Final Report), the Referee is authorized to instruct the escrow officer to do the following:

a. To pay (by means of a check from Owner #2 to Owner #1) the sum of $_ _[*dollar amount*]_ _ as full and final payment to Owner #1 of the fair market value of the ownership interests of Owner #1 in the subject property;

b. To accept that Owner #2 has assumed full and sole responsibility to pay all sums of principal and interest due on the existing loans described in Exhibit _ _;

c. To pay (by means of a check from Owner #2) the sum of $_ _[*dollar amount*]_ _ commission to _ _[*name*]_ _ Real Estate;

d. To pay (by means of a check from Owner #2) the fees owed to the Referee $_ _[*dollar amount*]_ _ owed to Referee, per the referee's final report, Exhibit _ _;

e. To pay (by means of a check from Owner #2) the fees owed to the Referee's attorney _ _[*name*]_ _

($_ _[*dollar amount*]_ _) owed to referee's attorney, per the referee's final report, Exhibit _ _;

f. To accept the payment by Owner #2 of the payment of any and all fees owed to _ _[*name*]_ _ Title Company in an amount to be determined by the escrow company;

g. To direct _ _[*name*]_ _ Title Company to record forthwith the release of lis pendens signed by Owner #1;

h. To direct _ _[*name*]_ _ Title Company to record forthwith and thereafter deliver to Owner #2 the grant deed signed by Owner #1, conveying all right, title, and interest in the subject property of Owner #1 to Owner #2;

i. To direct _ _[*name*]_ _ Title Company to deliver to Owner #2 a bill of sale for all personal property owned by the partnership, consisting of all personal property at _ _[*address*]_ _, except that owned by the existing residential tenants at the property;

j. To do such other ministerial acts as may be necessary to complete the purchase by Owner #2 of all of the right, title, and interest of Owner #1 in the business located at _ _[*address*]_ _, California, named _ _[*name of business*]_ _ and in the real property and improvements commonly known as _ _[*address*]_ _, California.

3. Approval of fees of referee and _ _[*his/her*]_ _ attorney:

a. After reviewing the referee's final report, and finding good cause, the fee application for the referee's attorney is hereby approved, and consent hereby is given to the payment thereof by Owner #2 of the fees owed to the referee ($_ _[*dollar amount*]_ _, per the referee's final report, Exhibit _ _);

b. After reviewing the referee's final report, and finding good cause, the fee application for the referee's attorney is approved, and consent is given to the payment by Owner #2 of the fees owed to the referee's attorney of $_ _[*dollar amount*]_ _, per the referee's final report, Exhibit _ _.

4. Allocation of attorney fees between parties:

[*Add one of the following alternatives*]

[*Alternative 1: Each party to bear respective fees*]

Given that the parties were found by the Court to be equal (50 percent-50 percent) partners in the subject property and that the attorneys for each side presented their case in a manner that primarily benefited only _ _[*his/her*]_ _ particular client, the Court hereby orders that each party shall bear _ _[*his/her*]_ _ respective attorney fees and costs of action.

[*Alternative 2: Owner #1 to pay Owner #2 specified sum*]

Given that this Court finds that the attorney for Owner #2 presented information that was of substantial benefit to the partnership, and not just to Owner #2, this Court hereby orders that Owner #1 pay to Owner #2 the sum of $_ _[*dollar amount*]_ _ as _ _[*his/her*]_ _ share of the compensation for the services of the attorney.

[*Alternative 3: Partnership to pay Owner #2 a specified sum*]

Given that this Court finds that the attorney for Owner #2 presented information that was of substantial benefit to the partnership, and not just to Owner #2, this Court hereby orders that the sum of $_ _[*dollar amount*]_ _ shall be paid to Owner #2 from the partnership's common checking account as partial compensation for the expense incurred by Owner #2 for services of that attorney.

[*Alternative 4: Each party to pay a prorata share*]

Given that this Court has found that Owner #1 had a _ _[*e.g., 40 percent ownership*]_ _ in the subject real property and that Owner #2 had a _ _[*e.g., 60 percent ownership*]_ _, the Court hereby orders that each party shall pay their respective prorata share of the total attorney fees and costs incurred by both sides.

[*Continue*]

5. Release and discharge of referee: After reviewing the referee's final report and finding good cause, all actions and decisions made by the referee are approved and confirmed, and referee _ _[*name*]_ _ is released and discharged of any further obligations or duties for which _ _[*his/her*]_ _ services were retained in this matter.

IT IS SO ORDERED.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

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E. Final Judgment

§8.88 1. Statutory Requirements

The final judgment in a partition action should provide for recovery of statutory costs under CCP §1032, as well as for allocation of unpaid partition costs under CCP §874.040 (see §§8.83-8.86). If the action involved numerous issues, it may be necessary to prorate the statutory costs. CCP §874.040; see CCP §1032.

Counsel should consider necessary or appropriate provisions for the court to reserve jurisdiction when security has been taken on a sale, when protective provisions have been established for owners of future interests or for other unknown owners, or when a trust has been created by court order to protect remainder interests. CCP §§873.840-873.850. Code of Civil Procedure §874.240 provides that a transfer or conveyance under CCP §873.750 (order on confirmation of referee sale), §873.790 (recordation of referee sale transfer), or §873.960 (order confirming partition by appraisal) is binding and conclusive in the same manner as a judgment.

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§8.89 2. Persons Bound

The judgment in a partition action is binding and conclusive on the following:

- All persons known and unknown who were joined as parties to the action and who claim any interest whatsoever in the property (CCP §874.210(a));
- All persons not in being or not ascertainable when judgment is entered who have any remainder interest in the property and who may be entitled to a beneficial interest in the property, as long as the court has made appropriate provision to protect their interests (CCP §874.210(b)); and
- All persons who were not parties to the action and who claim any interest in the property that was not recorded when the lis pendens was filed or, if none was filed, when the judgment was recorded (CCP §874.210(c)).

A judgment in a partition action does not affect a "claim in the property or part thereof" of anyone who was not a party to the action if (CCP §874.225):

- That claim was recorded before the lis pendens (or, if none, before the judgment) was recorded;
- The plaintiff knew of the claim; or
- The claim would have been reasonably apparent from an inspection of the property.

A person is bound by the judgment, however, if he or she succeeds to the claim of a party to the action after the action has begun and has actual or constructive knowledge of the action. CCP §§874.225, 1908(a)(2). Code of Civil Procedure §874.225(b) defines "claim in the property, or part thereof" as the interest of the person (who was not a party to partition action) in the portion of the property or the sales proceeds of the portion allocated to the plaintiff.

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§8.90 F. Appeal

The interlocutory judgment ordering partition is appealable (CCP §904.1(a)(9)); *Riley v Turpin* (1960) 53 C2d 598, 2 CR 457) as is the final judgment (CCP §904.1(a)(1)) and the following types of orders:

- An order confirming or refusing to confirm the partition sale. *Solis v Vallar* (1999) 76 CA4th 710, 711, 90 CR2d 677 (disapproving *Hummel v First Nat'l Bank* (1987) 191 CA3d 489, 493, 236 CR 449). See also *Dunn v Dunn* (1902) 137 C 51, 69 P 847; *Holt v Holt* (1901) 131 C 610, 63 P 912; *Balkins v Norrby* (1944) 64 CA2d 848, 149 P2d 396.
- An order approving the referee's report on liens. *Heller Props., Inc. v Rothschild* (1970) 11 CA3d 705, 90 CR 133.
- An order for writ of assistance to place the buyer in possession. *Gordan v Graham* (1908) 153 C 297, 95 P 145.
- An order awarding a real estate commission on the estate sale of real property. *Simonini v Passalacqua* (1986) 180 CA3d 400, 402, 225 CR 588.

The general trend of the cases appears to be that orders fixing the amount of referee or attorney compensation are appealable even if made during the progress of the case, but orders imposing a charge but not fixing the compensation are not. See *Holt v Holt, supra; Southern Cal. Title Clearing Co. v Laws* (1969) 2 CA3d 586, 83 CR 8. On stay of interlocutory judgment and other proceedings in partition by perfection of an appeal, see California Civil Appellate Practice, chaps 3, 6 (3d ed Cal CEB 1996).

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9

Slander of Title

Cynthia K. Long

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I. INTRODUCTION

§9.1 A. Definition; Scope of Chapter

Slander of title (also called "disparagement of title") is the tort of unprivileged publication of false information disparaging title to real or personal property, which impairs the vendibility of the property and thus causes monetary loss to the owner; it is subject to the test of reasonable foreseeability that such publication might adversely influence the conduct of a buyer or lessee. See *Gudger v Manton* (1943) 21 C2d 537, 134 P2d 217, disapproved on other grounds in *Albertson v Raboff* (1956) 46 C2d 375, 381, 295 P2d 405; *Stalberg v Western Title Ins. Co.* (1994) 27 CA4th 925, 929, 32 CR2d 750. See generally Restatement (Second) of Torts §624 (1977); California Title Insurance Practice, chap 11 (2d ed Cal CEB 1997).

To constitute slander of title, the disparaging publication must dispute the plaintiff's actual right or title to property (*Glass v Gulf Oil Corp.* (1970) 12 CA3d 412, 96 CR 902), not merely downgrade the quality of the property (intentional disparagement of the quality of property that results in monetary injury is the tort of trade libel; see *Erlich v Etner* (1964) 224 CA2d 69, 36 CR 256) or derogate some other aspect of ownership (see *Burkett v Griffith* (1891) 90 C 532, 27 P 527). To be disparaging, a statement need not completely deny the plaintiff's title; it is sufficient that it cloud or cast doubt on the property's ownership (*Ezmirlian v Otto* (1934) 139 CA 486, 34 P2d 774). What makes conduct actionable is not whether a defendant succeeds in casting a legal cloud on the plaintiff's title, but whether the defendant could reasonably foresee that the false publication might influence the conduct of a third person buyer or lessee. *Seeley v Seymour* (1987) 190 CA3d 844, 858, 237 CR 282. See also Title Ins §11.46.

This chapter investigates case law application of the above definition (see §§9.3-9.5) and further elements of the cause of action, including lack of privilege (see §§9.6-9.15), malice (see §9.14), and monetary loss (see §9.16). In addition, the requisites for bringing an action for slander of title are discussed (see §§9.17-9.20), as are defenses (see §§9.21-9.24) and criminal sanctions (see §9.25).

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§9.2 B. Parties and Property Interests Protected

A cause of action for slander of title is not limited to owners in fee but is available to the holders of certain interests in real property, such as:

- The beneficiary of a deed of trust (*Smith v Commonwealth Land Title Ins. Co.* (1986) 177 CA3d 625, 223 CR 339);
- Easement holders (*Glass v Gulf Oil Corp.* (1970) 12 CA3d 412, 96 CR 902 (see §9.16A; see also California Easements and Boundaries: Law and Litigation, chap 10 (Cal CEB 2008));
- The buyer under a recorded contract to convey property (*Southcott v Pioneer Title Co.* (1962) 203 CA2d 673, 21 CR 917); and
- A lessee (*Baker v Kale* (1947) 83 CA2d 89, 189 P2d 57 (lessee's title slandered when landlord refused to acknowledge rights of assignee in possession under lease)).

The plaintiff must be legally entitled to the interest sought to be protected in order to maintain a slander of title action. *Slusher v Buckley* (1959) 174 CA2d 324, 344 P2d 905. Title obtained by adverse possession is insufficient until title is judicially confirmed. *Howard v Schaniel* (1980) 113 CA3d 256, 264, 169 CR 678. See Anno, *Slander of Title: Sufficiency of Plaintiff's Interest in Real Property to Maintain Action*, 86 ALR4th 738, 742 (1991).

Death does not abate a slander of title action; the tort survives both the slanderer and the person whose property interest was slandered. *Smith v Stuthman* (1947) 79 CA2d 708, 181 P2d 123.

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II. ELEMENTS OF SLANDER OF TITLE

§9.3 A. Disparagement

Disparagement consists of words or conduct that could reasonably be foreseen to affect the conduct of a third person as the buyer or lessee of the property in a manner adverse to the plaintiff's interests. See *Gudger v Manton* (1943) 21 C2d 537, 134 P2d 217, disapproved on other grounds in *Albertson v Raboff* (1956) 46 C2d 375, 381, 295 P2d 405. Disparagement may be found if the defendant's actions can be reasonably understood to cast doubt on the existence or extent of the plaintiff's interest in the property. *Hill v Allan* (1968) 259 CA2d 470, 66 CR 676. Disparagement may occur by spoken or written means (*Coley v Hecker* (1928) 206 C 22, 27, 272 P 1045) or by conduct (*Glass v Gulf Oil Corp.* (1970) 12 CA3d 412, 96 CR 902). Disparagement may be either direct (see, *e.g., Baker v Kale* (1947) 83 CA2d 89, 189 P2d 57 (lessor told third party who contracted to buy lessee's business lease that lease was invalid)) or indirect (see, *e.g., Cavin Mem. Corp. v Requa* (1970) 5 CA3d 345, 85 CR 107 (person lacking title gave a deed)).

Disparagement can be illustrated by a wide range of conduct and events, including:

(1) Posting by tax authorities of a notice of seizure and sale purporting to offer full title and right to possession of personal property in which the plaintiff held a perfected security interest (*Chrysler Credit Corp. v Ostly* (1974) 42 CA3d 663, 117 CR 167);

(2) Levying and recordation of a writ of execution on the separate property of a husband based on a judgment against the wife, for whose debt the husband was not liable (*Gudger v Manton, supra*);

(3) Posting of a sign stating that anyone who buys the plaintiff's house "is buying law suit" by a defendant who had obtained a judgment that a five-inch strip of the plaintiff's house encroached on her property (*Phillips v Glazer* (1949) 94 CA2d 673, 674, 211 P2d 37);

(4) Filing of a master plan with the county planning commission, publicly displaying a model and photographs, and making statements at planning commission meetings and on the radio that the plaintiff's private road was available as a major access road to a proposed development on the defendant's adjoining property (*Glass v Gulf Oil Corp., supra*);

(5) Recordation of a declaration of rescission and false accusations of fraud on the buyer (*Contra Costa County Title Co. v Waloff* (1960) 184 CA2d 59, 7 CR 358);

(6) Recordation of an assignment of royalties payable under a mining lease that had been canceled (*Ezmirlian v Otto* (1934) 139 CA 486, 34 P2d 774);

(7) Forging a deed of trust (*Forte v Nolfi* (1972) 25 CA3d 656, 102 CR 455);

(8) Recordation of notices of the location of mining claims on which the plaintiff held a leasehold interest (*Davis v Wood* (1943) 61 CA2d 788, 143 P2d 740);

(9) Sending a letter to prospective buyers asserting the defendant's claim to the property (*Earp v Nobmann* (1981) 122 CA3d 270, 175 CR 767, disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 212, 266 CR 638);

(10) Recordation of an abstract of judgment after an undertaking pending appeal was filed (*Coley v Hecker* (1928) 206 C 22, 272 P 1045);.

(11) Recordation of a "Memorandum of Agreement" by a purported lessee against the property owner's title, even though the memorandum did not create any interest in the property, did not constitute constructive notice of anything, and was without legal effect (*Seeley v Seymour* (1987) 190 CA3d 844, 237 CR 282).

PRACTICE NOTE: The court in *Seeley v Seymour, supra,* held that the county recorder has a nondelegable statutory duty to review all documents for their recordability. Under Govt C §27204 it is a misdemeanor for anyone who receives a form from the recorder stating that the document is unrecordable to later attempt to record the document without a court order. However, Govt C §27203 makes a recorder who neglects or refuses to record a properly recordable instrument liable in damages unless the recorder has reason to believe that the document is unrecordable. The recorder may provide to the person seeking recordation of the document a form stating that the

person has the right to judicial review of the recorder's refusal to record the document. If the court rules that the document is recordable, the recorder must pay the filing fees for the court's review and record the document within a reasonable time.

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§9.4 B. Publication

To state a cause of action for slander of title, the plaintiff must allege and prove that the defendant officially recorded or otherwise communicated the disparaging material to a third person. *Southcott v Pioneer Title Co.* (1962) 203 CA2d 673, 21 CR 917. Publication may occur orally, in writing, or by conduct. See §9.3. The most common instance of publication is recordation of a disparaging document. See, *e.g., Wright v Rogers* (1959) 172 CA2d 349, 342 P2d 447. Another example of publication is an attorney's letter written in behalf of a rival claimant. See *Kalajian v Nash* (1957) 148 CA2d 495, 306 P2d 921. See also *Earp v Nobmann* (1981) 122 CA3d 270, 175 CR 767, disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 212, 266 CR 638. For further examples of how publication may occur, see §9.3.

PRACTICE TIP: To allege publication sufficiently to avoid a demurrer, a plaintiff must allege more than the mere fact that the defendant prepared the document and that escrow closed. *Southcott v Pioneer Title Co.* (1962) 203 CA2d 673, 677, 21 CR 917. See also California Title Insurance Practice §11.118 (2d ed Cal CEB 1997). The plaintiff should allege facts sufficient to show that the defendant communicated the disparaging information to parties outside of the escrow.

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§9.5 C. Falsity

To entitle a plaintiff to recover in a slander of title action, the disparaging words or conduct must be false. *Glass v Gulf Oil Corp.* (1970) 12 CA3d 412, 96 CR 902. Use of conditional language will not enable the defendant to claim that the disparaging statement is true if the statement lacks legal basis. *Gudger v Manton* (1943) 21 C2d 537, 134 P2d 217, disapproved on other grounds in *Albertson v Raboff* (1956) 46 C2d 375, 381, 295 P2d 405 (writ ordering execution on wife's interest, if any, in husband's property was held false despite its conditional language because lien lacked legal foundation).

A good faith belief in the truth of the disparaging statement will not protect the defendant if the statement is actually false. *Contra Costa County Title Co. v Waloff* (1960) 184 CA2d 59, 7 CR 358 (buyer's notice of rescission correctly set forth buyer's contentions, but buyer had no cause to rescind); *West Inv. Co. v Moorhead* (1953) 120 CA2d 837, 262 P2d 322, disapproved on other grounds in *Albertson v Raboff* (1956) 46 C2d 375, 380, 295 P2d 405 (lis pendens correctly stated defendant's claims in lawsuit, but lawsuit itself was maliciously brought. Note that, at the time *Moorhead* was decided, a lis pendens enjoyed only a conditional privilege; see §9.7). See California Title Insurance Practice §11.113 (2d ed Cal CEB 1997).

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§9.6 D. Privileges

Lack of privilege is an essential element of the plaintiff's cause of action for slander of title (*Gudger v Manton* (1943) 21 C2d 537, 134 P2d 217, disapproved on other grounds in *Albertson v Raboff* (1956) 46 C2d 375, 381, 295 P2d 405).

There are two relevant types of privileges—absolute and conditional (*i.e.*, qualified). (On absolute privilege, see §9.7 and California Title Insurance Practice §11.114 (2d ed Cal CEB 1997); on conditional privilege, see §9.13 and Title Ins §11.115.) The difference between absolute and conditional privilege lies in the effect of the motive and purpose of the disparager. The malice or malevolent purpose of the disparager is of no consequence if the occasion is absolutely privileged, but if the privilege is conditional only, proof of actual malice or ill will is required to make the defendant liable. In other words, malice is irrelevant if the communication occurs on an occasion absolutely privileged, because the immunity is absolute. But the insulation of an occasion only conditionally privileged is overcome by proof of malice. *Lundquist v Reusser* (1994) 7 C4th 1193, 31 CR2d 776. If the complaint itself discloses the existence of a qualified privilege, it must go on to allege malice in order to state a cause of action for slander of title. *Smith v Commonwealth Land Title Ins. Co.* (1986) 177 CA3d 625, 223 CR 339.

EXAMPLE: In *Smith,* the complaint alleged that the title company slandered the plaintiff's title by issuing a title insurance policy that failed to disclose the existence of approximately 32 notes and deeds of trust. The court ruled that the issuance of the policy was a privileged communication. Because the complaint itself showed that the communication was privileged, the burden of pleading and proof was shifted to the plaintiff. Without an allegation of malice to overcome the privilege, the plaintiff could not state a cause of action. Moreover, merely issuing the policy did not constitute "publication," nor did it represent that the title was in any particular condition. It merely offered to indemnify against loss if the title were different from what it reported.

The same privileges apply to defamation as apply to slander of title. Thus, cases dealing with defamation privileges generally may be cited for slander of title questions. *Block v Sacramento Clinical Labs.* (1982) 131 CA3d 386, 182 CR 438.

PRACTICE TIP: Although arguably privilege is a defense and the plaintiff need not plead lack of privilege in every case, as a practical matter the plaintiff should always plead lack of privilege and be prepared to prove it. The defendant bears the initial burden of demonstrating that the allegedly defamatory communication was made on a privileged occasion. If the privilege is qualified rather than absolute, the plaintiff then bears the burden of proving that the defendant made the statement with malice. *Lundquist v Reusser* (1994) 7 C4th 1193, 1208, 31 CR2d 776.

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1. Absolute Privilege

§9.7 a. Statutory Basis

Some communications are absolutely privileged by statute and thus cannot provide the basis for a slander of title action, even if made maliciously, as long as they are made:

(a) In the proper discharge of an official duty (CC §47(a));

(b) In legislative, judicial, and administrative proceedings and any other official proceeding authorized by law (CC §47(b));

(c) By a fair and true report in, or a communication to, a public journal of legislative, judicial, or other official proceedings (CC §47(d)); or

(d) In a fair and true report of a public meeting, or the publication of the matter complained of was made for the public benefit (CC §47(e)).

The CC §47(b) privilege is the one that arises most often in slander of title actions.

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Source: Real Property/California Real Property Remedies and Damages/9 Slander of Title/§9.8 b. Scope of Privilege Under CC §47(b)

§9.8 b. Scope of Privilege Under CC §47(b)

Under CC §47(b) (former CC §47(2)), the privilege arises at the point when litigation is no longer a mere possibility, but has instead ripened into a proposed proceeding that is actually contemplated in good faith and under serious consideration as a means of obtaining access to the courts in order to resolve the dispute. *Knoell v Petrovich* (1999) 76 CA4th 164, 90 CR2d 162.

The requirement in §47(b) that statements be made in judicial proceedings does not limit the privilege to court files and evidence. *Albertson v Raboff* (1956) 46 C2d 375, 381, 295 P2d 405. Thus, publications made in the course of a judicial proceeding can include communications made before suit was filed. See *Action Apartment Ass'n v City of Santa Monica* (2007) 41 C4th 1232, 63 CR3d 398 (eviction notice); *Rubin v Green* (1993) 4 C4th 1187, 1194, 17 CR2d 828 (notice of intention to commence suit against mobilehome park manager); *Wilton v Mountain Wood Homeowners Ass'n* (1993) 18 CA4th 565, 569, 22 CR2d 471 (homeowner association assessment lien); *Lerette v Dean Witter Org.* (1976) 60 CA3d 573, 577, 131 CR 592 (prelitigation demand letter). Whether communication regarding prospective litigation is subject to the litigation privilege is a question of fact. *Action Apartment Ass'n v City of Santa Monica* (2007) 41 C4th 1232, 1250, 63 CR3d 398. The person sending such communication is protected by the privilege only if suit is contemplated in good faith and under serious consideration. 41 C4th at 1251.

The §47(b) privilege applies to any communication or communicative conduct, whether or not it amounts to a publication, and to all torts except malicious prosecution. *Silberg v Anderson* (1990) 50 C3d 205, 266 CR 638. The distinction between communicative or noncommunicative conduct hinges on the gravamen of the action. *Rusheen v Cohen* (2006) 37 C4th 1048, 1058, 39 CR3d 516. See *Gallanis-Politis v Medina* (2007) 152 CA4th 600, 61 CR3d 701 (investigation made in relation to discovery requests is communicative conduct). In describing the "usual formulation" of the privilege, the supreme court in *Silberg* stated (50 C3d at 212):

> [T]he privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.

Elaborating on this formulation, the court added (50 C3d at 219):

> The requirement that the communication be in furtherance of the objects of the litigation is, in essence, simply part of the requirement that the communication be connected with, or have some logical relation to, the action, *i.e.,* that it not be extraneous to the action. A good example of an application of the principle is found in the cases holding that a statement made in a judicial proceeding is not privileged unless it has some reasonable relevancy to the subject matter of the action.… The "furtherance" motive was never intended as a test of a participant's motives, morals, ethics or intent.

A communication is authorized by law if it is included in a category of publications permitted by law; the specific publication need not be permitted. *Jacob B. v County of Shasta* (2007) 40 C4th 948, 959, 56 CR3d 477 (applying privilege to constitutionally based privacy cause of action).

The *Silberg* court expressly rejected an exception to the privilege for communications not made to promote the "interest of justice" and disapproved decisions, beginning with *Bradley v Hartford Acc. & Indem. Co.* (1973) 30 CA3d 818, 106 CR 718, announcing or employing the "interest of justice" rule, to the extent they are inconsistent with *Silberg*. 50 C3d at 212. (Decisions that followed *Bradley* include *McKnight v Faber* (1986) 185 CA3d 639, 230 CR 57; *Fuhrman v California Satellite Sys.* (1986) 179 CA3d 408, 225 CR 140; *Barbary Coast Furniture Co. v Sjolie* (1985) 167 CA3d 319, 213 CR 168; *Earp v Nobmann* (1981) 122 CA3d 270, 175 CR 767; and *Kinnamon v Staitman & Snyder* (1977) 66 CA3d 893, 136 CR 321.)

A court of appeal later applied the rule in *Silberg* in concluding that communications "made in connection with litigation do not necessarily fall outside the [§47(b)] privilege simply because they are, or are alleged to be, fraudulent, perjurious, unethical, or even illegal." *Kashian v Harriman* (2002) 98 CA4th 892, 920, 120 CR2d 576. If there is a good faith intention to bring a suit, even malicious publications are protected to allow litigants the utmost freedom of access to the courts. *Action Apartment Ass'n v City of Santa Monica* (2007) 41 C4th 1232, 1244, 63 CR3d 398 (municipal

ordinance that authorized civil and criminal penalties against landlord who files eviction action without reasonable factual or legal basis is preempted by litigation privilege).

NOTE: Except for malicious prosecution actions, CC §47(b) prevents communications only in the course of litigation from being used as the *basis* of liability in tort. It neither creates an evidentiary privilege nor prevents the evidentiary use of such communications. *Oren Royal Oaks Venture v Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 C3d 1157, 232 CR 567. When allegations of misconduct properly put an individual's intent at issue in a civil action, statements made during the course of another judicial proceeding may be admissible to show whether the individual acted with the requisite intent. 42 C3d at 1168. Thus, communications that are not actionable by themselves can still serve as valuable evidence.

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§9.9 (1) Lis Pendens

A lis pendens recorded under CCP §§405-405.61 is a republication of the pleadings in the proceeding and is absolutely privileged if it shows that the underlying action was filed with a court of competent jurisdiction and if the action affects the title or right of possession of real property. CC §47(b)(4). See *Palmer v Zaklama* (2003) 109 CA4th 1367, 1 CR3d 116 (rejecting application of absolute privilege because recording party did not establish lis pendens was supported by real property claim); *Wilton v Mountain Wood Homeowners Ass'n* (1993) 18 CA4th 565, 22 CR2d 471. (On the risks and advantages of filing a lis pendens, see §13.5.)

Note, however, that a letter to prospective buyers asserting the defendant's claim to the property after a lis pendens has been expunged in a pending action is only conditionally privileged (see §9.13) and is thus actionable if sent with malice. *Earp v Nobmann* (1981) 122 CA3d 270, 175 CR 767, disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 212, 266 CR 638. In *Cabanas v Gloodt Assocs.* (ED Cal 1996) 942 F Supp 1295, aff'd without published opinion in 141 F3d 1174, the court held that comments an appraiser made in an appraisal report about the manager of the appraised property were privileged even though they were reported to the bank that provided financing to the resort owners. The court distinguished *Earp v Nobmann, supra,* in which a real estate broker's negligent conduct led immediately to a dispute that prevented the seller from transferring the subject property to anyone. For comprehensive discussion of lis pendens procedures, see chap 13.

PRACTICE TIP: Although privilege is usually an affirmative defense, if an absolute privilege is apparent on the face of the complaint, a demurrer may lie. *Smith v Commonwealth Land Title Ins. Co.* (1986) 177 CA3d 625, 630, 223 CR 339.

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§9.10 (2) Arbitration Testimony

The supreme court has held the litigation privilege of CC §47(b) applicable to statements made in the course of a private, contractual arbitration proceeding. *Moore v Conliffe* (1994) 7 C4th 634, 29 CR2d 152. The court reasoned that, because arbitration is designed to serve a function analogous to that of the court system, the need for an absolute privilege to foster complete and truthful testimony is as vital in an arbitration setting as in court. The court noted that, because witnesses can be compelled to testify in arbitration proceedings, it would be unfair not to offer them protection from civil liability for their testimony. The court also stressed the need to ensure finality of the arbitrators' decisions.

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§9.11 (3) Assessment Liens

The publication of homeowners' association assessment liens was held to be absolutely privileged under CC §47(b). Such publication is a prerequisite to a foreclosure action and is therefore made in a "judicial proceeding" even though it is made outside the courtroom. See *Wilton v Mountain Wood Homeowners Ass'n* (1993) 18 CA4th 565, 22 CR2d 471.

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§9.12 c. Conduct Not Protected by Privilege

Republication of information, testimony, allegations, or communications to nonparticipants in a suit are generally not privileged under CC §47(b) (former CC §47(2)) and are thus actionable unless privileged on another basis. *Silberg v Anderson* (1990) 50 C3d 205, 219, 266 CR 638.

Noncommunicative conduct, such as wiretapping or eavesdropping, is not privileged under §47(b) and is therefore actionable. *Kimmell v Goland* (1990) 51 C3d 202, 271 CR 191. In *Kimmel*, the supreme court emphasized the distinction between noncommunicative conduct (*i.e.,* recording private telephone conversations), which is not privileged under §47(b), and communication (*i.e.,* the broadcast and publication in a court proceeding of the content of private conversations), which is privileged, and ruled that the plaintiffs could bring a civil action under Pen C §632 based on the defendant's eavesdropping. 51 C3 at 212. The distinction between communicative or noncommunicative conduct hinges on the gravamen of the action. *Rusheen v Cohen* (2006) 37 C4th 1048, 1058, 39 CR3d 516. See *Gallanis-Politis v Medina* (2007) 152 CA4th 600, 61 CR3d 701 (investigation made in relation to discovery requests is communicative conduct).

Kimmel highlights the care that counsel must take in drafting a complaint. To avoid the bar of §47(b), allegations must show that the plaintiff's injury arose from the defendant's wrongful noncommunicative conduct. The defendant's communications, however, can serve as evidence of the defendant's wrongdoing. The supreme court also held that a lawyer's wrongful conduct in the course of litigation or in anticipation of litigation is not immune under §47(b). 51 C3d at 213. See, however, *Gootee v Lightner* (1990) 224 CA3d 587, 274 CR 697 (§47(b) privilege protects witness's preparatory conduct leading to witness's testimony).

Any doubt about whether a communication is privileged should be resolved in favor of finding that it is privileged. *Costa v Superior Court* (1984) 157 CA3d 673, 204 CR 1. In construing CC §47(b), *Costa* held that a letter that related the events surrounding a judicial proceeding was absolutely privileged. The court reaffirmed that the presence or absence of malice was irrelevant to the determination of whether the communication was privileged.

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2. Conditional Privilege

§9.13 a. Statutory Basis

The conditional or qualified privilege is derived from the common law common interest privilege and is codified in CC §47(c) (former §47(3)). The privilege protects a communication made without malice to an interested person by (1) one who is also interested, (2) one who stands in such a relation to the person interested as to provide a reasonable ground for supposing an innocent motive for the communication, or (3) one who is requested by the interested person to reveal the information. The interest protected may be private or pecuniary, the relationship between the parties must be close (*e.g.,* a family, business, or organizational interest), and the request for information must have been in the course of that relationship. See *Brown v Kelly Broadcasting Co.* (1989) 48 C3d 711, 727, 257 CR 708. Compare *Garretson v Post* (2007) 156 CA4th 1508, 68 CR3d 230 (applied absolute privilege), with *Kachlon v Markowitz* (2008) 168 CA4th 316, 85 CR3d 532 (applied qualified privilege in action for slander of title against foreclosing trustee).

California courts have long held that a rival claimant to property has a conditional privilege to disparage another's interest in the property by a good faith assertion of an inconsistent legally protected interest. *Gudger v Manton* (1943) 21 C2d 537, 134 P2d 217, disapproved on other grounds in *Albertson v Raboff* (1956) 46 C2d 375, 381, 295 P2d 405; *Hill v Allan* (1968) 259 CA2d 470, 66 CR 676. Malice or lack of good faith defeats the conditional privilege. *Gudger v Manton, supra; Baker v Kale* (1947) 83 CA2d 89, 95, 189 P2d 57; *Davis v Wood* (1943) 61 CA2d 788, 794, 143 P2d 740.

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§9.14 b. Malice Required

The plaintiff has the burden of proving malice when the qualified privilege to disparage another's interest in property is raised (see §9.13). *Spencer v Harmon Enters.* (1965) 234 CA2d 614, 44 CR 683.

PRACTICE TIP: Because the defendant is virtually certain to assert the conditional privilege, malice becomes an element of the plaintiff's case for all practical purposes. In addition, the plaintiff will probably want to allege malice as a basis for punitive damages, although the degree of proof required to recover punitive damages for malice is greater. See CC §3294(a); *Gudger v Manton* (1943) 21 C2d 537, 134 P2d 217, disapproved on other grounds in *Albertson v Raboff* (1956) 46 C2d 375, 381, 295 P2d 405. See also §12.87.

The malice required to overcome the conditional privilege may be either actual (ill will toward the plaintiff) or implied in law (lack of good faith in asserting a claim). *Spencer v Harmon Enters., supra* (defendants' engagement in fraudulent conspiracy to acquire land held to be malice); *Davis v Wood* (1943) 61 CA2d 788, 143 P2d 740 (demurrer overcome by allegation that defendants recorded mining claims with knowledge of their falsity). Malice may not be inferred merely from the fact that the defendant communicated a disparaging statement. CC §48; *Hill v Allan* (1968) 259 CA2d 470, 66 CR 676.

NOTE: Implied malice may also be shown when a defendant, knowing that the contents of a document are false, records that document in the public record. *Contra Costa County Title Co. v Waloff* (1960) 184 CA2d 59, 66, 7 CR 358.

If a complaint on its face shows the communication to be subject to a qualified privilege, such as CC §47(c) (former CC §47(3)), the plaintiff has the burden of pleading and proving additional facts, such as the presence of malice, that make the privilege unavailable as a defense. *Smith v Commonwealth Land Title Ins. Co.* (1986) 177 CA3d 625, 223 CR 339, citing 4 Witkin, California Procedure, *Pleading* §412 (5th ed 2008). Because the plaintiff's complaint in *Smith* alleged that a lender had requested the publication, a title report, from the defendant title company, it indicated that the publication in controversy was subject to a qualified privilege.

On the evidentiary use of coercive, threatening, or defamatory statements made in the course of a judicial proceeding, see *Oren Royal Oaks Venture v Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 C3d 1157, 232 CR 567.

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§9.15 3. Alternative Remedies for Publication of Privileged Communications

Although the privilege of CC §47(b) effectively bars tort claims, including claims for slander of title, in many situations there are other possible remedies for the injured plaintiff besides a suit for damages. The court in *Silberg v Anderson* (1990) 50 C3d 205, 266 CR 638, cited several examples: criminal prosecution for perjury or subornation of perjury, criminal prosecution under Bus & P C §6128, and State Bar disciplinary proceedings for violating Bus & P C §6068(d).

Despite the fact that the absolute privilege bars a slander of title action when a lis pendens has been recorded against real property and the underlying action properly alleges a claim against that property (see §9.9), the owner is not without recourse. The expungement procedures of former CCP §§409.1-409.2 (now CCP §§405.30-405.39; see chap 13) may be used to remove the lis pendens as a cloud on the title, and the owner may have a cause of action for malicious prosecution rather than for slander of title. *Albertson v Raboff* (1956) 46 C2d 375, 295 P2d 405. In *Albertson,* the court noted that the plaintiff had pleaded all the elements of malicious prosecution: termination of the defendant's lawsuit in the plaintiff's favor, lack of probable cause (defendant's knowledge of the falsity of his claim), and malice. See also *Palmer v Zaklama* (2003) 109 CA4th 1367, 1 CR3d 116.

Filing and proceeding to enforce a mechanics' lien is another example of absolute privilege within the meaning of former CC §47(2) (now CC §47(b)). *Frank Pisano & Assocs. v Taggart* (1972) 29 CA3d 1, 105 CR 414. Again, the owner may have recourse. Under CC §3154, the owner may petition for a decree releasing the property from the lien on expiration of the appropriate time limits. The prevailing party is entitled to attorney fees not to exceed $2000, and the relief granted is not exclusive. See California Mechanics' Liens and Related Construction Remedies, chaps 3, 8 (3d ed Cal CEB 1998).

The plaintiff may also have a cause of action for negligence. In *Seeley v Seymour* (1987) 190 CA3d 844, 237 CR 282, Seeley and Seymour had been negotiating a lease but they never reached agreement on its terms. Seymour then prepared a "Memorandum of Agreement" signed only by himself, which purported to set forth the essential terms of a long-term lease on the property. As an accommodation to Seymour, Safeco Title Company delivered the document, among others, to the county recorder, who recorded the document. The jury's general verdict in favor of Seeley and against Seymour and Safeco was unclear about whether the verdict was based on slander of title or negligence. The appellate court found that verdict was supportable on either theory.

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§9.16 E. Recoverable Damages

Unless a disparaging statement causes damage, it is not actionable (*Burkett v Griffith* (1891) 90 C 532, 537, 27 P 527); facts showing that damages were suffered must be alleged (*Neville v Higbie* (1933) 130 CA 669, 20 P2d 348). For a property owner to obtain damages for slander of title, the owner must prove that the alleged loss was proximately caused by the slander. See, *e.g., Frank Pisano & Assocs. v Taggart* (1972) 29 CA3d 1, 25, 105 CR 414; California Title Insurance Practice §11.119 (2d ed Cal CEB 1997).

The plaintiff need not show that any particular buyer rejected the property as a result of the slander. It is enough that the plaintiff was deprived of a market in which, but for the disparagement, the property might "with reasonable certainty" have found a buyer. *Glass v Gulf Oil Corp.* (1970) 12 CA3d 412, 424, 96 CR 902. Although a property owner is required to advise a prospective buyer of adverse claims, doing so does not preclude the right to bring an action against one who has slandered title. *Gudger v Manton* (1943) 21 C2d 537, 134 P2d 217, disapproved on other grounds in *Albertson v Raboff* (1956) 46 C2d 375, 381, 295 P2d 405; *Kalajian v Nash* (1957) 148 CA2d 495, 306 P2d 921.

Compensatory damages are awarded as in any other tort claim under CC §3333, *i.e.,* damages are restricted to the loss directly and immediately resulting from the impairment of the vendibility of the property caused by the publication and to reasonable litigation expenses required to remove the doubt cast on the property by the disparaging publication. *Frank Pisano & Assocs. v Taggart, supra*.

Compensatory damages specifically include:

- The difference between the market price of the property interest before and after the disparagement (*i.e.,* depreciation). *Gudger v Manton, supra; Contra Costa County Title Co. v Waloff* (1960) 184 CA2d 59, 7 CR 358.
- The actual cost of removing a slanderous claim, such as expert fees, court costs, and attorney fees incurred in removing the cloud on title. *Contra Costa County Title Co. v Waloff, supra; Ezmirlian v Otto* (1934) 139 CA 486, 34 P2d 774.
- The real estate broker's commission on a resale and the seller's rental expenses incurred in order to give the buyer possession. *Contra Costa County Title Co. v Waloff, supra*.
- The owner's increased cost of construction after a delay caused by the defendant's slander of title. *Appel v Burman* (1984) 159 CA3d 1209, 206 CR 259.
- General damages for the time spent and inconvenience suffered by the plaintiff in removing the doubt cast on the title to the property. *Seeley v Seymour* (1987) 190 CA3d 844, 237 CR 282.

Damages are proved as in any other case, and expert witnesses may be used to assist the trier of fact. *Glass v Gulf Oil Corp.* (1970) 12 CA3d 412, 425, 96 CR 902.

Attorney fees for prosecuting the slander of title action itself, however, are not recoverable. *Contra Costa County Title Co. v Waloff, supra*. Likewise, emotional distress damages and damages for the loss of use of money that would have been realized from the sale of the property are not recoverable. *Seeley v Seymour, supra*.

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§9.16A F. Injunctive Relief

Injunctive relief may be available when a defendant publishes incorrect information about a plaintiff's property that causes damage. It was successfully obtained in *Glass v Gulf Oil Corp.* (1970) 12 CA3d 412, 96 CR 902, when project developers assumed that a roadway over several parcels was a public road based on their investigation and review of public records, insisted their conclusions were accurate during public meetings despite contradictory evidence, and used the road extensively during predevelopment assessment and planning. The owners and easement holders protested that the road was a private easement only for those whose properties abutted on it, and the court granted an injunction against the developers and awarded damages. On litigating easement rights, see California Easements and Boundaries: Law and Litigation, chaps 1, 8, 10 (Cal CEB 2008).

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III. BRINGING THE ACTION

§9.17 A. Joinder of Other Causes of Action

Facts supporting a claim for slander of title can generate other causes of action that the plaintiff may join in a single lawsuit. A cause of action for slander of title may be joined with causes of action:

- to quiet title (*Baker v Kale* (1947) 83 CA2d 89, 189 P2d 57);
- for money had and received (*Ezmirlian v Otto* (1934) 139 CA 486, 34 P2d 774);
- for declaratory relief (*Kendis v Cohn* (1928) 90 CA 41, 265 P 844);
- for injunctive relief (*Phillips v Glazer* (1949) 94 CA2d 673, 211 P2d 37); and
- for fraud (*Spencer v Harmon Enters.* (1965) 234 CA2d 614, 44 CR 683).

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Source: Real Property/California Real Property Remedies and Damages/9 Slander of Title/§9.18 B. Checklist: Facts and Documents

§9.18 B. Checklist: Facts and Documents

▶ To download **Word** version, right click and choose *Save Target As*

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1. Facts to ascertain:

a. Concerning plaintiff

___ (1) Personal data (name, address, etc.)

___ (2) Plaintiff's capacity

(3) Nature of plaintiff's title (see §9.2)

___ (a) Whether plaintiff actually has title (title company search; see California Title Insurance Practice, chaps 3-4 (2d ed Cal CEB 1997)

___ (b) Whether any adverse possessors may have title

___ (4) Property description

___ (5) How the alleged slander was published (see §9.4)

(6) How the statement affected the property's title and vendibility

___ (a) Whether a prospective sale or lease ever reached the stage in which formal documents were prepared

___ (b) Whether a loan commitment was ever obtained

___ (c) Whether the transaction would have been consummated but for the slander of title (interview of escrow officers)

(7) How plaintiff was damaged, *e.g.,* by

___ (a) loss of prospective buyer or lessee

___ (b) depression in market value of property

___ (c) costs of litigation, including attorney fees, to remove the cloud on title

b. Concerning defendant

___ (1) Personal data (name, address, etc.)

___ (2) Defendant's capacity

___ (3) Nature of defendant's title to or claim of interest in the property

___ (4) All other persons who may claim an interest in the property

___ (5) Any claim of privilege

___ (6) Defendant's purpose in making the statement

___ (7) Any deeds or other documents defendant possesses or relied on

___ (8) Solvency

2. Documents to obtain:

___ a. Copies of documents by which the disparaging statement was published, *e.g.,* deed, abstract of judgment, other recorded claim, or other recorded notice

___ b. Any unrecorded evidence of publication, *e.g.,* newspaper article, billboard, private letter, or telephone call

___ c. Title report showing nature of plaintiff's interest in the property

___ d. Copies of letters or documents relating to defendant's claim to the property

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§9.19 C. Jurisdiction and Venue

Slander of title sounds in tort and is thus an action at law. See §9.1. If the damages claimed, exclusive of interest, do not exceed $25,000, the action is treated as a limited civil case. CCP §86(a)(1). If the damages exceed that amount, the action is deemed an unlimited civil case. See CCP §§86, 88. It is prudent to consider the court's discretion granted in CCP §1033(a) on the award of costs when evaluating whether to file a "limited" or "unlimited" civil case. If the action could have been brought as a limited civil case and was brought as an unlimited civil case, the court is not required to award costs to the prevailing party.

Although it is a tort action, a suit to remedy slander of title is, for venue purposes, a local action for injury to real property and must therefore be brought and tried in the county where the slandered property, or part of it, is located. CCP §392(a)(1). See *Coley v Hecker* (1928) 206 C 22, 272 P 1045; California Title Insurance Practice §11.120 (2d ed Cal CEB 1997). A claim for punitive damages does not change the character of the action from one within CCP §392. *Coley v Hecker, supra*. When the slander cause of action is joined with a transitory action, however, the question of venue must be decided on the basis of the entire complaint. *Perkins v Winder* (1932) 123 CA 467, 11 P2d 394 (plaintiffs' joinder of slander of title action with two related damages actions made case triable under CCP §395, *i.e.,* in county of defendants' residence). But see *Wick v Mattison* (1962) 207 CA2d 608, 24 CR 677 (slander of title joined with malicious prosecution held action for injury to real property and properly filed in county where property is located).

On venue considerations generally, see California Civil Procedure Before Trial, chap 8 (4th ed Cal CEB 2004).

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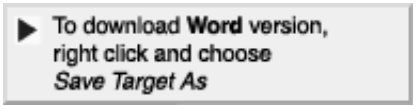
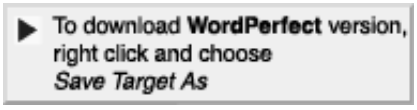
Source: Real Property/California Real Property Remedies and Damages/9 Slander of Title/§9.20 D. Form: Complaint for Damages for Slander of Title

§9.20 D. Form: Complaint for Damages for Slander of Title





_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**COMPLAINT FOR DAMAGES**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	**FOR SLANDER OF TITLE**
_____	)	

Plaintiff alleges:

1. _ _[*State plaintiff's capacity and residence*]_ _**.**

2. _ _[*State defendant's identity, capacity, and residence*]_ _**.**

3. _ _[*Fictitious name allegations, if needed*]_ _**.**

[4.] On or about _ _[*date*]_ _**, plaintiff was** _ _[*e.g., the owner in fee*]_ _ **of real property located in** _ _ _ _ _ _ **County, California, commonly known as** _ _[*street address or other common designation*]_ _ **and more particularly described as** _ _[*legal description*]_ _**.**

[5.] On or about _ _[*date*]_ _**, defendant willfully, maliciously, and without privilege or justification published a false statement concerning plaintiff's** _ _[*title/rights*]_ _ **to the property described in Paragraph 4 by** _ _[*set forth the facts showing why the statement was false; specify whether publication was made by oral communication, written communication, recordation of a document, or other conduct; and indicate to whom the communications were made or that publication gave notice to the world by recordation in a particular county*]_ _**.**

[6.] Publication of the false statement by described in Paragraph 5 impaired the vendibility of the property, to plaintiff's damage in a sum that _ _[*will/will not*]_ _ **exceed $25,000.** _ _[*Publication of the false statement described in Paragraph 5 resulted in increased construction costs of plaintiff, to plaintiff's damage in the sum of $*_ _[*dollar amount*]_ _.]_ _

[7.] The publication described in Paragraph 5 was motivated by defendant's _ _[*oppression/fraud/malice*]_ _ **in that** _ _[*summarize particular facts supporting claim of defendant's oppression, fraud, or malice*]_ _**, and plaintiff is therefore entitled to punitive damages in a sum according to proof.**

WHEREFORE, plaintiff prays for judgment as follows:

1. Compensatory damages in the sum of $_ _[*dollar amount*]_ _**;**

2. Punitive damages in a sum according to proof;

3. Consequential damages defendant caused plaintiff by the time spent and inconvenience suffered by plaintiff in removing the cloud on plaintiff's title in the sum of $_ _[*dollar amount*]_ _; and

4. Costs of suit and other relief that the Court considers proper.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Verification, see Comment*]

Copies: Original (filed with court clerk); copies for service (one for each defendant who is to be served); office copies.

Comment: If the allegation in Paragraph 5 is that the publication was effected by recordation of a false document, set forth the facts showing why it was false (*e.g.,* that it was a forgery, that it was never delivered by the plaintiff, or that it was obtained from the plaintiff by duress). See California Civil Procedure Before Trial, chap 15 (4th ed Cal CEB 2004) on caption and introductory clause and on whether and how to verify a complaint. On pleading requirements in limited civil cases, see Comment to form complaint in §1.45.

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IV. DEFENSES

§9.21 A. Statute of Limitations

A claim for slander of title to real property must be brought within 3 years. CCP §338(g); *Southcott v Pioneer Title Co.* (1962) 203 CA2d 673, 21 CR 917. Note that, unlike other subsections of CCP §338, §338(g) does not specify whether the time starts running from the date of the alleged wrong or the date of its discovery. In *Arthur v Davis* (1981) 126 CA3d 684, 178 CR 920, the court held that the limitation period runs from discovery of the slander despite the lack of any provision to that effect in §338(g).

The 3-year limitation may be equitably tolled during the pendency of a related quiet title action. See *Stalberg v Western Title Ins. Co.* (1994) 27 CA4th 925, 32 CR2d 750; California Title Insurance Practice §11.116 (2d ed Cal CEB 1997). In *Stalberg,* plaintiffs in a quiet title action pursued neighbors who asserted a fictitious easement. During the litigation, plaintiffs discovered that the defendant title insurance company had drafted and recorded the fictitious easements. Within a year after conclusion of the quiet title action, but more than 3 years after plaintiffs first learned of the title company's action, they brought a suit for slander of title against the title insurer. The court held that plaintiffs had acted reasonably and in good faith to pursue the cause of action, which, if successful, would lessen the extent of their injuries and damages, and that the 3-year statute of limitations was equitably tolled.

Section 338 now includes any action challenging the validity of a special tax levied by a local agency on a per-parcel basis within the 3-year limitation. CCP §338(m).

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§9.22 B. Truth

The truth of a disparaging statement is an absolute defense to a slander of title action because falsity is an essential element of the cause of action. *Kirsch v Barnes* (ND Cal 1957) 153 F Supp 260, 264, aff'd (9th Cir 1959) 263 F2d 692; *Gudger v Manton* (1943) 21 C2d 537, 134 P2d 217, disapproved on other grounds in *Albertson v Raboff* (1956) 46 C2d 375, 381, 295 P2d 405.

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§9.23 C. Privilege; Lack of Malice

Although lack of privilege is probably most accurately characterized as an element of the plaintiff's case, the defendant will almost always want to plead the existence of any available privilege. An absolute privilege (see §9.7) entitles the defendant to judgment or dismissal regardless of the motive behind the disparaging statement. A conditional privilege, however, constitutes a defense only if the statement was made without actual or implied malice (see §9.13).

The plaintiff will find it virtually impossible to prove malice and thus defeat the conditional privilege if the defendant can demonstrate that he or she made full disclosure of the facts to an attorney and acted on the attorney's advice. *Cavin Mem. Corp. v Requa* (1970) 5 CA3d 345, 85 CR 107; *Alhambra Consol. Mines, Inc. v Alhambra Shumway Mines, Inc.* (1966) 239 CA2d 590, 49 CR 38. See California Title Insurance Practice §11.117 (2d ed Cal CEB 1997).

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§9.24 D. Equitable Defenses

Although slander of title is a tort action at law (see §9.1), in *Glass v Gulf Oil Corp.* (1970) 12 CA3d 412, 96 CR 902, the court considered the equitable defenses of laches and unclean hands, but it ruled in the plaintiff's favor on both.

For a discussion of the application of the doctrine of unclean hands to a tort action, see *Blain v Doctor's Co.* (1990) 222 CA3d 1048, 272 CR 250 (perjury committed by plaintiff on advice of counsel found to bar plaintiff's recovery for later legal malpractice action). See *CrossTalk Productions, Inc. v Jacobson* (1998) 65 CA4th 631, 76 CR2d 615, for a discussion of the unclean hands doctrine and analysis and application of the court's holding in *Blain.*

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§9.25 V. CRIMINAL SANCTIONS

A tortfeasor can be subject to criminal sanctions for slander of title. Under Pen C §115 anyone who knowingly procures or offers any false or forged instruments for recordation is guilty of a felony. There is no requirement that intent to defraud be proved. *People v Geibel* (1949) 93 CA2d 147, 208 P2d 743.

Each instrument procured or offered constitutes a separate violation. Pen C §115. Section 115 recommends that sentence not be suspended and an offender not be placed on probation if the offender (1) was previously convicted under §115 or (2) is convicted of more than one violation in a single proceeding with intent to defraud and the total financial loss attributable to the violations exceeds $100,000.

Penal Code §115.5 has been added to provide additional penalties for filing false or forged documents relating to single-family residences of four or fewer dwelling units.

It is a misdemeanor for a person who knows that an earlier unrecorded conveyance exists to attempt to cloud title by executing or procuring a deed to the property. Pen C §531a. A violation of §531a may be found even if recordation of the second deed does not void the first conveyance. See *People v Scott* (1913) 22 CA 54, 133 P 496 (decided under former Pen C §533).

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10

Ejectment

Robert C. Thorn

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§10.1 I. INTRODUCTION

Ejectment is a legal action to recover possession of real property wrongfully withheld from the plaintiff. *Caperton v Schmidt* (1864) 26 C 479; *McNulty v Copp* (1954) 125 CA2d 697, 271 P2d 90. The gravamen of an ejectment action is frustration of the plaintiff's right to possession, not title (*B & B Sulphur Co. v Kelley* (1943) 61 CA2d 3, 141 P2d 908; *Barcroft v Livacich* (1939) 35 CA2d 710, 96 P2d 951), but determining title may be necessary in an ejectment action if title is the basis for a party's claim of the right to possession (*Whittaker v Otto* (1961) 188 CA2d 619, 10 CR 689; *Craviotto v All Persons* (1928) 93 CA 346, 269 P 760). Thus, a plaintiff who acquires possession under the judgment in an ejectment action does not acquire any better or different title and goes into possession under whatever title he or she previously held. *Long v Neville* (1865) 29 C 131.

This chapter discusses the nature of the remedy in §§10.2-10.7, the requisites of an ejectment action in §§10.8-10.11, initiating an ejectment action in §§10.12-10.22, responsive pleadings in §§10.23-10.34, and trial in §§10.35-10.46.

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II. NATURE OF THE REMEDY

§10.2 A. Statutory and Common Law Basis

A person entitled to real property (under either a perfected claim or a claim that ought to be perfected) may maintain an action to recover the property in the manner prescribed by the Code of Civil Procedure, either by a judgment for its possession, or by a judgment requiring the other party to perfect title and deliver possession. CC §3375. The procedures prescribed in the Code of Civil Procedure are actions for forcible entry and detainer (CCP §§1159-1160, 1174) and for unlawful detainer (CCP §§1161-1179a).

In addition to these statutory causes of action, case law has long recognized a nonstatutory action for the recovery of possession of real property and damages for its withholding. See *Payne & Dewey v Treadwell* (1860) 16 C 220; *Caperton v Schmidt* (1864) 26 C 479. Although neither strictly analogous to the common law remedy of ejectment nor subject to common law rules, this nonstatutory action is commonly known as an action in ejectment. *Caperton v Schmidt, supra; McNulty v Copp* (1954) 125 CA2d 697, 271 P2d 90.

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§10.3 B. When Appropriate

The action of ejectment has been largely superseded by the statutory quiet title action (see chap 7) and by an unlawful detainer action (see §10.4) when a landlord seeks to evict a tenant or when a buyer at a foreclosure sale sues to oust a mortgagor or tenant in possession. Although ejectment is still recognized as an appropriate remedy to obtain possession from a tenant after a foreclosure sale terminates a subordinate lease by operation of law (*Dover Mobile Estates v Fiber Form Prods.* (1990) 220 CA3d 1494, 1499, 270 CR 183), an unlawful detainer action is usually preferred because it is the quicker remedy (see §10.4).

Ejectment, however, retains its usefulness in a few situations. For example, it may be the only action available to litigate the right to possession when neither party asserts a right to possession based on title, and there has been no forcible entry and detainer or unlawful detainer as defined in CCP §§1159-1179a. When title is in issue, a quiet title action may be brought, and a judgment quieting title may include an order for possession of the property. See chap 7. Frequently, causes of action for ejectment and to quiet title are joined in the same action. See §10.6.

In addition, ejectment has been held to be the proper remedy for recovery of real property in the following situations:

- Two parties claim under leases from the same or different lessors (*Boles v Weifenback* (1860) 15 C 144; *Dondero v O'Hara* (1906) 3 CA 633, 86 P 985);
- The property is held by an adverse possessor (*McLeran v McNamara* (1882) 60 C 610);
- The property is held by a mere trespasser (*Smpardos v Piombo Constr. Co.* (1952) 111 CA2d 415, 244 P2d 435); or
- The vendee has breached an executory contract for sale of real property (*Paap v Von Helmholt* (1960) 185 CA2d 823, 8 CR 568; *Maloney v White* (1960) 182 CA2d 787, 6 CR 540).

The plaintiff may recover damages for wrongful withholding of the property in addition to recovery of possession. See §10.19.

PRACTICE TIP: Ejectment is seldom litigated as an exclusive cause of action and is better served in conjunction with other appropriate theories for relief. Proper drafting of conveyancing documents will further limit the need for such general civil litigation by using interim occupancy agreements characterized as licenses or tenancies. By avoiding title transfer and making contemporaneous recitations that the occupier acquires no equitable interest until full compliance with the sales agreement (*i.e.,* by lease with option to purchase and application of a portion of the rent to the down payment), landowners may take advantage of the speedier remedy of unlawful detainer. See, *e.g.,* California Real Property Sales Transactions chaps 4, 6 (4th ed Cal CEB 2007).

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C. Distinguished From Other Remedies

§10.4 1. Unlawful Detainer

Unlawful detainer is a summary statutory remedy (CCP §§1161-1179a) by which a landlord may remove a tenant from possession of real property. It may also be invoked in non-landlord-tenant relationships to remove an occupant when the premises have been sold on foreclosure, on execution, under various similar circumstances (CCP §1161a), or to remove an employee who continues in possession after the employment relationship has ended (CCP §1161(1)). A complaint in unlawful detainer that fails to state a cause of action may be construed as one in ejectment, and relief may be granted on this basis if the complaint alleges the essential elements of a cause of action for ejectment. *Chinese Hosp. Found. Fund v Patterson* (1969) 1 CA3d 627, 81 CR 795; *Baugh v Consumers Assocs.* (1966) 241 CA2d 672, 50 CR 822; *Samuels v Singer* (1934) 1 CA2d 545, 36 P2d 1098. On foreclosures, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 2-7 (4th ed Cal CEB 2009). On prosecuting and defending unlawful detainer actions, see California Landlord-Tenant Practice, chaps 9-13 (2d ed Cal CEB 1997); California Eviction Defense Manual (2d ed Cal CEB 1993).

Ejectment and unlawful detainer have the same object—removal of an occupant from real property—but differ procedurally in several particulars. The main advantage of unlawful detainer for the plaintiff is its summary nature: (1) The defendant has only 5 days to answer (CCP §1167), (2) the action has precedence over other civil actions (CCP §1179a), and (3) there is no right to cross-complain while possession is at issue. Equitable and legal defenses, however, may be raised (*Knowles v Robinson* (1963) 60 C2d 620, 36 CR 33; see Eviction Defense Man, chap 14), and a stay pending appeal is discretionary with the trial court (CCP §1176). Because of its summary nature, an unlawful detainer action requires that the plaintiff comply strictly with the procedural requirements and demonstrate that the case comes within the authorizing statutes. *Feder v Wreden Packing & Provision Co.* (1928) 89 CA 665, 265 P 386.

In ejectment, however, (1) no termination notice is required as a preliminary step (compare with CCP §1161 and CC §1946, applicable to unlawful detainer proceedings); (2) the summons is in the ordinary form, giving the usual time to answer (compare with CCP §1167); (3) the defendant may cross-complain (CCP §428.10); (4) the issue of title may be raised and tried; (5) the class of defendants is not limited; (6) the provision that limits "statutory" damages to $600 if the plaintiff prevails and shows that the defendant acted with malice (CCP §1174) does not apply; and (7) other special provisions governing judgment and its enforcement in unlawful detainer (CCP §1174) do not apply. Further, the plaintiff in an unlawful detainer action might encounter more difficulties in obtaining an award of rent and damages (see Eviction Defense Man §§15.6-15.15) than in recovering damages in an ejectment action. See §10.19.

NOTE: A court of appeal has suggested that an action defective in proving unlawful detainer may be considered an ejectment action, even after the case has been submitted and the court announces its tentative decision. See *Canal-Randolph Anaheim, Inc. v Wilkoski* (1978) 78 CA3d 477, 493, 144 CR 474. However, a tenant might object to this as taking advantage of a summary remedy that requires strict compliance with all prerequisites to unlawful detainer relief. See *Feder v Wreden Packing & Provision Co., supra; Horton-Howard v Payton* (1919) 44 CA 108, 186 P 167.

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§10.5 2. Forcible Entry or Detainer

One who has been forcibly turned out of real property or had real property withheld by force may maintain an action for forcible entry or detainer to recover the property and damages. CCP §§1159-1160, 1174. Besides the forcible entry or detainer, the plaintiff need show only actual peaceable possession, or the right to it, at the time of the forcible entry. CCP §1172. The gravamen of forcible detainer is the withholding of the premises by force; for ejectment, the withholding need only be wrongful. *Hodgkins v Jordan* (1866) 29 C 577. As in unlawful detainer actions, statutory damages of up to $600 may be recovered for malicious forcible entry and detainer under CCP §1174(b). There are no statutory provisions for exemplary damages in ejectment actions.

On forcible entry or detainer, see California Landlord-Tenant Practice §§8.138-8.146 (2d ed Cal CEB 1997).

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§10.6 3. Quiet Title

Under CCP §760.020, an action to quiet title may be brought by any person against another who claims an estate or interest in real or personal property adverse to the plaintiff, for the purpose of determining the adverse claim. The quiet title statutes (CCP §§760.010-765.060) provide a procedure for obtaining an in rem judgment binding persons known and unknown having adverse claims to the property. CCP §764.030. On quiet title actions, see chap 7.

The principal difference between quiet title and ejectment is that a mere possessory right without title is a sufficient basis for an ejectment action, but will not support a quiet title action. See §10.10. In a quiet title action, the plaintiff must prevail on the strength of his or her own title, not the weakness of the defendant's claims of title. In an ejectment action, the plaintiff's possession of the property confers title sufficient against all who are unable to establish a superior claim and gives rise to a presumption of ownership that must prevail in the absence of any other evidence of title. *Kunza v Gaskell* (1979) 91 CA3d 201, 154 CR 101; see Evid C §§637-638.

The relief available in a quiet title action to a plaintiff who is not in possession generally includes possession of the property. *South Shore Land Co. v Petersen* (1964) 226 CA2d 725, 38 CR 392; *Keele v Clouser* (1928) 92 CA 526, 268 P 682. Thus, ejectment is probably embraced within most quiet title actions in which the plaintiff seeks possession. Similarly, causes of action for ejectment and to quiet title can clearly be joined in the same action. See *Paap v Von Helmholt* (1960) 185 CA2d 823, 8 CR 568. See also CCP §427.10 (providing for liberal joinder of causes of action). When a plaintiff seeks both possession and to clear title, the safest course may be to plead both causes of action to apprise the court and opposing counsel of the full scope of relief sought.

PRACTICE TIP: When filing an action to quiet title, a "Notice of Pending Action" (*i.e.,* lis pendens) must be filed in the county recorder's office in each county where any real property described in the complaint is located. See CCP §761.010. On lis pendens, see chap 13.

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§10.7 4. Injunctive Relief; Damages

When the defendant has not actually taken possession of the property but threatens to do so, the proper remedy is an injunction, not ejectment. *Montgomery v Santa Ana Westminster Ry.* (1894) 104 C 186, 37 P 786. If the defendant's possession has already occurred, the appropriate remedy is damages or an injunction to abate the nuisance. *Montgomery v Santa Ana Westminster Ry., supra*. See also discussion of remedies available for nuisance and trespass in chap 11. On injunctive relief generally, see California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB 2004).

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III. REQUISITES OF EJECTMENT ACTION

§10.8 A. Present Right to Possession

In an ejectment action, the plaintiff must show that he or she has a present right to possession of the property in dispute and that the defendant has ousted the plaintiff and withheld possession. *Montgomery v Santa Ana Westminster Ry.* (1894) 104 C 186, 37 P 786. To establish the right to possession, the plaintiff must prove either title to the property that is superior to the defendant's (see §10.9) or prior actual possession of the property within the last 5 years (see §10.10).

If the plaintiff has only a reversionary interest in the property but not a present right to possession, ejectment will not lie. See *Dieterich Int'l Truck Sales v J. S. & J. Servs.* (1992) 3 CA4th 1601, 1610, 5 CR2d 388 (out-of-possession landlord cannot use ejectment against trespassing neighbor, but tenant in possession can eject neighbor or sue for trespass).

Because the plaintiff must show that the right to possession existed when the action was initiated (*Sauer v Meyer* (1890) 87 C 34, 25 P 153; *Porter v Woodward* (1881) 57 C 535), a deed to the plaintiff executed after the action was filed may be excluded at trial (*Smith v Billett* (1860) 15 C 23). A party to whom the plaintiff transfers the property while the action is pending, however, may be substituted into the action and continue either in the plaintiff's name (*Moss v Shear* (1866) 30 C 467) or in his or her own name (*Northern Ry. v Jordan* (1890) 87 C 23, 25 P 273).

As in unlawful detainer matters, the plaintiff must also show a right of possession at the time of trial. *Meeks v Kirby* (1873) 47 C 168; *Kile v Tubbs* (1867) 32 C 332. Thus, a deed to the defendant executed after the action was commenced is admissible to defeat recovery (*Roper v McFadden* (1874) 48 C 346; *Moore v Tice* (1863) 22 Cal 513), although the defendant must then file a supplemental answer alleging that fact (*Roper v McFadden, supra; Thompson v McKay* (1871) 41 C 221). Even if the plaintiff's interest in the property terminates while the action is pending, the action may still continue for damages for the withholding of the property. See CCP §740.

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§10.9 1. Superior Title

When neither the plaintiff nor the plaintiff's grantors have ever been in possession of the property, the plaintiff must rely on strict title and cannot prevail if a link in the chain of title cannot be proved. *Waechter v Bullard* (1923) 61 CA 683, 215 P 696; *Welch v Sullivan* (1857) 8 C 511. If an essential element of title is lacking, the defendant's mere occupancy of the property is sufficient to defeat the plaintiff's claim. *Waechter v Bullard, supra*. The plaintiff must be able to show a chain of title from the government or a grantor in possession (*Waechter v Bullard, supra*) or from a common source claimed by each party (*Frink v Roe* (1886) 70 C 296, 11 P 820; *Whitman v Steiger* (1873) 46 C 256).

To prevail when title has been placed at issue, the plaintiff must establish legal, and not merely equitable, title. *Frink v Roe, supra; Brown v Winter & Sherry* (1859) 14 C 31. As in a quiet title action (see chap 7), the plaintiff's claim must stand on the strength of the plaintiff's title (*De Witt v Sides* (1927) 81 CA 643, 254 P 668), not the weakness of the defendant's (*Redemeyer v Cunningham* (1923) 61 CA 423, 215 P 83).

Courts have held the following indicia of title to be sufficient to support an ejectment action:

- Confirmation of a Spanish or Mexican land grant (*Carpentier v Montgomery* (1872) 80 US 480, 20 L Ed 698, 13 Wall 480);
- A quitclaim deed from one who could have maintained the action (*Rego v Van Pelt* (1884) 65 C 254, 3 P 867; *Lawrence v Ballou* (1869) 37 C 518);
- A certificate of purchase from the state (*Laugenour v Hennagin* (1881) 59 C 625; *Toland v Mandell* (1869) 38 C 30; see also Evid C §1604);
- A certificate from a government land office of full payment for preempted land (*Sacre v Chalupnik* (1922) 188 C 386, 205 P 449; *Thompson v Basler* (1906) 148 C 646, 84 P 161); and
- A patent from the state (*O'Connor v Frasher* (1880) 56 C 499).

A party who has held property by adverse possession for the period prescribed by CCP §321 acquires title to the property and may recover possession if ousted by the former owner. *Langford v Poppe* (1880) 56 C 73.

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§10.10 2. Prior Actual Possession

When neither party relies on paper title, prior actual possession by the plaintiff is sufficient to support an ejectment action. *Whittaker v Otto* (1961) 188 CA2d 619, 10 CR 689. See also *Page v O'Brien* (1869) 36 C 559. Prior possession coupled with color of title will prevail unless better title is shown by the other party. *Spotts v Hanley* (1890) 85 C 155, 24 P 738; *McCourtney v Fortune* (1881) 57 C 617. The prior possession need not be personal; possession by a tenant (*Easton v O'Reilly* (1883) 63 C 305) or an employee will suffice (*Dodge v Yates* (1888) 76 C 251, 18 P 323).

To maintain an ejectment action, the prior possession must have been actual and not merely an assertion of title and the exercise of casual acts of ownership. *Foot v Murphy* (1887) 72 C 104, 13 P 163; *Polack v McGrath* (1867) 32 C 15; *Coryell v Cain* (1860) 16 C 567. The requisite actual possession turns on the facts of the case, but it is usually evidenced by indications of control and occupation such as enclosure, cultivation, and appropriate use. *Lantz v Cole* (1916) 172 C 245, 156 P 45; *Hanson v Stinehoff* (1903) 139 C 169, 72 P 913; *Coryell v Cain, supra*.

PRACTICE TIP: When there has been no joinder of an action in quiet title, on conclusion of litigation legal title to the property will remain unchanged. See *Whittaker v Otto* (1961) 188 CA2d 619, 10 CR 689. See also §10.6.

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§10.11 B. Ouster and Withholding of Possession

The gravamen of an ejectment action is the wrongful withholding of possession of property. *Johnson v Vance* (1890) 86 C 128, 24 P 863; *Ayres v Bensley* (1867) 32 C 620. The plaintiff must plead and prove ouster by the defendant and continued withholding of the property. *McCarthy v Brown* (1896) 113 C 15, 45 P 14; *Caperton v Schmidt* (1864) 26 C 479; *Payne & Dewey v Treadwell* (1860) 16 C 220. The ouster may have been voluntary, such as the defendant's placement in the premises as a purchaser under an installment sales contract, or may have been by interim occupancy with no reservation for rents, pending a sale of the premises. *Paap v Von Helmholt* (1960) 185 CA2d 823, 8 CR 568.

In determining whether an ouster occurred, the key issue is whether the defendant's continued possession is wrongful; the means used to oust the plaintiff are irrelevant. The defendant's wrongful entry may have been effected by force or fraud (*Depuy v Williams* (1864) 26 C 309), or it may consist of holding over by a tenant either in contravention of the terms of tenancy (*Haight v Green* (1861) 19 C 113) or after expiration of a lease (*McCarthy v Brown, supra; McKissick v Ashby* (1893) 98 C 422, 33 P 729). (Note, a tenant's continued occupancy after expiration of a fixed-term lease is a tenancy at sufferance, and the landlord may evict the tenant by using either the ejectment remedy or an unlawful detainer action under CCP §1161(1), without prior notice. See §10.4.) The ouster need not have been committed by the defendant personally; ejectment will lie if it was committed by an agent or employee. *Polack v Mansfield* (1872) 44 C 36.

If the defendant is rightfully in possession, however, the plaintiff is not entitled to ejectment, even if the ouster was accomplished through fraud. *Depuy v Williams, supra*.

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IV. INITIATING EJECTMENT ACTION

§10.12 A. Jurisdiction and Venue

Jurisdiction as a "limited civil case" in the superior court is proper if the demand, exclusive of interest, or the value of property in controversy is under $25,000. CCP §86(a). Because most real estate disputes involve property worth more than $25,000, as a practical matter an ejectment action would be most likely filed in the superior court as an unlimited civil case.

Subject to the court's power to transfer actions, an action to recover real property or to determine a right or an interest in real property should be filed in the county in which the property, or any part of it, is located. CCP §392(a)(1). See *Fresno Nat'l Bank v Superior Court* (1890) 83 C 491, 24 P 157; *Hancock v Burton* (1882) 61 C 70. On subject matter jurisdiction and venue generally, see California Civil Procedure Before Trial, chaps 6, 8 (4th ed Cal CEB 2004).

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B. Parties

§10.13 1. Plaintiffs

The range of real parties in interest who may bring an ejectment action is broad and includes:

- A trustee against a third party to recover the subject of trust (*Anson v Townsend* (1887) 73 C 415, 15 P 49);
- An owner in fee of a servient tenement against any unlawful possessor (*City & County of San Francisco v Grote* (1898) 120 C 59, 52 P 127);
- A tenant in common against third persons (*Cassin v Nicholson* (1908) 154 C 497, 98 P 190);
- A partner against intruders (*Smith v Smith* (1889) 80 C 323, 22 P 186);
- A seller of real property under an executory contract against a defaulting buyer (*Gervaise v Brookins* (1909) 156 C 103, 103 P 329; *Smpardos v Piombo Constr. Co.* (1952) 111 CA2d 415, 244 P2d 435);
- An executor or administrator of an estate (*Salmon v Wilson* (1871) 41 C 595);
- A landlord entitled to possession against a tenant (*Roffinella v Roffinella* (1923) 191 C 753, 218 P 397);
- A tenant entitled to possession against the owner (*Camarillo v Fenlon* (1874) 49 C 202); and
- Opposing tenants claiming under separate leases with the same or different landlords (*Boles v Weifenback* (1860) 15 C 144).

One spouse cannot bring an ejectment action to recover property that is the other spouse's separate estate. *Swain v Duane* (1874) 48 C 358.

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§10.14 2. Defendants

An ejectment action must be brought against the party who, at the time the action is filed, is the occupant of the premises. *Frazier v Lynch* (1893) 97 C 370, 32 P 319; *Sheldon v Mull* (1885) 67 C 299, 7 P 710. If several parties are in possession, they should all be joined. *Fogarty v Sparks* (1863) 22 C 142. A defendant need not be in actual personal occupancy but may be in constructive possession (*Tubbs v Ghirardelli* (1873) 45 C 231) or in possession through agents (*Polack v Mansfield* (1872) 44 C 36).

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§10.15 C. Separate Parcels

A plaintiff may include several and distinct parcels of land in the same complaint if they are covered by the same title and if the action affects all parties. *Smith v Smith* (1889) 80 C 323, 22 P 186; *Boles v Cohen* (1860) 15 C 150. The causes of action, however, must be separately stated. *Boles v Cohen, supra*. The plaintiff is not bound to bring separate actions against several trespassers on a single, separate, and distinct tenement or parcel of land. *Greer v Mezes* (1861) 65 US 268, 16 L Ed 661, 24 How 268. A party claiming a parcel of land that he or she does not completely occupy may not recover the entire parcel unless he or she claims to hold title to the complete parcel. He or she may recover the right to possess only the property occupied. *Walsh v Hill* (1869) 38 C 481. See also Practice Tip on lis pendens in §10.6.

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§10.16 D. Joinder of Causes of Action

Under the liberal joinder rule of CCP §427.10, a plaintiff who alleges a cause of action against one or more defendants may join in the complaint any other causes of action he or she has against any of the defendants. Even before the enactment of §427.10, courts were inclined to be lenient in permitting joinder of other causes of action with a complaint for ejectment. See, *e.g., Seabury v Costello* (1962) 209 CA2d 640, 26 CR 248 (ejectment and quiet title); *Paap v Von Helmholt* (1960) 185 CA2d 823, 8 CR 568 (ejectment, damages, and quiet title).

PRACTICE TIP: In the absence of the joinder of a cause of action in declaratory relief, quiet title, reformation of deed, or a related remedy, an ejectment action standing alone will not change the manner in which title is held. It merely establishes the right to possession, see §10.41.

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E. The Complaint

1. Essential Allegations

§10.17 a. Plaintiff's Right to Possession

To state a cause of action for ejectment, the complaint must allege either the plaintiff's ownership of the property (see §10.9) or the plaintiff's prior possession within the last 5 years (see §10.10) and ouster by the defendant and the defendant's continuing possession (see §10.11). It is not necessary (although it is probably advisable) to allege the probative facts establishing ownership or prior possession and ouster. Thus, a simple allegation of the plaintiff's ownership of the property is sufficient. *Jones v Peck* (1923) 63 CA 397, 218 P 1030; *Payne & Dewey v Treadwell* (1860) 16 C 220. When the plaintiff was previously in possession, it is sufficient to allege prior possession, ouster, and continued withholding by the defendant. *Glacier Mtn. Silver Mining Co. v Willis* (1888) 127 US 471, 32 L Ed 172, 8 S Ct 1214; *Caperton v Schmidt* (1864) 26 C 479. Deviations from typical form allegations are not fatal if the essential facts are pleaded. *Chinese Hosp. Found. Fund v Patterson* (1969) 1 CA3d 627, 632, 81 CR 795.

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§10.18 b. Description of Property

The property the plaintiff seeks to recover must be described with sufficient certainty to enable an executing officer to identify it. CCP §455. This requirement generally means that the complaint should include both a common designation, such as a street address, and the legal description of the property. A legal description should suffice, however, and a mistaken or uncertain description is not fatal. *Heilbron v Heinlen* (1887) 72 C 371, 14 P 22; *Carpentier v Grant* (1862) 21 C 140. See also *Hildreth v White* (1885) 66 C 549, 6 P 454; *Merryman v Kirby* (1910) 13 CA 344, 109 P 635. But see Practice Tip in §10.42.

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Source: Real Property/California Real Property Remedies and Damages/10 Ejectment/§10.19 c. Damages

§10.19 c. Damages

The complaint should allege damages from withholding of possession, and the value of any rents and profits. See *Nathan v Dierssen* (1913) 164 C 607, 130 P 12; *Locke v Peters* (1884) 65 C 161, 3 P 657; *Carpentier v Mitchell* (1865) 29 C 330; *Carpentier v Mendenhall* (1865) 28 C 484. The measure of damages for the wrongful occupation of real property includes (CC §3334(a)):

- The value of the use of the property for the time of that wrongful occupation, not exceeding 5 years preceding commencement of the action or proceeding to enforce the right to damages;
- The reasonable cost of repair or restoration of the property to its original condition; and
- The costs, if any, of recovering possession.

The value of the property's use is the greater of the reasonable rental value of the property or the benefits obtained by the person wrongfully occupying the property. CC §3334(b)(1). If, however, the wrongful occupation resulted from the wrongful occupier's mistake of fact, the value of the property's use is its reasonable rental value. CC §3334(b)(2). This measure of damages applies regardless of the owner's intent to use or not use the property. *Don v Trojan Constr. Co.* (1960) 178 CA2d 135, 2 CR 626; *McKelvey v Rodriquez* (1943) 57 CA2d 214, 134 P2d 870. It does not apply to cases falling under CC §3335 (tenant holding over after lawful term), the Eminent Domain Law (CCP §§1230.010-1273.050), or CCP §1174 (judgment restoring premises and forfeiting lease).

Under CC §3334, damages may be established by proving the actual rental value of the land (*F. A. Hihn Co. v Fleckner* (1895) 106 C 95, 39 P 214; *Love v Shartzer* (1867) 31 C 487; *Hodges v Lochhead* (1963) 217 CA2d 199, 31 CR 879), or by showing the rents and profits actually received (*Nathan v Dierssen, supra*). Interest may be allowed when necessary to afford relief. *Nathan v Dierssen, supra; Furlong v Cooney* (1887) 72 C 322, 14 P 12. The successful plaintiff, in addition to recovering the property's use value, may recover further damages, according to facts alleged and proved, such as injury by waste, cutting of timber, or removal of crops. *Page v Fowler* (1870) 39 C 412. The gross value of the crops themselves is not compensable, because the plaintiff is limited to rental value. *Rector v Lewis* (1920) 46 CA 168, 188 P 1018; *Moy v Silveira* (1960) 184 CA2d 80, 7 CR 251. Given an occupancy that is "wrongful," however, the occupant's profit from the crops should be recoverable. See CC §3334(b)(1).

The period for which damages for wrongful withholding may be assessed extends from the defendant's ouster of the plaintiff up to the time judgment is entered, except for any period when the defendant's possession was by permission of the plaintiff, and not exceeding 5 years before the action was initiated. CC §3334; *Don v Trojan Constr. Co., supra; McKelvey v Rodriquez, supra* (period does not end with commencement of trial). When the plaintiff's right to ejectment shown at the commencement of the action terminates during the pendency of the action, however, damages are recoverable only for the period before the plaintiff's right terminated. CCP §740; *McCaffrey v Wiley* (1951) 103 CA2d 621, 230 P2d 152.

Improvements made in good faith by the defendant that actually enhance the value of the property *may* be allowed as a setoff against the claim for damages. CCP §§741, 871.1-871.7.

PRACTICE TIP: Under CCP §741(b), a person who is a "good faith improver," which includes an unincorporated association (CCP §§871.1-871.2), is entitled to set off the damages awardable against him or her on a complaint brought for the recovery of real property. That setoff may be the value of improvements made on the property by the good faith improver, or his or her predecessor in interest, if the improvements enhance the value of the land. The court will make an enhancement determination if it appears to be in the interests of "substantial justice" (CCP §871.4) under the circumstances of the particular case. The comparative negligence of the good faith improver in making the enhancement, vis-à-vis the "unjust enrichment" that the plaintiff/owner will be provided by the benefits of any improvements, as well as the pecuniary loss, if any, the plaintiff/owner will incur as a result of litigation costs, are all criteria for the court's analysis. CCP §871.5. For a suggested format for a court offset in the judgment, see §10.44.

Dated case law holds that an allowance can be made only as a setoff against damages and cannot be made

unless the complaint contains a claim for damages. *Ford v Holton* (1855) 5 C 319; *McMinn v Mayes* (1854) 4 C 209. However, CCP §§871.3-871.5 suggests that the good faith improver is not limited to using the enhancement value as a shield for a claim for damages, but that the same may, in equitable circumstances, be the basis for affirmative relief. Note, however, that this appears to be contrary to the holding in *Taliaferro v Colasso* (1956) 139 CA2d 903, 906, 294 P2d 774.

Failure to claim damages along with ejectment waives the right to recover damages in another action. *McCaffrey v Wiley, supra*. When it is found that the plaintiff owned the property in question and that the defendant had no right, title, or interest in the property, the plaintiff is entitled to a determination of issues raised concerning damages for unauthorized use. *U.S. v Langendorf* (9th Cir 1963) 322 F2d 25.

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Source: Real Property/California Real Property Remedies and Damages/10 Ejectment/§10.20 2. Form: Complaint for Ejectment, Declaratory Relief, Quiet Title, and Damages

§10.20 2. Form: Complaint for Ejectment, Declaratory Relief, Quiet Title, and Damages

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Plaintiff, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
vs	)	**COMPLAINT FOR**
_ _[*Name(s)*]_ _ _ _[*and Does 1 through 20, inclusive*]_ _ , **Defendant(s)**	)	**EJECTMENT, DECLARATORY RELIEF, QUIET TITLE, AND DAMAGES (CCP §§760.010, 1060; CC §§3334, 3375)**

Plaintiff alleges:

FIRST CAUSE OF ACTION
(Ejectment by Plaintiff _ _[*name*]_ _
Against Defendant _ _[*name*]_ _)

1. Plaintiff is, and at all times mentioned below was, _ _[*the owner and*]_ _ entitled to possession of real property located in _ _ _ _ _ _ County, California, commonly known as _ _[*street address or other common designation*]_ _, hereafter referred to as "the property," and more particularly described as _ _[*legal description*]_ _.

2. Defendant _ _[*name*]_ _ caused or permitted to be caused the acts or failure to act alleged in this complaint.

3. Plaintiff is unaware of the true names, capacities, or basis for liability of defendants Does 1 through 20, inclusive, and therefore sues these defendants by their fictitious names. Plaintiff will amend this complaint to allege their true names, capacities, or basis for liability when the same has been ascertained. Plaintiff is informed and believes and thereon alleges that defendants Does 1 through 20, inclusive, and each of them, are in some manner liable to plaintiff, or claim some right, title, or interest in the subject property that is junior and inferior to that of plaintiff, or both.

4. At all times relevant to this action, each defendant, including those fictitiously named, was the agent, servant, employee, partner, joint venturer, or surety of the other defendants and was acting within the scope of that relationship, with the knowledge and consent or ratification of each other defendant in doing the things alleged in this complaint.

5. On or about _ _[*date*]_ _, defendant entered the property, _ _[*describe action, such as "ousted plaintiff from peaceful possession,"*]_ _ and took possession of it and has since that time withheld possession of the property from plaintiff. _ _[*Add additional allegations as appropriate, such as: This occupancy was under a written agreement, a true copy of which is attached as Exhibit _ _ and incorporated here by this reference, as though fully set forth. On or about _ _[date]_ _, defendant breached the agreement by failing to perform under the written agreement, Exhibit _ _. Plaintiff has performed all obligations required to be performed under that agreement, or is excused from further performance by the breach of the terms of the agreement by defendant.*]_ _

[*Add one of the following alternatives*]

[*Alternative 1: If rents and profits is measure of damages*]

6. The reasonable value of the rents and profits of the property is the sum of $_ _[*dollar amount*]_ _ per month. Plaintiff has been damaged in this sum since _ _[*date*]_ _, and will continue to be damaged in the sum of $_ _[*dollar amount*]_ _ per month as long as defendant withholds possession from plaintiff.

[*Alternative 2: If reasonable rental value is measure of damages*]

6. Because defendant continues to withhold possession of the property, plaintiff has been denied the use and occupation of the property to _ _[*his/her*]_ _ damage in the sum of $_ _[*dollar amount*]_ _ per month and will continue to sustain damages in the sum of $_ _[*dollar amount*]_ _ per _ _[*day/month/year*]_ _ as long as defendant withholds possession of the property from plaintiff.

[*Continue*]

SECOND CAUSE OF ACTION
(Declaratory Relief by Plaintiff _ _[*name*]_ _
Against Defendant _ _[*name*]_ _)

7. Plaintiff hereby incorporates by this reference each allegation in Paragraphs 1-6 above, as though set forth at length.

8. An actual and justiciable controversy now exists between the parties as to their respective rights and duties under the written agreement. Plaintiff contends and defendant denies that _ _[*e.g., defendant has no right to require plaintiff to transfer title to the subject premises to _ _[himself/herself]_ _, because defendant failed _ _[to pay the monthly sum of $_ _[dollar amount]_ _/to secure financing for the purchase of the conveyance instrument/to otherwise comply with the material covenants of the conveyance instrument*]_ _. Defendant contends and plaintiff denies that _ _[*plaintiff is in breach of the terms of the agreement, and defendant is entitled to require specific performance of the agreement*]_ _]_ _.

9. Plaintiff desires a judicial determination of plaintiff's rights and duties under the agreement and a declaration of its enforceability, validity, or both.

10. A judicial determination and declaration is appropriate and necessary at this time in order that the parties may ascertain their respective rights and duties under the agreement.

THIRD CAUSE OF ACTION
(Quiet Title by Plaintiff _ _[*name*]_ _
Against Defendant _ _[*name*]_ _)

11. Plaintiff hereby incorporates by this reference each allegation in paragraphs 1-10 above, as though set forth at length.

12. On or about _ _[*date*]_ _, defendant entered into possession under the written agreement to purchase the subject premises. The purchase price was to be $_ _[*dollar amount*]_ _. Under the agreement, and in partial performance of it, defendant paid the sum of $_ _[*dollar amount*]_ _. Defendant was to pay the (monthly) sum of $_ _[*dollar amount*]_ _ for _ _[*number*]_ _ years, which payments were to be applied to _ _[*property taxes, insurance, and the monthly mortgage payment owed on the property by the plaintiff*]_ _. On conclusion of the payments agreement, title to the property would be deeded to the defendant.

13. On or about _ _[*date*]_ _, defendant breached the terms of the agreement by failing to make payment when due of the sum of $_ _[*dollar amount*]_ _. Demand for payment or to quit the premises has been made, and defendant has failed to pay or quit the premises.

14. Plaintiff admits the following encumbrances against the property. _ _[*State liens, abstracts, taxes owed, mortgages, etc.*]_ _

15. Plaintiff seeks to quiet title, as of the date of this complaint, against defendant's claim under the written agreement, Exhibit _ _ _. Defendant's claim is without any right whatsoever, and defendant has no right, title, estate, lien, or interest whatsoever in the property described in this complaint.

16. As a proximate result of defendant's failure to perform under the contract, plaintiff has sustained damages in an amount subject to proof for nonpayment of property taxes, insurance, and the reasonable rental value of the property. The reasonable rental value of the property has been and is the sum of $_ _[*dollar amount*]_ _ per day. Plaintiff will continue to be damaged at the daily rental value until the premises are restored to plaintiff.

WHEREFORE, plaintiff prays

On the first cause of action:

That this Court decree that plaintiff is entitled to have and recover possession of the property described in Paragraph 1 of this complaint;

That this Court issue its writ of execution directed to the _ _[*sheriff/marshal/other appropriate levying officer*]_ _ of _ _ _ _ _ _ County, California, directing the _ _[*specify levying officer*]_ _ to remove defendant and all those claiming by, through, or under defendant and to place plaintiff in possession of the property;

For an award of damages for defendant's wrongful withholding of the premises in the sum of $_ _[*dollar amount*]_ _ per day from _ _[*date*]_ _, until delivery of possession of the property;

For costs of suit;

For other relief that the Court deems appropriate.

On the second cause of action:

For a declaration that defendant breached the written agreement, which is therefore void and of no further legal effect;

_ _[*State any other relief requested pertaining to the instrument*]_ _**;**

For costs of suit incurred in this action, and for such other and further relief as the Court deems appropriate;

For a decree declaring that that certain agreement, Exhibit _ _ _, is terminated and that all rights of defendant under that agreement are forfeited;

On the third cause of action:

For a decree that all money paid by defendant to plaintiff under the agreement shall be retained by plaintiff as payment for the fair rental value of the property since execution of the agreement;

For restitution to plaintiff of the premises described in Paragraph 1.

For damages at the rate of $_ _[*dollar amount*]_ _ per day for defendant's wrongful detention of the premises, until such time as the premises are restored to plaintiff;

For a judgment that plaintiff is the sole owner of the property, and that defendant has no interest in the property adverse to plaintiff, or any other interest;

For costs of suit and such other and further relief as the Court deems appropriate.

Date: _ _ _ _ _ _ __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*Verification, see Comment*]

Copies: Original (filed with court clerk); copies for service (one for each defendant who is to be served); office

copies.

Comment: This form anticipates the presenting of an installment sales contract or an executory purchase agreement for real property, in which the vendee has taken possession of the premises without a clear understanding of each party's rights and duties. On preparing a complaint, see California Civil Procedure Before Trial, chap 15 (4th ed Cal CEB 2004). Code of Civil Procedure §128.7 (repealed by its own terms on January 1, 2006) confirms that verification of the complaint is generally not required. On essential allegations, see §§10.17-10.19. In ejectment, as opposed to unlawful detainer (see §10.4), there is no requirement that the plaintiff demand that the defendant surrender the property (see *Bank of America v O'Shields* (1954) 128 CA2d 212, 275 P2d 153) or verify the complaint (see CCP §1166).

PRACTICE TIP: A demand to surrender, if made, can be alleged, but the allegation may needlessly put facts in issue.

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§10.21 F. Lis Pendens

At the time of filing a complaint for ejectment, the plaintiff should record a notice of the pendency of the action (lis pendens) in the office of the county recorder of each county in which the real property described in the complaint is located. CCP §§405-405.61. The duty is not mandatory as it is in quiet title actions. See §10.6. To obtain the protection the lis pendens affords, the notice should be recorded immediately after the complaint is filed. Subsequent purchasers and encumbrancers may not be bound by the judgment if their interests are recorded before the lis pendens. On recordation and service of lis pendens, see chap 13.

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§10.22 G. Service of Process

There are no special requirements for service of process in an ejectment action. On the steps that must be taken to effect service of process generally under CCP §§413.10-417.40, see California Civil Procedure Before Trial, chaps 17-18 (4th ed Cal CEB 2004).

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V. RESPONSIVE PLEADINGS

§10.23 A. Answer

The answer in an ejectment action, as in civil actions generally, may interpose all available defenses even if inconsistent. CCP §431.30(g); *Bell v Brown* (1863) 22 C 671. The answer must deny the material allegations of the complaint. *Doyle v Franklin* (1874) 48 C 537. The answer must deny either the defendant's possession or the plaintiff's right to possession whether based on the plaintiff's prior possession (*Pryor v Madigan* (1875) 51 C 178) or the plaintiff's title or ownership (*F. A. Hihn Co. v Fleckner* (1895) 106 C 95, 39 P 214). A simple denial that the defendant's occupancy is wrongful constitutes an admission of the plaintiff's superior right to possession. *F. A. Hihn Co. v Fleckner, supra*.

The complaint's failure to allege with certainty that the defendant was in possession is cured by an affirmative statement of possession in the answer. *Cole v Ralph* (1920) 252 US 286, 64 L Ed 567, 40 S Ct 321. A general denial in the answer puts in issue any claim that would defeat the plaintiff's assertion of superior possession or title (*Sparrow v Rhoades* (1888) 76 C 208, 18 P 245) and allows the defendant to offer any evidence that tends to defeat the plaintiff's claim (*Sparrow v Rhoades, supra*). On answers generally, see California Civil Procedure Before Trial, chap 25 (4th ed Cal CEB 2004).

There is no plea of disclaimer to an ejectment action analogous to that permitted in quiet title actions under CCP §761.030(b). *Ellis v Jeans* (1864) 26 C 272, 278; *Wilson v Diche* (1961) 192 CA2d 312, 13 CR 243. On disclaimers in quiet title actions, see chap 7.

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§10.24 B. Demurrer

A demurrer may be used to raise objections to the sufficiency of a complaint for ejectment under rules generally applicable to civil cases. CCP §§421, 422.10, 430.10. For example, a complaint that alleges that the plaintiff is in possession of the whole tract and the defendant is in possession of part of it is demurrable for uncertainty. *Meacham v Bear Valley Irrig. Co.* (1904) 145 C 606, 79 P 281. On the nature and functions of demurrers, see California Civil Procedure Before Trial, chap 23 (4th ed Cal CEB 2004).

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§10.25 C. Cross-Complaint

The defendant has a right to cross-complain in an ejectment action, as in civil actions generally. See CCP §§422.10, 428.10-428.80; California Civil Procedure Before Trial, chap 26 (4th ed Cal CEB 2004). When the relief the defendant seeks can be provided on the basis of the denials and allegations of the answer, however, there is no need for a cross-complaint to quiet title. See *Nelson v O'Brien* (1903) 139 C 628, 73 P 469; *Mills v Fletcher* (1893) 100 C 142, 34 P 637. A cross-complaint may be necessary when the relief sought includes more than title and the right to possession as in, *e.g.,* protection against harassment by the reopening of questions already adjudicated. *City of Eureka v Gates* (1898) 120 C 54, 52 P 125; *Martin v Molera* (1906) 4 CA 298, 87 P 1104.

PRACTICE TIP: When conflicting claims arise from parties not joined as litigants, as in different landlords for the same premises or different grantors of an estate in land, use a title profile (or a litigation guaranty; see California Title Insurance Practice, chap 9 (2d ed Cal CEB 1997)) to verify legal title, bring in the nonlitigants claiming equitable interests via cross-complaint, then use requests for admissions in discovery. This approach generally leads to a speedy resolution by summary judgment.

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D. Particular Defenses

§10.26 1. Statute of Limitations

No action to recover real property or its possession can be maintained unless the plaintiff or the plaintiff's predecessor was seised or possessed of the property within 5 years before commencement of the action. CCP §318. "Seised or possessed" of the property within the requisite time means only that the plaintiff has held legal title; it does not mean that the plaintiff had to be in actual possession. *Tobin v Stevens* (1988) 204 CA3d 945, 251 CR 587. A person establishing legal title to property is presumed to have been possessed of it within the time required by CCP §318, and occupation of the property by anyone else is considered to have been under the legal title unless the property was held adversely to the legal title for 5 years before the initiation of the ejectment action. CCP §321. See *McKelvey v Rodriquez* (1943) 57 CA2d 214, 134 P2d 870.

The statute of limitations is waived as a defense if it is not pleaded in the trial court. *Minton v Cavaney* (1961) 56 C2d 576, 15 CR 641. It may be raised by general demurrer if the defect appears on the face of the complaint (CCP §430.30(a)), or by answer whether or not the defect appears on the face of the complaint (see *California Safe Deposit & Trust Co. v Sierra Valleys Ry.* (1910) 158 C 690, 112 P 274). A statute of limitations defense must be affirmatively pleaded; a denial is insufficient to raise it. See, *e.g., Warden v Bailey* (1933) 133 CA 383, 24 P2d 192. The defense may be pleaded by reference to the section number (and subsection, if there is one) in the Code of Civil Procedure that specifies the limitation period, without stating the facts that show this defense. CCP §458; see generally California Civil Procedure Before Trial §25.42 (4th ed Cal CEB 2004).

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§10.27 2. Contractual Rights

The defendant in an ejectment action may assert equitable title to the property as a defense on the basis of a right to purchase the property under an installment land contract or a purchase and sale agreement. *Arguello v Bours* (1885) 67 C 447, 8 P 49. The defendant's allegations must be equivalent to those that would be required to support a specific performance action; failure to allege performance or excuse, fairness, and the like will render the defense ineffective. *Verbeck v Clymer* (1927) 202 C 557, 261 P 1017; *Arguello v Bours, supra; Bruck v Tucker* (1871) 42 C 346. On the essential allegations for a complaint for specific performance, see chap 5.

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§10.28 3. Adverse Possession

Occupancy of land for any period confers title that prevails against all except the state and persons having better title. CC §1006. An occupant who maintains adverse possession of the land for the period described by law, which is 5 years (CCP §321), as sufficient to bar an action by the legal owner for recovery of the land, acquires title by adverse possession, or prescription. Such title is "sufficient against all" except for persons holding future interests (CC §741) and property dedicated to a public use by a public utility or dedicated to or owned by the state or any public entity (CC §1007).

Adverse possession maintained for the statutory period vests the possessor with title, and the holder of title thus acquired may maintain an ejectment action to recover the premises if ousted of possession, whether by a third person or by the former owner. *Sharon v Tucker* (1892) 144 US 533, 36 L Ed 532, 12 S Ct 720. Prescriptive title is also a good defense to an ejectment action brought by a former owner or other claimant. *Wilson v Atkinson* (1888) 77 C 485, 20 P 66; *Cannon v Stockmon* (1869) 36 C 535; *Franklin v Dorland* (1865) 28 C 175. Under CC §741, however, the prescriptive period cannot run against a future interest, such as a landlord's reversionary interest; therefore, a landlord may use ejectment against a third party neighbor after a tenancy has expired even if the neighbor established a prescriptive easement against the tenant. See *Dieterich Int'l Truck Sales v J. S. & J. Servs.* (1992) 3 CA4th 1601, 1610, 5 CR2d 388.

In an action to recover possession of real property sold under an executory contract, payment by the seller's executors of taxes on the land is sufficient to defeat a claim of title by adverse possession raised by the buyer's successors in interest. *McKelvey v Rodriquez* (1943) 57 CA2d 214, 134 P2d 870.

When the possessor claims title only by adverse possession, a plaintiff claiming legal title need not trace his or her title back to the grantor in possession of the property at the time of conveyance. Once the plaintiff establishes legal title by asserting paper title, the defendant in actual possession has the burden of establishing adverse possession. However, a defendant who admits that he or she failed to pay taxes on the property during his or her tenure of possession may lose the ability to prove adverse possession. *Tobin v Stevens* (1988) 204 CA3d 945, 251 CR 587.

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§10.29 4. Title in Third Person

When the plaintiff relies on title as the basis for asserting the right to possession (see §10.9), the defendant may prove that a third person has better title. *Piercy v Sabin* (1858) 10 C 22; *Redemeyer v Cunningham* (1923) 61 CA 423, 215 P 83. A cross-complaint joining such third person appears prudent (see §10.25). When the plaintiff relies on prior possession, however, a mere intruder or trespasser may not be protected in the possession by setting up an outstanding title in a third party. *Polack v McGrath* (1867) 32 C 15; *Piercy v Sabin, supra; Bequette v Caulfield* (1854) 4 C 278.

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§10.30 5. Waiver

A plaintiff who is entitled to sue for both ejectment and damages (see §10.19), but who elects to sue for damages and not ejectment, is deemed to have waived the right to possession and consented to the continued occupancy of the land in controversy. *Slater v Shell Oil Co.* (1943) 58 CA2d 864, 137 P2d 713. A plaintiff who seeks only ejectment may not file another action seeking damages. *McCaffrey v Wiley* (1951) 103 CA2d 621, 230 P2d 152. A landlord bringing an ejectment action, however, does not waive the right to collect rent to the end of the lease term or cause a surrender of the lease as long as the lease permits reentry after a tenant default. *Barker v Briggs* (1952) 39 C2d 654, 664, 248 P2d 897; *Chinese Hosp. Found. Fund v Patterson* (1969) 1 CA3d 627, 633, 81 CR 795.

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§10.31 6. Indispensable Parties

As in civil actions generally, nonjoinder of defendant parties may be raised by a defendant in an ejectment action when the parties not joined are indispensable. *McKelvey v Rodriquez* (1943) 57 CA2d 214, 134 P2d 870. Even if this issue is raised, however, it is unlikely to bar the action altogether but may instead cause the additional parties to be joined in the action. CCP §389; see California Civil Procedure Before Trial §§14.8-14.10 (4th ed Cal CEB 2004).

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§10.32 7. Defendant Not in Possession

If the evidence fails to show that the defendant was in possession at the commencement of the action, the plaintiff may not recover damages for use of land of which the defendant never dispossessed the plaintiff (*Frazier v Lynch* (1893) 97 C 370, 32 P 319; *Ellis v Jeans* (1864) 26 C 272) and is not entitled to judgment (*Frazier v Lynch, supra*). Denial of entry on the property is sufficient to deny withholding of possession (*Hawkins v Reichert* (1865) 28 C 534), and a denial that the defendant is or ever was in possession will raise the defense (*Youdall v Kaufman* (1921) 55 CA 363, 203 P 448).

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§10.33 8. Abandonment

When the plaintiff in an ejectment action asserts prior possession (see §10.10), but not title, as the basis for the right to possession, the defendant may defend by showing that the plaintiff abandoned the land before the defendant's entry. *Willson v Cleaveland* (1866) 30 C 192; *Bird v Lisbros* (1858) 9 C 1; *Bequette v Caulfield* (1854) 4 C 278.

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§10.34 9. Supplemental Pleadings

Both the plaintiff and the defendant may be allowed on motion to file a supplemental complaint or answer, alleging facts material to the case that occurred after the prior complaint or answer. CCP §464. For example, after-acquired title to the premises may be pleaded by the defendant in ejectment in a supplemental answer. *Kirsch v Brigard* (1883) 63 C 319; *Bagley v Ward* (1869) 37 C 121. The use, however, by plaintiff of a supplemental complaint based on superior title (as compared with a superior right to possession) for a postfiling transfer of title to the plaintiff could be deemed improper for the reason that the supplemental complaint must relate back to the date of the filing to show a properly vested right. See *Bendix Corp. v City of Los Angeles* (1984) 150 CA3d 921, 926, 198 CR 370.

Note in lieu of dismissal that the plaintiff might elect to claim a superior right to possession in such litigation and amend to conform to proof at trial. Absent a showing of substantial prejudice to the defendant, the trial court may permit the amendment. *Trafton v Youngblood* (1968) 69 C2d 17, 69 CR 568. Alternatively, pleading a two-count complaint in ejectment, one on the theory of superior title and the other on the superior right to possession, is the best way to protect the plaintiff's rights.

If a supplemental complaint is filed, the court clerk must issue an amended or supplemental summons, which must be served along with the complaint in the manner required for service of initial pleadings. CCP §464(c). On supplemental complaints and answers, see California Civil Procedure Before Trial §§16.18, 25.79 (4th ed Cal CEB 2004).

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VI. TRIAL

§10.35 A. Entitlement to Jury Trial

In an ejectment action, either party is entitled to a jury trial on the legal issues. *Haggin v Kelly* (1902) 136 C 481, 69 P 140; *Weber v Marshall* (1861) 19 C 447. The plaintiff's prior possession is a mixed question of law and fact, and a jury must determine whether the plaintiff's acts of dominion were sufficient to notify the public that the property was appropriated. *Haggin v Kelly, supra; Polack v McGrath* (1867) 32 C 15. Equitable defenses must be tried by the court before legal issues are tried (*Estrada v Murphy* (1861) 19 C 248); equitable issues raised by cross-complaint, such as a defendant's claim to quiet title, must also be tried first by the court (*Blume v MacGregor* (1944) 64 CA2d 244, 148 P2d 656).

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§10.36 B. Interlocutory Order and Restraining Orders

The trial court in an ejectment action may, on motion, grant an interlocutory order allowing the moving party to enter the property to conduct a survey or to perform other legitimate business. CCP §§742-743.

The court may grant an order restraining waste during the pendency of the litigation (*Haggin v Kelly* (1902) 136 C 481, 69 P 140; *Curtis v Sutter* (1860) 15 C 259) unless there is no reasonable ground for the plaintiff's assertion of title (*Hunt v Steese* (1888) 75 C 620, 17 P 920).

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C. Burden of Proof

§10.37 1. Plaintiff

In an ejectment action, the plaintiff must prove either superior title or a superior right to possession. See *Tolliver v Lundquist* (1960) 183 CA2d 816, 7 CR 192; *Bank of America Nat'l Trust & Sav. Ass'n v O'Shields* (1954) 128 CA2d 212, 275 P2d 153. Generally, possession is prima facie evidence of title and is sufficient to maintain ejectment. *Leonard v Flynn* (1891) 89 C 543, 26 P 1099. Recall, however, that the court will exclude evidence of a deed executed to the plaintiff after an ejectment action is filed. *Smith v Billett* (1860) 15 C 23 (see §10.8). In that event, the plaintiff's appropriate course of action would be to dismiss and refile or to request leave to file a supplemental complaint (see discussion in §10.34).

Because actual possession establishes a presumption of title and right of possession that can be overcome only by proof of prior possession or title from a paramount source (see §10.9), the burden is on the plaintiff to show that the defendant's possession is wrongful. *City of Oakland v Buteau* (1919) 180 C 83, 179 P 170; *Zilmer v Gerichten* (1896) 111 C 73, 43 P 408. Record or paper title or a deed such as one acquired from a judicial, foreclosure, or execution sale is prima facie evidence of title. Evid C §§1600-1605. See California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 2-3, 7 (4th ed Cal CEB 2009).

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§10.38 2. Defendant

The defendant can prevail merely by rebutting the plaintiff's evidence; it is sufficient if the defendant shows that the plaintiff has no title or interest creating a right to possession. *Irwin v Towne* (1871) 42 C 326; *Hawxhurst v Lander* (1865) 28 C 331; *Stark v Barrett* (1860) 15 C 361. Thus, in a complaint solely for ejectment, the defendant has no burden of establishing title in his or her own right.

The defendant may offer proof of any fact tending to show that the plaintiff has no title (*Stockton v Knock* (1887) 73 C 425, 15 P 51)—for example, that the consideration for a deed on which the plaintiff relies to claim title was illegal (*Sparrow v Rhoades* (1888) 76 C 208, 18 P 245). When the plaintiff relies on possession and not legal title, the defendant may defeat recovery by proving that the plaintiff abandoned the property (see §10.33). *Willson v Cleaveland* (1866) 30 C 192.

A showing of superior title in a third person may also defeat the action (see §10.29) except when the defendant is the plaintiff's tenant or derives title through the tenant. A defendant who is a tenant cannot controvert the plaintiff's title by showing better title either in himself or herself or in a third person. *Robertson v Pickrell* (1883) 109 US 608, 27 L Ed 1049, 3 S Ct 407.

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§10.39 D. Verdict or Statement of Decision

A general verdict is sufficient in an ejectment action when the plaintiff claims ownership of the property. *Joy v McKay* (1886) 70 C 445, 11 P 763. The general verdict establishes the plaintiff's ownership and determines that the defendant's possession was wrongful. *Johnson v Visher* (1892) 96 C 310, 31 P 106.

The court, and not the jury, must rule on an equitable defense set up in an ejectment action. The record should show that the issue was decided by the court, and suitable findings should be made. *Blume v MacGregor* (1944) 64 CA2d 244, 148 P2d 656. No findings are required concerning interests of persons not directly involved in the action. *McKelvey v Rodriquez* (1943) 57 CA2d 214, 134 P2d 870. The legal and factual bases for the decision, formerly findings of fact and conclusions of law, are contained in the court's statement of decision. CCP §632; Cal Rules of Ct 3.1590.

When trial is before a jury, the right to possession is a factual question for the jury, and findings are not required on that issue. *Blalock v Dunger* (1928) 205 C 782, 272 P 1048. When trial is by the court, the better practice is to request a statement of decision on the title claims of all parties. See CCP §632; Cal Rules of Ct 3.1590-3.1591.

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§10.40 E. Judgment

The judgment in an ejectment action has the same conclusiveness and effect as judgments in civil actions generally. The judgment will bar a subsequent action between the same parties or their privies for the same real property, estate, or interest (*Merryman v Bourne* (1870) 76 US 592, 19 L Ed 683, 9 Wall 592; *Breon v Robrecht* (1897) 118 C 469, 50 P 689; *Caperton v Schmidt* (1864) 26 C 479; *McCaffrey v Wiley* (1951) 103 CA2d 621, 230 P2d 152; *McKelvey v Rodriquez* (1943) 57 CA2d 214, 134 P2d 870) unless the plaintiff in the new action can show a change in circumstances subsequent to the judgment that affects the right to possession (*Graves v Hebbron* (1899) 125 C 400, 58 P 12; *Caperton v Schmidt, supra*).

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§10.41 1. Title

When title is not an issue in the ejectment action and is not tried, the judgment is not conclusive on the question of title in any later action between the same parties. *Breon v Robrecht* (1897) 118 C 469, 50 P 689; *Burns v Hodgdon* (1883) 64 C 72, 28 P 61. Even when title is raised and decided, the judgment does not transfer to the successful party the title of the adverse party; instead, it has the effect of extinguishing the adverse title. *Whittaker v Otto* (1961) 188 CA2d 619, 10 CR 689; *Paap v Von Helmholt* (1960) 185 CA2d 823, 8 CR 568; *Zaccaria v Bank of America* (1958) 164 CA2d 715, 331 P2d 198; *McKelvey v Rodriquez* (1943) 57 CA2d 214, 134 P2d 870.

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Source: Real Property/California Real Property Remedies and Damages/10 Ejectment/§10.42 2. Description

§10.42 2. Description

The judgment must describe the property with sufficient certainty to permit the executing officer to locate it (see §10.18). CCP §455; *Rosenthal v Matthews* (1893) 100 C 81, 34 P 624.

WARNING: Failure to adequately describe the premises can make the entire proceeding problematic. When dealing with unimproved land, a title profile's legal description should be scrutinized closely. A call to the levying enforcement office to discuss the description before filing the complaint can be helpful in avoiding problems. If considerable doubt exists about the correct legal description, a litigation guaranty can be purchased before the suit is filed. See California Title Insurance Practice, chap 9 (2d ed Cal CEB 1997).

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§10.43 3. Costs and Attorney Fees

The prevailing party in an ejectment action is entitled to recover costs. CCP §§1031-1032. It has been held that a plaintiff who obtains a judgment only for recovery of rent of the demanded premises is entitled to an award of costs. *Lawton v Gordon* (1869) 37 C 202.

Attorney fees are recoverable in civil actions only if provided for by statute or agreement of the parties. CCP §1021; CC §1717. No statute provides for attorney fees in ejectment actions. It is possible, however, that the plaintiff in an ejectment action could rely on an attorney fees provision in an agreement with the defendant. For example, a seller seeking to eject a defaulting buyer under a contract for sale of the property may seek to recover attorney fees if the contract provides for them in the event of a breach.

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Source: Real Property/California Real Property Remedies and Damages/10 Ejectment/§10.44 4. Form: Judgment

§10.44 4. Form: Judgment

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_ _ _ _ _ _ Court, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *Judicial District*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _,	)	**No. _ _ _ _ _ _**
Plaintiff(s)	)	**JUDGMENT FOR**
vs	)	_ _[*EJECTMENT/*
_ _[*Name(s)*]_ _, _ _[*and Does 1*	)	*DECLARATORY RELIEF/*
through 20, inclusive]_ _	)	*QUIET TITLE/DAMAGES*]_ _
Defendant(s)	)	**(CCP §§760.010, 1060; CC**
_____	)	**§§3334, 3375)**

This action for ejectment was regularly tried on _ _[*date*]_ _, before the Court sitting without a jury. Appearing as attorneys were _ _[*name*]_ _ for plaintiff and _ _[*name*]_ _ for defendant. The Court, having heard the testimony and considered the evidence, and _ _[*a statement of decision not having been requested/having already filed its statement of decision on _ _[*date*]_ _]_ _, enters its judgment as follows:

IT IS ORDERED AND ADJUDGED that

1. Plaintiff have and recover possession of real property located in _ _ _ _ _ _ County, California, commonly known as _ _[*street address or other common designation*]_ _ and more particularly described as _ _[*legal description*]_ _ from defendant;

2. A writ of execution be issued to the _ _[*sheriff/marshal/other appropriate levying officer*]_ _ of _ _ _ _ _ _ County, California, directing the _ _[*specify levying officer*]_ _ to remove defendant and all those claiming by, through, or under defendant, and to place plaintiff in possession of the property;

3. Plaintiff recover damages from defendant in the sum of $_ _[*dollar amount*]_ _;

4. The value of good faith improvements by defendant has been ascertained and is determined to be the sum of $_ _[*dollar amount*]_ _; the damages awarded in paragraph 3 reflect the balance due after such determination; and

5. Plaintiff recover costs from defendant in the sum of $_ _[*dollar amount*]_ _.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Copies: Original (presented to judge for signature, then filed with proof of service); conformed copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: This sample judgment is for a trial by the court sitting without a jury; if the legal issues are tried before a jury, there will not be a statement of decision on those issues and the judgment will have to be adapted to fit a jury verdict. For general discussion and forms of jury verdicts, see California Trial Practice: Civil Procedure During Trial §§22.8-22.17, 22.34-22.41 (3d ed Cal CEB 1995). On verdict and findings, see §10.39; on right to jury trial, see §10.35. A successful plaintiff is entitled to a writ of possession. CCP §715.010 (see §10.45). The judgment must contain an accurate description of the property (see §10.42).

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Source: Real Property/California Real Property Remedies and Damages/10 Ejectment/§10.45 5. Enforcement

§10.45 5. Enforcement

A judgment for possession of real property may be enforced by a writ of possession. CCP §715.010.

CAUTION: This statute requires execution, "notwithstanding receipt of notice of a filing by the defendant of a bankruptcy proceeding." CCP §715.010. It violates the supremacy clause to the extent that a bankruptcy court deems the eviction to be an action taken against the debtor's estate. See *Vanderpark Props. v Buchbinder (In re Windmill Farms)* (9th Cir 1988) 841 F2d 1467; *Westside Apartments, LLC v Butler (In re Butler)* (Bankr CD Cal 2002) 271 BR 867. A writ of possession should not be confused with a writ of execution for money; collection attempts are clearly barred by the automatic stay in 11 USC §361. For discussion, see California Landlord-Tenant Practice, chap 14 (2d ed Cal CEB 1997).

A plaintiff who takes possession under a writ of possession is entitled not only to the land but to all fixtures and improvements affixed to the premises, including growing crops. *Huerstal v Muir* (1884) 64 C 450, 2 P 33; *McMinn v Mayes* (1854) 4 C 209. Note that this case law predates CCP §871.3 (see discussion in §10.19).

PRACTICE TIP: Civil Code §§1013-1019 gives further direction on the respective rights and duties of the parties to the removal of fixtures, improvements, and trade fixtures.

On enforcing judgments generally, see Debt Collection Practice in California (2d ed Cal CEB 1999). For Judicial Council writ of execution form (EJ-130), see 3 California Judicial Council Forms Manual p 9-11 (Cal CEB 1981).

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§10.46 F. Appeal

A judgment for ejectment is appealable. CCP §§904.1(a)(1) (appeal of cases other than limited civil cases), 904.2(a) (appeal of limited civil case). During the pendency of an appeal, a receiver may be appointed to collect rents and preserve the property. *Garniss v Superior Court* (1891) 88 C 413, 26 P 351. An undertaking is required as a condition of staying execution on the judgment for possession of the premises. The plaintiff has a right of recourse to the undertaking for the value of the use and occupancy of the property and, when the property is ordered sold, the plaintiff may recover against the undertaking the payment of any deficiency for mortgage payments owed. CCP §917.4.

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11

Remedies for Nuisance and Trespass

Stephen L. R. McNichols

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§11.1 I. INTRODUCTION

This chapter addresses the remedies available for damage to real property resulting from nuisance or trespass. The subject is approached from the point of view of an attorney who is evaluating the alternatives available in prospective or pending litigation. This chapter assesses alternative courses of action and their likely consequences. It examines both claims and defenses and should be helpful to both plaintiff's and defense counsel. For discussion of nuisance and trespass claims in the context of easement litigation, see California Easements and Boundaries: Law and Litigation, chaps 1, 8, 10 (Cal CEB 2008).

The law governing nuisance and trespass has many of the same characteristics, and the analysis of both torts is essentially the same. There are some differences, and these are noted. The line between these two torts is often uncertain. The primary distinction is that trespass is an invasion of the plaintiff's interest in possession of land, and nuisance is an interference with the use and enjoyment of land. Often, the same situation is both a nuisance and trespass. See Restatement (Second) of Torts §821D, Comments b, d-e (1979).

The focus of the chapter is on remedies. However, one of the enigmatic features of nuisance and trespass law is that the remedies cannot be separated from the substantive law. The historical growth of these two torts has produced a bond and a dynamic interplay between various substantive law determinations and the remedies available.

The remedies and defenses applicable to a particular situation involving nuisance or trespass depend on the classification of the underlying claim as "per se" (see §11.3), "public" or "private" (see §§11.7-11.12), and "temporary/continuing" or "permanent" (see §§11.13-11.16). The result is that remedies can be meaningfully discussed only in the context of the substantive law. Therefore, it is necessary to review the elements of causes of actions for nuisance and trespass in order to give the practitioner sufficient information to evaluate the remedy options available in the case. Also, there are devastating traps for the unwary inherent in these classifications (*e.g.,* public/private, continuing/permanent). The characterizations are often artificial and extremely difficult to make or predict with accuracy. These classifications not only control what remedies are available but also determine whether the plaintiff has any viable claim at all. Practitioners must be aware of the implications of these classifications in their cases. See, *e.g.,* §§11.7-11.12 (defining public and private nuisances), 11.13-11.16 (defining temporary or continuing versus permanent nuisances).

This chapter does not provide a complete treatment of the substantive law of nuisance and trespass. For a discussion of nuisance, see 13 Witkin, Summary of California Law, *Equity* §§133-173 (10th ed 2005); and of trespass, see 5 Witkin, Summary, *Torts* §§693-698. Nor does the chapter specifically discuss toxic torts and related statutory remedies. For a discussion of environmental litigation, see California Attorney's Guide to Damages, chap 5 (2d ed Cal CEB 2004). For a review of insurance issues dealing with damage to real property, see California Liability Insurance Practice: Claims & Litigation (Cal CEB 1991).

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II. NUISANCE

§11.2 A. General Definition

The word "nuisance" is derived from Latin by way of the French and means hurt, annoyance, or inconvenience. Nuisance theory has provided an effective means for redress to a wide range of wrongs. The tort of nuisance, however, is incapable of an exact or comprehensive definition. Most of the uncertainty regarding this term derives from the fact that nuisance law has been used to cover the invasion of many different interests caused by various kinds of conduct that inconveniences someone. For an absorbing history of the development of the law of nuisance, see McRae, *Development of Nuisance in The Early Common Law*, 1 U Fla L Rev 27 (1948).

Nuisance results from conduct or conditions that unreasonably interfere with, or create a condition that interferes with, the use or enjoyment of land. Nuisance is a species of tort liability rather than a type of tortious conduct. Although nuisance is primarily created and defined by the interests invaded and the damage or harm caused, and not by the conduct that has created the condition (see CC §3479), it usually requires proof of negligence, recklessness, or intent. See *Lussier v San Lorenzo Valley Water Dist.* (1988) 206 CA3d 92, 100, 253 CR 470. Defendants who deposit hazardous waste at a county landfill when the act of depositing the waste is not itself negligent or intentional misconduct have not committed a nuisance. *West Coast Home Builders, Inc. v Aventis Cropscience USA, Inc.* (ND Cal, Aug. 21, 2009, No. C04-2225) 2009 US Dist Lexis 74460 (noting that plaintiff claimed cause of nuisance was improper handling of deposits in landfill for hazardous waste, which was conduct flowing from landfill operation, not defendants' disposal of waste).

Nuisance is a civil wrong based on disturbance of rights in land. The cause of action is based on the idea that owners or possessors of land are entitled to the full use and enjoyment of their land, but they must use their property in a way that does not unreasonably interfere with either the general welfare of the community or others' right to the full enjoyment of their property. *County of Contra Costa v Cowell Portland Cement Co.* (1932) 126 CA 267, 271, 14 P2d 606; *Wolford v Thomas* (1987) 190 CA3d 347, 358, 235 CR 422. The public policy underlying nuisance law and its purpose is to provide a means of recovery for harm suffered and to facilitate a just and equitable recovery. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 871, 218 CR 293. See §11.24.

PRACTICE TIP: Nuisance law works well when the nuisance creates an immediate, perceptible condition that can be seen, heard, smelled, felt, and so forth. It does not function as well when dealing with "stealth" conditions such as toxic contamination or other hidden conditions affecting the use of property. See McNichols, *Revisiting Mangini II: Should the Burden of Proof in Contamination-Nuisance Cases Be Re-Examined?*, 25 CEB Real Prop L Rep 93 (Apr. 2002).

Offensive conduct by a neighbor (as much as offensive conditions on neighboring property) may constitute actionable nuisance or trespass; in some cases, both are present. See, *e.g., Acadia, Cal., Ltd. v Herbert* (1960) 54 C2d 328, 337, 5 CR 686; *Alexander v McKnight* (1992) 7 CA4th 973, 976, 9 CR2d 453. The right to enjoy property free from nuisance is not limited to residential property. See *Balboa Island Village Inn, Inc. v Lemen* (2007) 40 C4th 1141, 57 CR3d 320 (restaurant entitled to injunction against neighboring residential defendant).

The overall policy of providing a remedy for recovery for harm suffered has been eroded in practice by the mechanical, and sometimes convoluted, application of the technical rules based on the classification of the nuisance, such as temporary (or continuing) versus permanent. See §§11.13-11.16. These classifications often result in the denial of recovery to landowners for conduct that is obviously tortious because it interferes with the use of land. See, *e.g., Mangini v Aerojet-General Corp. (Mangini II)* (1996) 12 C4th 1087, 51 CR2d 272, discussed in §11.41. Contemporary situations, which were not contemplated at the time these classifications and rules were developed, are fertile fields for reexamination and reformulation of nuisance law. See, *e.g., County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 40 CR3d 313 (municipal agencies attempt to bring public and private nuisance actions against manufacturer of lead paint used in municipal buildings).

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§11.3 B. Nuisance Per Se

Nuisance per se arises when a legislative body, in exercising its police power, expressly declares a particular object, substance, activity, or circumstance to be a nuisance. *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1206, 52 CR2d 518. A nuisance per se can be declared by statute or ordinance. See, *e.g.,* Govt C §38771; *City of Bakersfield v Miller* (1966) 64 C2d 93, 48 CR 889 (discussing preemption issues and authority of legislature and cities); *Flahive v City of Dana Point* (1999) 72 CA4th 241, 244, 85 CR2d 51; *People ex rel Dep't of Transp. v Outdoor Media Group* (1993) 13 CA4th 1067, 17 CR2d 19; *City of Costa Mesa v Soffer* (1992) 11 CA4th 378, 13 CR2d 735; *Amusing Sandwich, Inc. v City of Palm Springs* (1985) 165 CA3d 1116, 211 CR 911; *City & County of San Francisco v Padilla* (1972) 23 CA3d 388, 401, 100 CR 223 (violation of ordinance). See also authorities cited in §§11.7-11.8. A nuisance per se can also be declared by administrative or judicial procedures taken by a governmental agency. *Beck Dev. Co. v Southern Pac. Transp. Co., supra*.

If an activity is a nuisance per se, the court does not go beyond the legislative determination that the activity is a nuisance. The court does not balance the equities. *City of Costa Mesa v Soffer* (1992) 11 CA4th 378, 382, 13 CR2d 735. Although the plaintiff has the burden of proving the essential factual elements of nuisance (*Beck Dev. Co. v Southern Pac. Transp. Co., supra*), a nuisance per se can be enjoined without proof of injury (*City & County of San Francisco v Padilla, supra* (enjoined violation of ordinance)). Finally, for a nuisance per se to exist, the statute in question must have been in effect at the time the nuisance occurred (these statutes are not applied retroactively), and the statute must apply to the condition on the property. *Beck Dev. Co. v Southern Pac. Transp. Co., supra*.

PRACTICE TIP: There are numerous statutes and ordinances that a plaintiff can use to classify the condition or conduct as a nuisance per se, and plaintiff's counsel should research them at the outset of the case. See, *e.g., Beck Dev. Co. v Southern Pac. Transp. Co., supra*. In view of the lighter burden a plaintiff must carry on a nuisance per se action, the defendant's best defense is usually to argue that the statutes are inapplicable. For a comprehensive list of defense arguments, see *Beck Dev. Co. v Southern Pac. Transp. Co., supra*.

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§11.4 C. Categories of Nuisance Under CC §3479

If an activity has not been declared to be a nuisance by law (see *e.g.*, §§11.3, 11.7-11.8), a court may find it to be a nuisance under CC §3479 if it meets any of these descriptions:

- Anything injurious to health, including "the illegal sale of controlled substances";
- Anything "indecent or offensive to the senses";
- Any obstruction to the free use of property, "so as to interfere with the comfortable enjoyment of life or property"; or
- Anything that "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."

These definitions are broad and may include virtually any type of interference with the enjoyment or use of land. *Tint v Sanborn* (1989) 211 CA3d 1225, 1227, 259 CR 902. A real property owner may bring an action to abate a public nuisance against parties responsible for obstructing a street. See, *e.g., McLean v Llewellyn Iron Works* (1905) 2 CA 346, 83 P 1082. See also *Kempton v City of Los Angeles* (2008) 165 CA4th 1344, 1348, 81 CR3d 852 (public nuisance action to abate safety hazards and obstruction of access to sidewalk and public street).

Any activity done or maintained under the express authority of a statute, however, cannot be deemed a nuisance. CC §3482. See *Friends of H Street v City of Sacramento* (1993) 20 CA4th 152, 24 CR2d 607 (rejected residents' claims to enjoin designation of neighborhood street as "through" street with higher speed limits as nuisance, because city regulation of traffic is legislative function, expressly authorized by statute). For examples of the interplay between CC §§3479 and 3482, see *Jones v Union Pac. R.R.* (2000) 79 CA4th 1053, 94 CR2d 661; *Paterno v State* (1999) 74 CA4th 68, 87 CR2d 754 (court of appeal issued new opinion after second trial in *Paterno v State* (2003) 113 CA4th 998, 6 CR3d 854, in which liability was based on inverse condemnation).

Occasionally, construction defect actions (or tenant actions for uninhabitable conditions in rental units) are brought as nuisance actions, especially when the resulting interference with the property's use is substantial. See §11.5. For example, substantial interference may occur in a house infected with toxic mold. For further discussion, see California Construction Contracts, Defects, and Litigation §11.45 (Cal CEB 2008); California Landlord-Tenant Practice, chap 3 (2d ed Cal CEB 1997). On litigating toxic mold claims, see Handling Mold Litigation in California (Cal CEB Action Guide September 2009).

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§11.5 1. Objective Standard Under CC §3479

An activity or conduct that merely offends the esthetic senses or produces only personal discomfort will not be enjoined as a nuisance. To be actionable under CC §3479, the interference with the enjoyment of property rights must be "substantial and unreasonable" and affect the sensibilities of a "normal" person. *Oliver v AT&T Wireless Servs.* (1999) 76 CA4th 521, 533, 90 CR2d 491.

EXAMPLE: A 130-foot cellular telephone transmission tower on adjacent property was ruled not a nuisance despite its unpleasant appearance. The height and shape of the tower, even combined with intermittent noises and the requirement that the complaining landowner keep weeds low for fire clearance, did not make it a nuisance. *Oliver v AT&T Wireless Servs., supra*.

See also *City of San Diego v United States Gypsum Co.* (1994) 30 CA4th 575, 35 CR2d 876 (installation of defective product (asbestos) not a nuisance); *Hellman v La Cumbre Golf & Country Club* (1992) 6 CA4th 1224, 8 CR2d 293 (operation of golf course with balls landing on plaintiff's property adjacent to course not a nuisance).

The operation of a mortuary, however, was enjoined because the court found that its presence in the neighborhood would lower property values and affect the happiness of residents by causing people to be depressed and suffer physical disturbances. *Brown v Arbuckle* (1948) 88 CA2d 258, 261, 198 P2d 550. See also *Mangini v Aerojet-General Corp. (Mangini I)* (1991) 230 CA3d 1125, 281 CR 827 (owner can sue former owner or lessee of former owner on nuisance theory for damages caused by hazardous waste on property).

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§11.6 2. Balancing Equities Required Under CC §3479

If an activity is not a nuisance per se (see §11.3) and was not willfully created (see, *e.g., McIvor v Mercer-Fraser Co.* (1946) 76 CA2d 247, 172 P2d 758), it is difficult to generalize about what is and is not a nuisance under CC §3479 because this determination is a matter of degree. The issue is decided on the facts of each case and requires balancing the harm suffered by the plaintiff against the utility of the defendant's conduct. See *Hellman v La Cumbre Golf & Country Club* (1992) 6 CA4th 1224, 1231, 8 CR2d 293; Restatement (Second) of Torts §§826-831 (1979). Courts consider all factors, such as: the nature of the activity, the extent and frequency of the harm caused by the activity, the effects of the activity on the owners' health and enjoyment of the property, the harm that would be caused by discontinuing the activity, the manner in which the activity is conducted, the location of the activity, and the nature of the surroundings. See, *e.g., Hellman v La Cumbre Gold & Country Club, supra;* 13 Witkin, Summary of California Law, *Equity* §169 (10th ed 2005).

For example, the rule that there is no duty to control natural conditions on property (see *Boarts v Imperial Irrig. Dist.* (1947) 80 CA2d 574, 182 P2d 246) was abolished in California (see *Sprecher v Adamson Cos.* (1981) 30 C3d 358, 178 CR 783; *Locklin v City of Lafayette* (1994) 7 C4th 327, 27 CR2d 613). All property owners now have a duty to exercise reasonable care to control all conditions on their property, including natural ones. If a natural condition unreasonably interferes with the use and enjoyment of another's property and causes material injury, the court will balance the equities to decide whether a nuisance exists. *Lussier v San Lorenzo Valley Water Dist.* (1988) 206 CA3d 92, 253 CR 470.

PRACTICE TIP: In a typical case, it is evident that the defendant's activity to some extent meets the definition of nuisance under CC §3479. The initial battle over whether there is an *actionable* nuisance is won or lost in the balancing process. As a result, despite the general rules, the reported cases often appear contradictory and irreconcilable because a court decides the equitable issues in each case under the particular facts. Both sides of a dispute can usually find authority to support almost any reasonable position, at least by analogy. From there, it is up to the judge to "balance the equities." This lack of predictability is of little comfort to an attorney who is trying to explain the chances of success to a client, who should be advised that decisions dealing with nuisance can be highly subjective.

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Source: Real Property/California Real Property Remedies and Damages/11 Remedies for Nuisance and Trespass/ D. Public Nuisance/§11.7 1. Definition; Examples

D. Public Nuisance

§11.7 1. Definition; Examples

A public nuisance is defined as "one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." CC §3480. See *Wade v Campbell* (1962) 200 CA2d 54, 19 CR 173 (nuisance need not affect every member of community before it can be deemed a public nuisance); Restatement (Second) of Torts §§821B, 821D (1979). What constitutes a "considerable number of persons" is a fact-specific issue. A dairy farm was held to be a public nuisance when it affected 11 persons owning property near the farm. *Wade v Campbell* (1962) 200 CA2d 54, 59, 19 CR 173. A bar and restaurant that played loud amplified music, disturbing a rural neighborhood of about 33 homes, was found to be a public nuisance. *People v Mason* (1981) 124 CA3d 348, 354, 177 CR 284.

Some acts are specifically declared by law to be a public nuisance. See, *e.g.,* Pen C §370 (obstructing a highway); Pub Res C §4170 (uncontrolled fire); Pub Res C §4171 (fire hazard); Govt C §39561 (weeds); Health & S C §17980.6 (violation of building codes). Some local jurisdictions use public nuisance ordinances to enjoin gang-related activity. See, *e.g., People ex rel Gallo v Acuna* (1997) 14 C4th 1090, 60 CR2d 277; *In re Englebrecht* (1998) 67 CA4th 486, 79 CR2d 89. The purpose of public nuisance law is to protect public order. *People ex rel Gallo v Acuna, supra*.

PRACTICE TIP: If no specific legislation declares an act to be a public nuisance, the courts focus on the number of persons that are specifically affected by the factors that make the activity or condition a nuisance in order to determine whether it is a public nuisance.

The following cases determined that the conduct or conditions complained of were public nuisances:

- Emissions from a factory that caused allergies and respiratory problems for neighbors were found to constitute a public nuisance in *Venuto v Owens-Corning Fiberglas Corp.* (1971) 22 CA3d 116, 99 CR 350.
- Secondhand smoke in outdoor common areas of an apartment complex created a public nuisance because of the owner's failure to take action in *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 87 CR3d 602 (apartment tenant whose child suffered from asthma and chronic allergies could sue owner). See also *Melton v Boustred* (2010) 183 CA4th 521, ___ CR3d ___ (guest-invitees, who were attacked by strangers when they arrived at party advertised on Internet, did not adequately allege that owner-invitor created or assisted in creating public nuisance).
- Obstruction of traffic, even if not done for the purpose of obstructing traffic, was held to be a public nuisance in *People v Jones* (1988) 205 CA3d Supp 1, 252 CR 216.
- A city's closure of a public street that did not comply with statutory procedures and that impairs an abutting lot owner's street access may be both a public and a private nuisance. *Zack's, Inc. v City of Sausalito* (2008) 165 CA4th 1163, 81 CR3d 797. But see *Friends of H Street v City of Sacramento* (1993) 20 CA4th 152, 24 CR2d 607 (rejected residents' claims to enjoin designation of neighborhood street as "through" street with higher speed limits as nuisance, because regulation of traffic is legislative function).
- Lead paint in municipal buildings was held to be a nuisance when the action was brought on behalf of the public (remediation of a public health hazard), but not when the action was based on the economic loss of the public entities bringing suit (more akin to product liability). *County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 313, 40 CR3d 313.
- Violations of local planning codes constitute a public nuisance. See, *e.g.,* See *Golden Gate Water Ski Club v County of Contra Costa* (2008) 165 CA4th 249, 80 CR3d 876 (development over several decades without requesting land use and related permits violated county land use restrictions, as well as state and local health, planning, and building codes, including requirements for water, sewage, floodplain management, and land preservation).

Loss of development fees by the public entity is not sufficient to render the condition a public nuisance. A private

nuisance does not become a public nuisance merely because the public is tangentially affected. See *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1209, 52 CR2d 518. Also see §11.9.

Ordinances declaring activities to be a nuisance must meet due process standards. *Cook v City of Buena Park* (2005) 126 CA4th 1, 23 CR3d 700 (invalidated municipal ordinance requiring eviction of tenants suspected of criminal activity and requiring landlord to prevail in unlawful detainer action or face fines, misdemeanor punishment, property liens, or civil penalty).

The courts have rejected efforts by various public entities to expand nuisance and trespass concepts to situations that have been traditionally covered by products liability law. *City of San Diego v United States Gypsum Co.* (1994) 30 CA4th 575, 35 CR2d 876. The court in *U.S. Gypsum* held that claims for damage caused by asbestos in public buildings must be based on products liability principles and that nuisance and trespass remedies were not appropriate. It should be noted that the plaintiff in this action, City of San Diego, was suing in its capacity as a property owner. No reported decisions in California deal with whether such claims could be brought by public entities acting as representatives of the public.

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§11.8 2. Standing

A public nuisance can be abated by a civil, criminal, or administrative action instituted by government officials. CC §§3490-3496; Govt C §§38771-38773.5. A private citizen has no direct remedy to enjoin a public nuisance unless it is "specifically injurious" to him. To be "specifically injurious," the damage suffered must be different in kind, not merely in degree, from that suffered by other members of the public. *Koll-Irvine Ctr. Prop. Owners Ass'n v County of Orange* (1994) 24 CA4th 1036, 1040, 29 CR2d 664; *Frost v City of Los Angeles* (1919) 181 C 22, 183 P 342; *Brown v Petrolane, Inc.* (1980) 102 CA3d 720, 726, 162 CR 551.

A public nuisance action brought by government entities must be brought on behalf of the public, and must allege actual physical injury to the public. Such claims brought on behalf of the entities themselves for economic damages incurred in remediation efforts are not actionable. *County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 313, 40 CR3d 313.

The distinction between private and public nuisances is elusive. Courts have held that the fact that a nuisance is admittedly of a public nature "does not deprive the individual plaintiff of the right to an action for its abatement if it interfered with or obstructed the use and enjoyment of his private property." *Willson v Edwards* (1927) 82 CA 564, 569, 256 P 239 (quoting language in *Fisher v Zumwalt* (1900) 128 C 493, 61 P 82). When a court finds that a nuisance is both public and private, the plaintiff does not have to suffer damage different in kind from that suffered by the general public. *Jordan v City of Santa Barbara* (1996) 46 CA4th 1245, 1257, 54 CR2d 340, citing *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 342, 23 CR2d 377.

Some statutes specifically provide that any resident citizen can bring an action to abate certain public nuisances. In these instances, no showing of specific injury is required. Health & S C §11571; Pen C §§186.22a(b), 11201, 11226. It has been held that these acts do not create a right of action for damages. To recover damages, plaintiff must prove the elements of a cause of action for private nuisance. *Medina v Hillshore Partners* (1995) 40 CA4th 477, 485, 46 CR2d 871.

The district attorney can be compelled by writ of mandate to bring a nuisance action when so directed by the board of supervisors. *Board of Supervisors v Simpson* (1951) 36 C2d 671, 674, 227 P2d 14. The district attorney is not, and is not required to be, wholly independent of the influence of governmental authorities, and he or she retains some civil law duties, including nuisance abatement. *People v Parmar* (2001) 86 CA4th 781, 798, 104 CR2d 31. The business of government often necessitates the delegation of powers to administrative agencies, and this has been held to be proper. 86 CA4th at 799. Finally, the use of federal funds to partially fund a nuisance abatement specialist in the district attorney's office was held in *Parmar* to be consistent with federal, state, and local public policy.

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E. Private Nuisance

§11.9 1. Definition

Every nuisance not included in the definition of a public nuisance under CC §3480 is a private nuisance. CC §3481; *Koll-Irvine Ctr. Prop. Owners Ass'n v County of Orange* (1994) 24 CA4th 1036, 1040, 29 CR2d 664. For example, soil contamination was held to be a private nuisance because it interfered with the free use of the property in a manner the owner wished (residential development). This condition was held to be a nuisance even though it did not pose a risk to health and was not indecent or offensive to the senses and even though the trial court had concluded that the site had not been adequately tested by either side to establish that it was hazardous. Interference with the use of the property for residential development was sufficient to render the condition a private nuisance. See *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 52 CR2d 518. Violation of a residential development's covenants, conditions, and restrictions may constitute a nuisance if the restrictions provide that violations are a nuisance. *Woodridge Escondido Prop. Owners Ass'n v Nielsen* (2005) 130 CA4th 559, 570, 30 CR3d 15.

Sometimes a court will declare a condition to be both a public and a private nuisance. See *Zack's, Inc. v City of Sausalito* (2008) 165 CA4th 1163, 81 CR3d 797, which recognized that the city's impairment of the access easement of an owner of a lot abutting a street (without following statutory procedures for closing or vacating the street) is both a public and a private nuisance.

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§11.10 2. Threat of Future Injury

California courts have stated a general rule that a private nuisance action cannot be maintained for interference with the use and enjoyment of land caused solely by fear of future injury. See, *e.g.,* authorities cited in *Jordan v City of Santa Barbara* (1996) 46 CA4th 1245, 54 CR2d 340.

Other California courts have allowed actions for nuisance when the plaintiff established an actual and unnecessary harmful condition even though there was no physical damage. See, *e.g., San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 55 CR2d 724; *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1213, 52 CR2d 518. These cases established elaborate tests that should be examined carefully. In general, the plaintiff has the burden of showing the likelihood and magnitude of the potential for future injury and that the apprehension of future injury is well founded and based on an objective standard.

For cases dealing with the threat of future illness, see *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 997, 25 CR2d 550 (exposure to toxic emissions); *Macy's Cal., Inc. v Superior Court* (1995) 41 CA4th 744, 48 CR2d 496 (scratch from hypodermic needle possibly contaminated with AIDS virus); *Koll-Irvine Ctr. Prop. Owners Ass'n v County of Orange* (1994) 24 CA4th 1036, 1041, 29 CR2d 664; *Akins v Sacramento Mun. Util. Dist.* (1992) 18 CA4th 208, 8 CR2d 785 (damages for exposure to radioactive materials discharged into air) (CAVEAT: This case was depublished and is not citable).

For cases dealing with the threat of property damage as a nuisance, see *City of Malibu v California Coastal Comm'n* (2005) 128 CA4th 897, 27 CR3d 501 (speculation that persons using adjacent beach access would litter and trespass insufficient to find nuisance); *County of San Diego v Carlstrom* (1961) 196 CA2d 485, 16 CR 667 (dilapidated housing unit structure temporarily stored with and surrounded by combustible debris); *People v Oliver* (1948) 86 CA2d 885, 195 P2d 926 (uncompleted skeleton wooden building surrounded by flammable debris in built-up residential area).

In *Aas v Superior Court* (2000) 24 C4th 627, 101 CR2d 718, the supreme court decided that homeowners may not recover in tort for negligent construction if the condition has not yet resulted in damage. The court held that such negligence claims are limited to damages for physical injuries, and there is no recovery for economic loss alone. Although *Aas* dealt with construction defects, the rationale of this case arguably applies to economic loss caused by nuisance or trespass as well. See also *County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 40 CR3d 313 (citing *Aas* in rejecting plaintiffs' negligence and strict liability claims because of plaintiffs' failure to plead physical injury).

NOTE: After the *Aas* decision, the Right to Repair Act (CC §§895-945.5) repealed the economic loss rule for construction defect claims arising from a violation of the Act's building standards. See §12.31.

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§11.11 3. Blockage of Air, Light, or View

California does not recognize an implied easement for air, light, or view. As a result, the blockage of light to a neighbor's property, unless malice is the motive, does not constitute an actionable nuisance, even if a showing is made of material injury. *Sher v Leiderman* (1986) 181 CA3d 867, 876, 226 CR 698. For example, a penthouse apartment on adjacent property, blocking the plaintiffs' light, air, and view, and infringing on their privacy, was held not a nuisance. *Wolford v Thomas* (1987) 190 CA3d 347, 235 CR 422. For further discussion, see California Easements and Boundaries: Law and Litigation, chaps 1, 8, 10 (Cal CEB 2008).

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§11.12 F. Nuisance That Is Both Public and Private

An activity can be a public nuisance, a private nuisance, or both. See *Zack's, Inc. v City of Sausalito* (2008) 165 CA4th 1163, 81 CR3d 797. Unless a public nuisance also constitutes a private nuisance as to the plaintiff, the plaintiff cannot bring a private nuisance action. CC §3493. When a public nuisance does exist and a private party wishes to proceed on a private nuisance theory, the plaintiff must plead and prove an injury, specifically related to the use and enjoyment of its land, which is different from the injury suffered by the public in general. *Buchanan v Los Angeles County Flood Control Dist.* (1976) 56 CA3d 757, 768, 128 CR 770. Merely showing that the injury is of a different degree or intensity is not sufficient. For example, the court denied recovery for emotional distress damages based on a private nuisance theory to owners whose property was subjected to airport-generated noise levels that were higher than the noise level to which the general public was exposed because their injury did not differ in kind but only in degree. *Institoris v City of Los Angeles* (1989) 210 CA3d 10, 258 CR 418.

In *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 342, 23 CR2d 377, however, the court held that if there is actual, specific damage to the plaintiff's private property rights, the plaintiff need not show that it suffered damage of a different kind. In *Newhall,* the plaintiff alleged that it was unable to sell the property because of the pollution of soil and groundwater and that it spent money on investigation of the pollution. See *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 87 CR3d 602 (when public nuisance causes personal injury to individual or physical harm to land or chattels that is normally different from that suffered by others, tort action may be brought by individual); *Mangini v Aerojet-General Corp. (Mangini I)* (1991) 230 CA3d 1125, 281 CR 827 (toxic testing costs are sufficient to constitute a "special injury").

PRACTICE TIP: Defendants should consider whether they can successfully contend that the nuisance claimed by the plaintiff is solely a public nuisance. If the court agrees that the nuisance is public and further finds that it is not specifically injurious to the plaintiff, the plaintiff generally lacks standing to bring either a public or private action, and the action should be dismissed. See CC §3493, cited in §11.8.

When a plaintiff alleges that an activity is a nuisance solely because it violates a statute, ordinance, or regulation, and the determination of whether the activity constitutes a nuisance turns on the interpretation of the enactment, courts may properly defer to the interpretation by the government entity charged with enforcing the enactment. *Pallco Enters., Inc. v Beam* (2005) 132 CA4th 1482, 1499, 34 CR3d 490. This deference to administrative interpretation is appropriate when the plaintiff does not claim that the activity is unsafe or otherwise threatens adjacent property or the public. 132 CA4th at 1490. Generally, however, courts give great weight to administrative interpretations, unless they are clearly erroneous. *Norman v Unemployment Ins. Appeals Bd.* (1983) 34 C3d 1, 8, 192 CR 134.

If the court finds that the nuisance is public and that it is specifically injurious to the plaintiff, but also finds that the plaintiff has failed to plead or prove harm to its specific property rights that is different in kind from that suffered by the general public, the defendant can contend that the plaintiff cannot recover damages and is limited to the remedy of injunction. See *Koll-Irvine Ctr. Prop. Owners Ass'n v County of Orange* (1994) 24 CA4th 1036, 29 CR2d 664.

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G. Distinction Between Temporary or Continuing Nuisances and Permanent Nuisances

§11.13 1. Importance of Classification for Selection of Remedies

The classification of a nuisance or trespass as temporary or continuing versus permanent is the most difficult and probably the most frequently contested issue in this area of the law. The resolution of this issue is crucial and often determines the outcome of the case because it controls both the remedy available and the application of the defense of the statute of limitations.

If the nuisance or trespass is permanent,

- The plaintiff must bring one action for all past, present, and future damage within 3 years after the permanent nuisance arises; if plaintiff does not, the claim is barred by the statute of limitations;
- An injunction is not available; and
- The plaintiff can recover damages for diminution in value and stigma but not for loss of use.

See, *e.g.,* authorities cited in *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 868, 218 CR 293. See also *McCoy v Gustafson* (2009) 180 CA4th 56, 103 CR3d 37 and *Beck Dev. Co. v Southern Pac. Transp. Co*. (1996) 44 CA4th 1160, 1216, 52 CR2d 518.

If the nuisance or trespass is considered temporary or continuing,

- The person harmed may bring successive actions for damages until the nuisance is abated but recover only actual damages suffered in the 3 years before commencement of the action;
- An injunction is usually available; and
- The plaintiff can recover for loss of use, but prospective damages (such as diminution in value and stigma) are not recoverable.

Each repetition of a continuing nuisance or trespass is considered a separate wrong that commences a new period in which to bring an action for recovery based on the new injury. See *Baker v Burbank-Glendale-Pasadena Airport Auth., supra; Capogeannis v Superior Court* (1993) 12 CA4th 668, 676, 15 CR2d 796.

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§11.14 2. Factors

The factors the court considers in determining whether a nuisance or trespass is permanent or continuing are whether:

- It can be substantially abated in a reasonably feasible manner and at a reasonable cost (*Mangini v Aerojet-General Corp. (Mangini II)* (1996) 12 C4th 1087, 1097, 51 CR2d 272; *Wilshire Westwood Assocs. v Atlantic Richfield Co.* (1993) 20 CA4th 732, 744, 24 CR2d 562);
- It is the result of continuing activity (*Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1218, 52 CR2d 518); and
- The impact of the condition varies over time (*Mangini v Aerojet-General Corp. (Mangini I)* (1991) 230 CA3d 1125, 1147, 281 CR 827; *Field-Escandon v DeMann* (1988) 204 CA3d 228, 234, 251 CR 49).

The most important test is whether the nuisance or trespass can be substantially and feasibly abated without unreasonable burden. The question of whether a nuisance is abatable is a question of fact. *Mangini v Aerojet-General Corp. (Mangini II), supra; Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 C2d 265, 288 P2d 507; *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 343, 23 CR2d 377; *Mangini v Aerojet-General Corp. (Mangini I), supra*. The requirement of "substantial" abatement means that, even if a nuisance cannot be totally abated, partial abatement may be sufficient to classify the nuisance as temporary.

Abatement does not require proof that the condition can be entirely eradicated. Even if the abatement will take considerable time and may never be wholly successful, the nuisance may not be permanent as long as it can be reduced to acceptable levels. If there is no legitimate interest in permitting the condition to persist, the policy of the law should be to encourage discontinuance of the nuisance or trespass promptly and as thoroughly as possible. The court should not require absolutes. *Capogeannis v Superior Court* (1993) 12 CA4th 668, 680, 15 CR2d 796.

However, the plaintiff must introduce some evidence to show that the plaintiff's property can be repaired or abated by a reasonable means and at a reasonable cost before the court will deem a nuisance to be continuing. In *McCoy v Gustafson* (2009) 180 CA4th 56, 103 CR3d 37, for example, the appellate court held that the lack of evidence of an ability to abate precluded a determination that the nuisance was continuing, resulting in a time bar based on a 16-year-old complaint that started the running of the 3-year statute of limitations period for property damage under CCP §338(b). 180 CA4th at 113.

The "feasibility" and "without unreasonable burden" tests overlap and are often blended. These tests deal with two different concepts: (1) whether the means exist to abate, and (2) whether abatement is possible without unreasonable hardship or cost. *Mangini v Aerojet-General Corp. (Mangini II), supra; Beck Dev. Co. v Southern Pac. Transp. Co., supra*. "Abatable" depends on whether the contamination can be cleaned up to sufficient levels at a reasonable cost by reasonable means. The factors that should be considered in that determination are (1) feasibility of the means; (2) the alternatives to abatement; (3) the time and expense involved; (4) the legitimate competing interest; and (5) the benefits to be gained by abatement versus the detriments to be suffered if abatement is denied. This determination must be made on the facts and circumstances of each case. The burden of proof is on the plaintiff to prove that all these conditions are present. *Beck Dev. Co. v Southern Pac. Transp. Co, supra*.

PRACTICE TIP: If uncertain at the outset of the case about whether a condition is abatable, the plaintiff should plead continuing and permanent nuisance in the alternative, and allege on information and belief that the condition is abatable. See §§11.39-11.40.

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§11.15 3. Election by Plaintiff

The seminal case dealing with continuing and permanent nuisance is *Spaulding v Cameron* (1952) 38 C2d 265, 267, 239 P2d 625. The rationale behind the establishment of permanent nuisance is to allow one action to recover for all damages inflicted when it would be unfair to the defendant to be subjected to successive suits and unfair to the plaintiff if they were not allowed to recover all damages in one action. *Spaulding v Cameron, supra*.

The clearest example of a permanent nuisance is the operation of a public utility, which is privileged and will continue for indefinite duration because the utility is entitled to continue its operation. A more difficult situation exists when a nuisance or trespass is not privileged, but abandonment is impracticable or the plaintiff is willing to allow it to continue if he or she can be compensated for it. In that event, the plaintiff may elect to treat the nuisance as either permanent or continuing. A defendant who is not privileged to continue the nuisance and is able to abate it cannot complain about the classification selected by the plaintiff. 38 C2d at 268. This rule has been universally acknowledged since the *Spaulding* decision. *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 52 CR2d 518; *Wilshire Westwood Assocs. v Atlantic Richfield Co.* (1993) 20 CA4th 732, 24 CR2d 562; *Capogeannis v Superior Court* (1993) 12 CA4th 668, 15 CR2d 796.

The rule allowing a plaintiff to elect to treat the nuisance as either permanent or continuing applies when the nuisance cannot be abated or is operated by a public entity that has the discretion to terminate a nuisance at any time. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 871, 218 CR 293; *Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 C2d 265, 268, 288 P2d 507; *Phillips v City of Pasadena* (1945) 27 C2d 104, 162 P2d 625 (barricade of public street cutting off access to a resort). See also *Bartleson v U.S.* (9th Cir 1996) 96 F3d 1270; *Reynolds Metals Co. v Wand* (9th Cir 1962) 308 F2d 504 (fumes from plant that could not be abated can be treated as permanent nuisance).

Some courts have not permitted the plaintiff to elect in doubtful cases, using the rubric of *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1217, 52 CR2d 518. The *Beck* court recognized the plaintiffs' right to elect to treat a nuisance as permanent or continuing in doubtful cases, but it stated that the choice must be supported by evidence that would reasonably support either classification and concluded that the court should uphold the plaintiff's characterization only "if is reasonable to do so under a given formulation." *Beck Dev. Co. v Southern Pac. Transp. Co., supra*. See also *McCoy v Gustafson* (2009) 180 CA4th 56, 103 CR3d 37 (lack of evidence on ability to reasonably abate nuisance rendered nuisance permanent); *Spar v Pacific Bell* (1991) 235 CA3d 1480, 1 CR2d 480 (court denied plaintiff the right to elect by ruling that there was no reasonable doubt that the nuisance was permanent).

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§11.16 4. Courts' Preference for Continuing Nuisance

Courts have expressed, as a matter of policy, a preference for finding a continuing nuisance to (1) protect the plaintiff from contingencies, such as unforeseen future injuries; (2) prevent the plaintiff's claim from being barred by the statute of limitations; and (3) encourage termination of the condition causing the nuisance. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 870, 218 CR 293; *Mangini v Aerojet-General Corp. (Mangini I)* (1991) 230 CA3d 1125, 1148, 281 CR 827. But see *Mangini v Aerojet-General Corp. (Mangini II)* (1996) 12 C4th 1087, 51 CR2d 272, discussed in §11.41 (implies preference for permanent nuisance to determine whether claim barred by statute of limitations in property contamination cases). A continuing nuisance may exist even if the offensive conduct that has caused it has ended. A nuisance is defined by the condition created and the damage or harm inflicted, not by the conduct that created it. Therefore, the court will find a continuing nuisance if the harm continues or if there is a continuing threat of future injury. *Arcade Water Dist. v U.S.* (9th Cir 1991) 940 F2d 1265; *Starrh & Starrh Cotton Growers v Aera Energy* (2007) 153 CA4th 583, 63 CR3d 165 (continuous dumping of water into unlined ponds on defendant's property (that percolates down, migrates to aquifer under plaintiff's farm, and reduces quality of groundwater used to irrigate crops) constitutes continuing trespass onto plaintiff's property even though defendant's ponds are permanent); *Capogeannis v Superior Court* (1993) 12 CA4th 668, 681, 15 CR2d 796 (continuing nature of nuisance refers to continuing (but abatable) damage caused by offensive condition, not to acts causing offensive conditions to occur).

The court in *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1218, 52 CR2d 518, applied a restricted view of the continuing damage rule in a case involving groundwater contamination. It held that the contamination must continue to migrate through land or water and cause new and additional damages on a continuous basis before it will be considered a continuing nuisance or trespass. The static location of the contamination under the property without continuing migration or leaching "indicates a permanent rather than continuing nuisance." 44 CA4th at 1218. The court considered this condition to be more like a permanent encroachment that a court, after balancing the equities, will not abate. In *McCoy v Gustafson* (2009) 180 CA4th 56, 103 CR3d 37 the court focused on the ability to abate rather than the permanency of the damage, holding that the lack of evidence on the ability to abate a nuisance reasonably compelled the court to consider the nuisance permanent. 180 CA4th at 90. The court further held that the 3-year statute of limitations from the date of discovery would apply to bar the action under CCP §338(b). 180 CA4th at 113.

PRACTICE TIP: The *Beck* court seemed to confuse the conduct that created the condition with the continuing invasion of property interests and continuing damage caused by the condition after it was created. Arguably, the fact that the activity creating the nuisance has stopped is not relevant and, certainly, should not be determinative. As long as the condition exists and is abatable, the crucial factor should be the continuing nature of the interference compared with the plaintiff's full use and enjoyment of the property, regardless of whether the contamination is moving or not. See *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 345, 23 CR2d 377; *Capogeannis v Superior Court* (1993) 12 CA4th 668, 682, 15 CR2d 796. In cases involving toxic contamination, the policy of the law ought to be to get the contamination cleaned up. This policy would be supported by a finding of continuing nuisance, which encourages and facilitates cleanup and payments by the responsible parties.

Several issues about continuing nuisance law were left unanswered by the supreme court in *Mangini v Aerojet-General Corp. (Mangini II)* (1996) 12 C4th 1087, 51 CR2d 272. They include (1) whether continuing nuisance will remain the default substantive law holding of the court if there is doubt about whether the nuisance is continuing or permanent for the purpose of injunction and damages; (2) whether plaintiff can elect to characterize nuisance as continuing or permanent for the purposes of damages or injunction; and (3) whether the proof necessary to establish a nuisance as continuing or permanent for statute of limitations purposes (see §§11.40-11.41) will be the same as the proof used to determine whether the nuisance is temporary or continuing for the purposes of establishing the remedy. See McNichols: *Revisiting* Mangini II*: Should the Burden of Proof in Contamination-Nuisance Cases Be Re-Examined?*,

25 CEB Real Prop L Rep 93 (Apr. 2002).

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§11.16A H. Distinction Between Nuisance or Trespass and Inverse Condemnation

Nuisance and trespass are primarily statutory causes of action, and their remedies are derived from a combination of statutes and the common law. See §§11.18, 11.20-11.21. Inverse condemnation is a constitutionally-based cause of action. See, *e.g.,* authorities cited in Condemnation Practice in California, chap 13 (3d ed Cal CEB 2005). These causes of action are frequently pleaded as alternatives in a single lawsuit if a public entity plays a role in the dispute, but inverse condemnation actions are fairly limited. See, *e.g., Herzberg v County of Plumas* (2005) 133 CA4th 1, 34 CR3d 588. For discussion on the interplay of these theories in the context of the statute of limitations defense, see §§11.40-11.40B. On the interplay of these theories generally, see Condemnation Prac, chaps 13-16.

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III. TRESPASS

§11.17 A. Definition

Trespass to property is defined as an unlawful interference with possession. *Staples v Hoefke* (1987) 189 CA3d 1397, 235 CR 165; Restatement (Second) of Torts §158 (1965). In general, every unwarranted entry onto the land of another, "breaking the close," is a trespass. See *Herzberg v County of Plumas* (2005) 133 CA4th 1, 8, 34 CR3d 588.

Trespass may result from an act that is intentional, reckless, or negligent or that is the result of ultrahazardous activity. The only intent required is the intent to enter the property, regardless of the actor's motivation. *Miller v National Broad. Co.* (1986) 187 CA3d 1463, 1480, 232 CR 668. Trespass does not require personal entry onto the property; it can occur by causing the entry of material objects or inanimate substances. *Wilson v Interlake Steel Co.* (1982) 32 C3d 229, 185 CR 280 (damage from noise, vibrations, and deposit of particulates; see §11.18); *Roberts v Permanente Corp.* (1961) 188 CA2d 526, 10 CR 519 (dust). The performance of an act, without negligence or intent to harm, that will result with substantial certainty in the entry of foreign matter on another's land is sufficient for an intentional trespass. *Roberts v Permanente Corp., supra*. Trespass must cause actual damage to the property. *Elton v Anheuser-Busch Beverage Group* (1996) 50 CA4th 1301, 58 CR2d 303.

A party is generally liable for the entry of instrumentalities under his or her control on the land of another. This is true regardless of whether the land is enclosed or unenclosed. *Blevins v Mullally* (1913) 22 CA 519, 523, 135 P 307. However, California has unique rules that apply to trespass by cattle. Throughout most of California, the common law "fencing in" rule applies. Under this rule "the cattle owner builds a fence to keep his cattle in," and is responsible if they stray onto the property of others. Conversely, in some of California's northernmost counties, the "fencing out" rule applies. Under this rule, the neighboring landowners must build fences to keep the cattle out. Even under this rule, the owner of the cattle may be sued to enjoin the deliberate incursions of the cattle onto another's property. See historical discussion in *Herzberg v County of Plumas* (2005) 133 CA4th 1, 8, 34 CR3d 588.

Trespass may result from physical intrusion, failure to leave, or failure to remove foreign material. It can also occur when a party exceeds the scope of the permission or purpose of consent to enter the property (*Mangini v Aerojet-General Corp. (Mangini I)* (1991) 230 CA3d 1125, 1141, 281 CR 827) or exceeds the scope of use authorized by the lease (*SPPI-Somersville, Inc. v TRC Cos., Inc.* (ND Cal, Aug. 3, 2009, No. C04-2648) 2009 US Dist Lexis 71463). On the overuse of easement rights as a trespass, see *Patel v Southern Cal. Water Co.* (2002) 97 CA4th 841, 119 CR2d 119. It may result from the entry of foreign matter or causing the entry of other persons. Restatement §§158-159. Trespass may result in an invasion on the surface of the land, over the land, or below the land. 5 Witkin, Summary of California Law, *Torts* §§693-694 (10th ed 2005). One court held that contamination left on the property by a previous owner was not a trespass against the interests of the present owner, but was, however, a nuisance. *Capogeannis v Superior Court* (1993) 12 CA4th 668, 674, 15 CR2d 796. See also *County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 315, 40 CR3d 313, in which the court held that if the owner of the property "voluntarily places a product on the property [in this case, lead paint] and the product turns out to be hazardous, the owner cannot prosecute a trespass cause of action against the manufacturer … because the owner has consented to the entry of the product onto the land." 137 CA4th at 309. The court, however, let stand a claim for public nuisance.

Because tenants in common have the right to share equally in the possession of the entire property, a cotenant cannot trespass on commonly owned property. Thus, when one cotenant unlawfully excludes other cotenants from part of commonly owned land by erecting a fence, an action for possession (rather than trespass) and injunctive relief is appropriate. See *Kapner v Meadowlark Ranch Ass'n* (2004) 116 CA4th 1182, 1187, 11 CR3d 138 (court ordered cotenant either to remove fence or to enter into encroachment agreement). On encroachment agreements, see California Easements and Boundaries: Law and Litigation, chap 8 (Cal CEB 2008).

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§11.18 B. Distinction Between Nuisance and Trespass

The line between trespass and nuisance is wavering and uncertain. An action may be a trespass, a nuisance, or both. The primary distinctions between a claim for trespass and one for nuisance are found in the rights invaded and the proof of damages. Trespass requires physical invasion of the land and interference with the plaintiff's exclusive possession. See *Elton v Anheuser-Busch Beverage Group* (1996) 50 CA4th 1301, 58 CR2d 303 (fire spreading from defendant's property to plaintiff's constituted trespass); *Posey v Leavitt* (1991) 229 CA3d 1236, 1243, 280 CR 568. A nuisance is an interference with the plaintiff's use and enjoyment of property. *Lussier v San Lorenzo Valley Water Dist.* (1988) 206 CA3d 92, 253 CR 470.

Wilson v Interlake Steel Co. (1982) 32 C3d 229, 185 CR 280, illustrates the difference between the two torts. In *Wilson,* the court held that loud noise from a 24-hour steel mill could not be abated on the theory of trespass. The court distinguished between noise that caused vibrations resulting in damage or injury to the property (trespass) and noise waves that are merely bothersome and not physically damaging (nuisance). Intangible intrusion, such as noise, odor, or light with physical damage, is a nuisance and not a trespass. *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 935, 55 CR2d 724; *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 345, 23 CR2d 377; *Capogeannis v Superior Court* (1993) 12 CA4th 668, 674, 15 CR2d 796. Many types of conduct and conditions will interfere with both of these interests.

The second distinction between these two torts is that a cause of action for trespass requires proof of the deposit of particulate matter on the plaintiffs' property or of actual physical damage to the property; nuisance does not. *San Diego Gas & Elec. Co. v Superior Court, supra*. Proof of interference with the beneficial use and enjoyment of property is sufficient for nuisance. Liability for a private nuisance, however, requires proof that the invasion of the plaintiff's interest in the use and enjoyment of the land is substantial and that the substantial interference is unreasonable. 13 C4th at 937. Note that a continuing trespass creates a continuing cause of action that is virtually the same as a continuing nuisance claim. *Newhall Land & Farming Co. v Superior Court, supra*.

Many situations will give rise to liability both as trespass and a nuisance. These occur when a person's right of exclusive possession of land is violated and when there is an unreasonable and substantial interference with the use and enjoyment of that land. See, *e.g.*, *Rancho Viejo, LLC v Tres Amigos Viejos, LLC* (2002) 100 CA4th 550, 561, 123 CR2d 479.

The principles governing the permanent or continuing nature of a trespass or nuisance (see §§11.13-11.16) are generally the same for both torts, and reported cases discuss them without distinction. See *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1216, 52 CR2d 518, and authorities cited therein.

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§11.19 IV. ENCROACHMENT

An encroachment (*i.e.*, an unconsented intrusion by a building or other structure onto adjacent property) is usually treated as a nuisance or a trespass in California, depending on the nature of the encroachment. An encroachment may be both a nuisance and a trespass. An encroachment such as a building that rests on adjoining land is a permanent trespass (see *Rankin v DeBare* (1928) 205 C 639, 271 P 1050) and may be remedied by an action for damages (see §11.28) or for an injunction (see §11.23). If an encroachment substantially interferes with the adjoining owner's use and enjoyment of the land, it is a nuisance under CC §3479. *Kafka v Bozio* (1923) 191 C 746, 218 P 753.

When a structure encroaches only into the airspace of the adjacent land, it is not a trespass, but it may be a nuisance if it affects the adjacent owner's use and enjoyment. *Case v Sisich* (1929) 97 CA 106, 275 P 492. If it does, remedies applicable to nuisance apply. See §§11.23-11.26.

California courts have long applied a specific version of the relative hardship doctrine in determining whether to grant an injunction to enjoin trespass by encroachment. If the court determines that a trespass has occurred, it conducts an equitable balancing to determine whether to grant the injunction requiring removal of the easement or whether to award damages. *Hirshfield v Schwartz* (2001) 91 CA4th 749, 758, 110 CR2d 861. The test has three factors:

- Is the defendant innocent? The encroachment must not be willful or negligent.
- Unless the rights of the public would be harmed, the court should grant the injunction if the plaintiff will suffer irreparable injury regardless of the injury to the defendant.
- Is the hardship to the defendant that would be caused by granting the injunction greatly disproportionate to the hardship caused plaintiff by the continuing encroachment?

To deny an injunction on the basis of the third factor, the fact of disproportionate hardship to the defendant must clearly appear in the evidence and must be proved by the defendant. See *Fairrington v Dyke Water Co.* (1958) 50 C2d 198, 200, 323 P2d 1001; *Hirshfield v Schwartz* (2001) 91 CA4th 749, 759, 110 CR2d 861.

The net effect of an order refusing to enjoin an encroachment is a judicially created, often exclusive, easement created by a sort of nonstatutory eminent domain proceeding. The court in *Hirshfield* acknowledged that California courts generally have held that an exclusive, prescriptive easement that effectively amounts to ownership cannot be awarded in a residential boundary dispute situation if the encroaching landowner is not able to prove adverse possession. However, the courts also have approved essentially the same result under the "court's power in equity to create a protective interest in favor of an encroacher," which effectively results in a permanent exclusive easement. See 91 CA4th at 768. But this reasoning was criticized in a more recent encroachment case, *Kapner v Meadowlark Ranch Ass'n* (2004) 116 CA4th 1182, 1187, 11 CR3d 138, which stressed that the legal concepts of easement rights and possessory interests are distinct and that an encroaching party may not use a prescriptive easement remedy to circumvent the legal requirements for adverse possession. In *Kapner,* the court found that the encroaching party unlawfully possessed the neighboring cotenants' land with a fence, rejected his claim for a prescriptive easement, and ordered him either to remove the fence or to enter into an encroachment agreement with the homeowners' association. Arguably, the *Kapner* opinion is readily distinguishable from *Hirshfield* because *Kapner* addressed encroachment within a common interest development and involved a different set of interests.

On litigating encroachment claims, see California Easements and Boundaries: Law and Litigation, chaps 1, 8, 10 (Cal CEB 2008).

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§11.20 V. REMEDIES FOR PUBLIC NUISANCE

The remedies against a public nuisance differ depending on the type of public nuisance being addressed. Remedies include:

- Criminal indictment or information (CC §§3491-3496);
- Civil action for abatement or repair (Health & S C §§11571-11581, 17980-17980.9); or
- Summary abatement (Govt C §§38773-38773.5).

See also Pen C §§11225-11230 (red light and illegal gambling abatement law); *People ex rel Gallo v Acuna* (1997) 14 C4th 1090, 60 CR2d 277 (enjoining street gangs as public nuisance).

Cities and counties can establish procedures for abatement of nuisances involving substandard buildings, but an offending property owner must be given a choice of repairing or demolishing a condemned building and must be given a reasonable time to do so. Health & S C §17980(b); *Hawthorne Sav. & Loan Ass'n v City of Signal Hill* (1993) 19 CA4th 148, 23 CR2d 272. Ordinances may also provide that entry of a second or subsequent civil or criminal judgment for public nuisance within 2 years will put the owner at risk of being ordered to pay treble the costs of the abatement. Govt C §38773.7. This does not apply to conditions abated under Health & S C 17980.

In nuisance abatement actions based on a violation of specified criminal "vice" statutes (*e.g.*, obscenity, prostitution, drug-dealing), the public entity that brought the action may recover costs and fees. CC §3496. See *People v Bhakta* (2008) 162 CA4th 973, 76 CR3d 421 (affirming attorney fee award). In other abatement actions brought by public entities, the owner is liable for all costs of abatement and, if the city or county ordinance requires it, attorney fees as well. Govt C §§25845, 38773.1-38773.6. See *County of Sacramento v Sandison* (2009) 174 CA4th 646, 95 CR3d 30 (amount of attorney fee award to property owners who successfully defended county's nuisance abatement action was not limited under Govt C §25845 to amount of fees incurred by county). If a building is in a condition that substantially endangers the health and safety of residents, the court may order the owner to pay costs and attorney fees of the enforcement agency. Health & S C §17980.7(d). See *City & County of San Francisco v Jen* (2005) 135 CA4th 305, 37 CR3d 454 (owner of uninhabited building that endangered nearby residents ordered to pay costs and attorney fees).

Equitable civil actions to abate a public nuisance have been used in connection with gang abatement activities and other situations involving a pattern of activity amounting to a public nuisance. In these cases, public entities have obtained orders enjoining particular gang-related activities in the targeted area. The injunctions have included conduct that is both criminal and noncriminal. *People v Englebrecht* (2001) 88 CA4th 1236, 106 CR2d 738. These actions seek abatement of a public nuisance by injunctive relief. Such actions have been held to be equitable in nature; therefore, there is no right to a jury trial. 88 CA4th at 1245. See also *People v Bhakta, supra* (denied jury trial and enjoined prostitution activity at motel). Because the injunction curtails some liberty and a possible stigma may attach to the enjoined parties, the courts require clear and convincing evidence and will carefully scrutinize the reasons that the government entity has undertaken to restrict these activities. 88 CA4th at 1256. Finally, the court will also carefully restrict the breadth of the injunction to ensure that it is not more burdensome than absolutely necessary to achieve the desired result.

Damages are not recoverable for a public nuisance abatement action brought by a public entity in its representative capacity unless they are specifically provided for by statute. See CCP §731; *County of San Luis Obispo v Abalone Alliance* (1986) 178 CA3d 848, 860, 223 CR 846. Public entity plaintiffs cannot avoid this rule by seeking damages in the form of the costs of past abatement. 178 CA3d at 859. However, causes of action seeking future abatement are permissible. *County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 311, 40 CR3d 313.

Some statutes specifically authorize damages for public nuisances. See, *e.g.,* Pen C §11225(b). Note, however, that if a public entity has a property interest that is injuriously affected by the nuisance, it may recover the same type of damages available to private property holders. *Selma Pressure Treating Co. v Osmose Wood Preserving Co.* (1990) 221 CA3d 1601, 1614, 271 CR 596, disapproved on other grounds in *Johnson v American Standard, Inc*. (2008) 43 C4th 56, 70, 74 CR3d 108.

Legislative authority is a necessary prerequisite for local government bodies to set penalties for violations of ordinances. *People v Minor* (2002) 96 CA4th 29, 42, 116 CR2d 591. The court in *Minor* held that a trial court erred in ordering a defendant in a criminal abatement proceeding to repay the cost of investigating, analyzing, and prosecuting the action. The court held that, although Govt C §36901 explicitly authorizes cities to set the penalties for violations of penal ordinances, there is no equivalent statute for counties.

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§11.21 VI. REMEDIES FOR PRIVATE NUISANCE AND TRESPASS

Private nuisance and trespass give rise to alternative and concurrent remedies at law and in equity. 13 Witkin, Summary of California Law, *Equity* §§135-136 (10th ed 2005). The remedies available for a private nuisance are self-help abatement at the party's own risk or a civil action for injunction, damages, or both. CC §§3501-3503. See §§11.22-11.35.

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§11.22 A. Right to Self-Help

Anyone injured by a private nuisance may abate it by removing, or, if necessary, destroying, whatever constitutes the nuisance, if this is done without committing a breach of the peace or doing unnecessary injury. CC §3502. If the nuisance results from a mere omission of the wrongdoer and cannot be abated without entering onto the land of another, reasonable notice must be given before the entry can be made. CC §3503. A person who has the right to self-help may forgo this option and elect to resort to judicial remedies, such as an abatement order. See *Parsons v Luhr* (1928) 205 C 193, 270 P 443; *Bonde v Bishop* (1952) 112 CA2d 1, 6, 245 P2d 617.

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§11.23 B. Injunction

The most common remedies used against a private nuisance are an injunction, damages, or both. CC §3501; CCP §731. The plaintiff can elect to prosecute separate actions concurrently or combine an action for injunction and damages. *Katenkamp v Union Realty Co.* (1936) 6 C2d 765, 776, 59 P2d 473. However, the inclusion of a request for damages as one of the full range of possible remedies does not guarantee the right to a jury trial. *American Motorists Ins. Co. v Superior Court* (1998) 68 CA4th 864, 871, 80 CR2d 621. An action to abate a public nuisance that seeks an injunction is generally equitable, and there is no right to a jury trial. *People v Englebrecht* (2001) 88 CA4th 1236, 106 CR2d 738.

Civil Code §3533 states that "[t]he law disregards trifles." In deciding whether to grant an injunction, the court must balance the hardships and the equities by measuring the harm that will result to the plaintiff by a continuance of a nuisance against the harm that would be caused to the defendant if it is abated. This doctrine is referred to by several names: "relative hardship," "balancing of equities," "balancing of conveniences," and "comparative injury." *Hirshfield v Schwartz* (2001) 91 CA4th 749, 755 n1, 110 CR2d 861. This is a different balancing from that done by the court to decide whether a nuisance exists (see §11.6). The court may find that a condition or an activity is a nuisance and still deny an injunction if damages are an adequate remedy. Also, if the injury to the plaintiff is trivial or the damage to the defendant is greater than the damage to the plaintiff, the court may refuse an injunction and limit the plaintiff's relief to damages. See *Remmer v Glens Falls Indem. Co.* (1956) 140 CA2d 84, 87, 295 P2d 19 (in underlying nuisance action, court limited award to diminution in value because cost of abating nuisance exceeded diminution caused by nuisance). However, an injunction will not be refused merely because the offending activity or condition is highly beneficial to the defendant. CC §3533; *Rothaermel v Amerige* (1921) 55 CA 273, 203 P 833. The public interest may also justify denying an injunction. *Mountain Copper Co. v U.S.* (9th Cir 1906) 142 F 625, 638. The courts will, however, refuse to balance a hardship if a nuisance is created willfully. *Morgan v Veach* (1943) 59 CA2d 682, 689, 139 P2d 976.

As a practical matter, in the absence of extreme circumstances, the courts usually grant injunctive relief when a nuisance or trespass invades a substantial property right or unreasonably interferes with the plaintiff's use and enjoyment of its property. See *Balboa Island Village Inn, Inc. v Lemen* (2007) 40 C4th 1141, 57 CR3d 320 (restaurant granted injunction against neighboring residential defendant for defamation); *Sierra Screw Prods. v Azusa Greens, Inc.* (1979) 88 CA3d 358, 151 CR 799. Injunctive relief is also appropriate when one cotenant unlawfully excludes other cotenants from a part of commonly owned land. See *Kapner v Meadowlark Ranch Ass'n* (2004) 116 CA4th 1182, 1187, 11 CR3d 138, discussed in §11.19 (court ordered encroaching party either to remove fence or to enter into encroachment agreement). Most courts require a showing of proof of irreparable injury to the defendant before they will deny an injunction based on a balancing test, because a refusal to grant the injunction (allowing instead damages for a permanent nuisance) may effectively result in a condemnation award to a private party. *Fairrington v Dyke Water Co.* (1958) 50 C2d 198, 323 P2d 1001.

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§11.24 C. Tort Measure of Damages

The general tort measure of damages for trespass and nuisance is prescribed by CC §3333, which allows the plaintiff to recover the amount that will compensate the plaintiff for all detriment proximately caused by the tort, whether or not it could have been anticipated. *Coats v Atchison, T. & S. F. Ry.* (1905) 1 CA 441, 444, 82 P 640.

A plaintiff, in a suit for damage to real property, may recover either the cost to repair or the diminution in value, but not both. The plaintiff can recover the costs of repair even if that amount exceeds the diminution in value. The plaintiff cannot recover diminution in value if that amount exceeds the cost of repair. *Safeco Ins. Co. v J & D Painting* (1993) 17 CA4th 1199, 21 CR2d 903. Also, the plaintiff cannot recover diminution in market value that occurred while the repairs were taking place. *Safeco Ins. Co. v J & D Painting, supra*.

Nominal damages may be recovered for a nuisance even if the plaintiff suffers no appreciable detriment. CC §3360; *Davidson v Devine* (1886) 70 C 519, 11 P 664. As long as plaintiff has incurred some actual damages, an action for trespass can support an award of nominal damages. Nominal damages must be awarded if the matter decides a question of permanent right or entitles the plaintiffs to costs. *Staples v Hoefke* (1987) 189 CA3d 1397, 235 CR 165.

It is not necessary that a nuisance have its origin on neighboring property. A property owner can sue for damages caused by a nuisance created on its own property by a former owner or others. The party claiming a nuisance need not have a possessory or ownership interest in the property at the time the nuisance was created, and the defendant need not have a possessory or ownership interest in the property at the time the action is brought. See *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 343, 23 CR2d 377; *Mangini v Aerojet-General Corp. (Mangini I)* (1991) 230 CA3d 1125, 281 CR 827. A nuisance that obstructs the free use of the property is actionable. *Wilshire Westwood Assocs. v Atlantic Richfield Co.* (1993) 20 CA4th 732, 746, 24 CR2d 562 (allowed subsequent owner to recover for nuisance created by former lessee). Any party who creates, assists, or maintains a nuisance is liable for it. *Newhall Land & Farming Co. v Superior Court, supra*.

A person who is the owner of real property at the time an injury to the property occurred does not lose the right to recover damages when the property is sold to a third party. The transfer of real property does not automatically transfer the seller's cause of action to the new owner or deprive the previous owner of standing. *Vaughn v Dame Constr. Co.* (1990) 223 CA3d 144, 272 CR 261.

A plaintiff, however, cannot recover damages from a party who created a condition if the conduct is not itself negligence or intentional misconduct (*West Coast Home Builders, Inc. v Aventis Cropscience USA, Inc.* (ND Cal, Aug. 21, 2009, No. C04-2225) 2009 US Dist Lexis 74460), or when the conduct of a party (a lessee) was lawful and authorized by the contract (the lease) (*SPPI-Somersville, Inc. v TRC Cos., Inc.* (ND Cal, Aug. 3, 2009, No. C04-2648) 2009 US Dist Lexis 71463).

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§11.25 1. Continuing Nuisance

If the nuisance is continuing (see §§11.13-11.16), the remedy is either abatement and damages for past injury or successive actions for damages as new injuries occur until the nuisance is abated. *Spaulding v Cameron* (1952) 38 C2d 265, 239 P2d 625; *Rhodes v San Mateo Inv. Co.* (1955) 130 CA2d 116, 278 P2d 447. Recovery is limited to actual injury suffered before commencement of each action. Prospective damages are not recoverable. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 869, 218 CR 293. A person who obtains an injunction against a nuisance cannot recover damages for diminution in value but can bring a subsequent action for the damage that resulted during the period of the nuisance prior to abatement or for damages if the abatement is inadequate. *Alexander v McKnight* (1992) 7 CA4th 973, 9 CR2d 453; *Guttinger v Calaveras Cement Co.* (1958) 160 CA2d 460, 325 P2d 145.

Diminution of value damages and stigma damages are not recoverable in continuing trespass or continuing nuisance cases; damages are limited to abatement and to damages for loss of use. *Santa Fe Partnership v ARCO Prods. Co.* (1996) 46 CA4th 967, 977, 54 CR2d 214; *FDIC v Jackson-Shaw Partners No. 46, Ltd.* (ND Cal 1994) 850 F Supp 839, 844. Interest-rate differential damages, from the loss of a property's value as collateral for a loan, are a form of diminution in value damages and are not recoverable in continuing nuisance cases. *Gehr v Baker Hughes Oil Field Operations, Inc*. (2008) 165 CA4th 660, 81 CR3d 219. Damages for diminution in value caused by a nuisance are inappropriate when equitable relief is granted requiring abatement of the nuisance because the court assumes that the defendant will comply with the order. But see *Rhodes v San Mateo Inv. Co., supra* (although plaintiff obtained injunction requiring defendant to stabilize hill to prevent slides, plaintiff was also entitled to damages for fear and worry caused by future threatened damage).

If dirt, gravel, or other physical substances are deposited on the property, however, the injured party may recover the cost of removal and restoration or loss of market value, whichever is more appropriate to compensate the injured party, usually the lesser of the two amounts. After a plaintiff establishes decreased market value, the defendant has the burden of proving that restoration costs would be less. *Armitage v Decker* (1990) 218 CA3d 887, 904, 267 CR 399. The cost of testing property allegedly polluted with hazardous waste by a former tenant is a compensable injury for a continuing nuisance to the owners under CC §3493. *Mangini v Aerojet-General Corp. (Mangini I)* (1991) 230 CA3d 1125, 1138, 281 CR 827.

The purpose of the rule that diminution in value and stigma damages are not recoverable under any circumstance in a continuing nuisance or trespass action is to avoid a double recovery (*i.e.,* if a nuisance is continuing, an owner or a series of owners should not be able to recover more than once for the same diminution in value). The rule assumes that diminution in value will never occur when an injunction against the offending activity is granted. See, *e.g., Alexander v McKnight* (1992) 7 CA4th 973, 978, 9 CR2d 453 (suggesting that damaged party might be able to recover actual diminution in value caused by unabated continuing nuisance, but reversed award of diminution damages because trial court had granted injunctive relief). See also *Santa Fe Partnership v ARCO Prods. Co., supra*.

Application of the rule regarding diminution in value can work inefficiently with the laws regarding valuation in property sales transactions. For example, if a party sells a parcel of real property that contains or is affected by a continuing nuisance and receives less than the fair market value for the property because of that nuisance, that party should be able to recover damages for lost value. This result would not constitute a double recovery. First, these damages, once incurred, belong to the owner at the time the damages were inflicted and, unless the selling owner assigns the right to sue, the damages are not being passed on to future owners. *Vaughn v Dame Constr. Co.* (1990) 223 CA3d 144, 272 CR 261. Second, the owner/seller is legally obligated to disclose this condition to the buyer. As a result, the buyer will presumably pay less for the property than it would have without the disclosure of the nuisance. This is the difference the seller would be entitled to recover as diminution in value. A buyer who pays a reduced price based on the disclosure will not suffer the same damages during its ownership and would have no basis on which to recover them. See extended discussion of seller's duty to disclose known property conditions in *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 23 CR2d 377.

Finally, even if the nuisance is abated by compliance with a court order or statutory mandate, a seller must disclose some types of neighborhood problems even if they occurred in the past, such as noise and other nuisances. See, *e.g., Alexander v McKnight* (1992) 7 CA4th 973, 977, 9 CR2d 453, in which the court characterized the noise as primarily psychological, with "no guaranteed physical solution" to prevent the offending neighbors from reverting to their illegal behavior. 7 CA4th at 980. See also *Santa Fe Partnership v ARCO Prods. Co., supra,* in which the court acknowledged that the nature of the nuisance was contaminated soil that might take a long time to clean up, and during that time the owner would suffer stigma damages. Arguably, the reality of the marketplace is that often, even after remediation, the property will remain stigmatized. If a buyer offers less than the market value for the property because of the seller's disclosure of a prior nuisance, arguably that is damage the seller should be able to recover because it is not in the nature of a double recovery. For further discussion of the seller's and broker's duties to disclose, see California Real Property Sales Transactions §§6.29-6.70 (4th ed Cal CEB 2007); Handling Real Property Sales Transactions, steps 4-8 (Cal CEB Action Guide March 2009).

There are other ways to prevent double recovery and, at the same time, compensate injured parties. Rather than using a mechanical rule that all prospective damages are not recoverable under any circumstances when the nuisance or trespass is continuing, the courts should adopt a more flexible test such as the six-prong test used by the California Supreme Court in *Biakanja v Irving* (1958) 49 C2d 647, 320 P2d 16. This type of approach was discussed in *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 52 CR2d 518.

PRACTICE TIP: Arguably an appellate court could separate the concept of damages from the classification of the nuisance as permanent or continuing, which could still be used for determining the statute of limitations. As the dissent in *Mangini v Aerojet-General Corp. (Mangini II)* (1996) 12 C4th 1087, 51 CR2d 272, pointed out, it may be appropriate to use a different rule for damages from that used to calculate the statute of limitations. The dissent suggested that the unabated nuisance in *Mangini* could be treated as continuing for purposes of the statute of limitations and permanent or continuing for purposes of damages at the option of the plaintiff.

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§11.26 2. Permanent Nuisance

In an action for permanent nuisance, the plaintiff can recover for both past and future damages. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 869, 218 CR 293; *Razzano v Kent* (1947) 78 CA2d 254, 177 P2d 612; *Williams v Southern Pac. R.R.* (1907) 150 C 624, 89 P 599 (see §11.27).

The damage for a permanent nuisance is measured by the loss of the market value caused by the nuisance. CC §3333; *Spaulding v Cameron* (1954) 127 CA2d 698, 704, 274 P2d 177; *Guttinger v Calaveras Cement Co.* (1951) 105 CA2d 382, 233 P2d 914. Although there are no California cases on point, it appears that the valuation is set on the date that the nuisance became permanent. *Bartleson v U.S.* (9th Cir 1996) 96 F3d 1270; Restatement (Second) of Torts §930(3)(b) (1979).

Plaintiffs can also recover diminution in value of the property owing to stigma caused by a permanent nuisance. *Bartleson v U.S., supra* (damages awarded for mental anguish, interference with use, and diminution in value).

For a discussion of the evidence a jury may consider in arriving at the property's value, see *Los Angeles County Flood Control Dist. v Abbot* (1938) 24 CA2d 728, 76 P2d 188, disapproved on other grounds in *Joslin v Marin Mun. Water Dist.* (1967) 67 C2d 132, 143, 60 CR 377. The court held that, in determining value for eminent domain purposes, the jury could consider the condition of the property, the use to which it had been put, advantages of making practical use of the property, and the reasonable expectation of such advantages. *Los Angeles County Flood Control Dist. v Abbot, supra*.

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§11.27 3. Continuing Trespass

If a trespass can be enjoined or if it causes only temporary injury, the injured party can recover damages resulting from the original wrong. It can bring separate and successive actions for continuing damages caused by the trespass. *Kafka v Bozio* (1923) 191 C 746, 218 P 753; *Bertram v Orlando* (1951) 102 CA2d 506, 227 P2d 894.

Civil Code §3334 allows the plaintiff to recover the value of the loss of use of the property resulting from the trespass. The value is defined as the greater of the reasonable rental value or the benefit obtained by the trespasser (CC §3334(b)(1)), as well as the reasonable cost of restoration or repair and the cost of recovering possession (CC §3334(a)). If restoration is not possible or economically impractical, those costs cannot be recovered under §3334(a), and the plaintiff can recover for diminution in value. *Starrh & Starrh Cotton Growers v Aera Energy* (2007) 153 CA4th 583, 599, 63 CR3d 165. The intent of the statute is to eliminate financial incentives for trespass by eradicating the benefit of using another's land. 153 CA4th at 604.

In order to meet the "benefits obtained" test under CC §3334(b)(1)), the trespass must result in something advantageous for the trespasser. That is, the trespass itself must provide the trespasser with a financial or business advantage. *Watson Land Co. v Shell Oil Co.* (2005) 130 CA4th 69, 77, 29 CR3d 343 (oil leak on private property did not benefit oil company). The "benefits obtained" may include profits enjoyed by the trespasser that are directly linked to the wrongful trespass. *Starrh & Starrh Cotton Growers*, 153 CA4th at 604. See also *Bailey v Outdoor Media Group* (2007) 155 CA4th 778, 66 CR3d 322 (plaintiff entitled to net profits received by trespasser, not gross revenue).

The owner of land can recover damages for the value of the use of the property by a trespasser, even if the owner suffered no actual loss of rents. CC §3334; *Don v Trojan Constr. Co.* (1960) 178 CA2d 135, 2 CR 626. If the wrongful occupation of the real property is the result of mistake of fact, the value of the use of the property is its reasonable rental value. CC §3334(b)(2).

PRACTICE TIP: In drafting complaints, counsel should bear in mind the 3-year limitations period (CCP §338) for trespass and nuisance. If this period is problematic, another cause of action may be available. For instance, the court in *Harrison v Welch* (2004) 116 CA4th 1084, 1097, 11 CR3d 92, noted that a barred action for permanent trespass of improvements, subject to a 3-year period, might survive if the plaintiff instead pleaded facts supporting removal of the improvements, under an action for recovery of real property, which has a 5-year limitations period under CCP §§318 and 321. See also *Kapner v Meadowlark Ranch Ass'n* (2004) 116 CA4th 1182, 11 CR3d 138 (statute of limitations determined by facts pleaded).

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§11.28 4. Permanent Trespass

When the trespass is of a permanent nature, all damages past and prospective are recoverable in one action. *Kafka v Bozio* (1923) 191 C 746, 750, 218 P 753; *Bertram v Orlando* (1951) 102 CA2d 506, 227 P2d 894. When injury to real property from trespass is permanent, the measure of damages is the difference between the market value of the property before and after the injury. *Perkins v Blauth* (1912) 163 C 782, 127 P 50; *Revis v I. S. Chapman & Co.* (1933) 130 CA 109, 19 P2d 511; *Hancock v George R. Curtis Paving Co.* (1931) 114 CA 624, 300 P 65. On permanent injury, see *Guttinger v Calaveras Cement Co.* (1951) 105 CA2d 382, 233 P2d 914. For a description of various kinds of permanent injuries and applicable cases, see 6 Witkin, Summary of California Law, *Torts* §1727 (10th ed 2005); California Attorney's Guide to Damages §5.38 (2d ed Cal CEB 2004).

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§11.29 D. Damage, Destruction, or Removal of Fixtures or Personal Property

If a fixture is removed or destroyed, the measure of damages is the difference between the value of the real property before and after removal or destruction of the fixture. *Rhoda v Alameda County* (1881) 58 C 357; *Wilmerton v Morton* (1946) 74 CA2d 891, 169 P2d 992; *Givens v Markall* (1942) 51 CA2d 374, 124 P2d 839. In addition, CC §1013.5, allowing removal of improvements erroneously placed on another's land in good faith, may apply if its conditions are met.

For the total destruction of a building or other structures on real property, the measure of damages is the difference between fair market value of the property immediately before destruction and the value immediately after. Loss of use is not recoverable. *Ferraro v Southern Cal. Gas Co.* (1980) 102 CA3d 33, 162 CR 238. Conversely, the measure of damages that may be used for injury to a building is the reasonable cost of repair plus loss of rent if the building was leased. *Linforth v San Francisco Gas & Elec. Co.* (1909) 156 C 58, 103 P 320; California Attorney's Guide to Damages §5.38 (2d ed Cal CEB 2004).

If the property removed or damaged is not affixed and remains personal property, the measure of damages for harm to the real property is the difference in the real property's value immediately before the injury and immediately after, unless the cost of restoration is less than the difference, in which event the proper measure of damages is the cost of repair. *Cornell v Sennes* (1971) 18 CA3d 126, 136, 95 CR 728. See also remedies for conversion in Guide to Damages §4.46.

There are special rules for the damage, destruction, or removal of certain products of real property, including trees, crops, and raw material. In some of these areas, statutory rules on damages apply. For example, Civil Code §3346 and CCP §733 provide for payment of treble damages for wrongfully injuring or removing trees on the land of another or double damages when the trespass is casual or involuntary. See *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442, 463, 102 CR3d 32 (tree destruction caused by negligently spread fire subject to mandatory doubling of damages under §3346). Because these statutes are penal in nature, one cannot in addition get punitive damages under CC §3294. *Hassoldt v Patrick Media Group* (2000) 84 CA4th 153, 169, 100 CR2d 662.

For further discussion of the law regarding the obligations of neighboring owners regarding injury to trees, see California Easements and Boundaries: Law and Litigation, chap 8 (Cal CEB 2008). See also *Santa Barbara Pistachio Ranch v Chowchilla Water Dist.* (2001) 88 CA4th 439, 446, 105 CR2d 856, which allowed two pistachio farmers to recover the cost of replacing trees that died from contamination in an action for negligence and nuisance against a local water district. The court observed that the cost of replacing the trees and growing them to the equivalent maturity and condition depends on the value of the trees. This value is determined, at least in part, by the age of the trees, as age relates directly to the trees' productivity because pistachio trees take 17 years to reach maturity and produce a full crop. As a result, the court held that a lost profits analysis may conceivably be used to value these trees, particularly if it is impossible to replace the injured trees with mature trees. This case also has an interesting discussion of different measures of damages for injury for destruction of fruit, nut, and other productive trees.

Other types of damages are recoverable after forest fires. See, *e.g., U.S. v Union Pac. R.R. Co*. (ED Cal, April 30, 2008, No. Civ S-06-1740) 2008 US Dist Lexis 35338, in which the court determined that because of the unique character of forest land, for which no real estate market value could be established, diminution in value was not the proper measure of damages after a forest fire, but that the United States could recover damages for separate injuries to trees, to the soil, and pre-merchantable timber, for loss of use of habitat, and for reforestation costs. Restoration damages, under CC §3333, were not limited by reasonableness, as they would be under CC §3334 for the wrongful use or occupation of the property.

PRACTICE TIP: When first evaluating a tort claim for damage to property, check whether the facts fit under the wrongful use or occupancy of real property (CC §3334) or under proximately caused detriment (CC §3333). While both theories can be pleaded, a plaintiff at trial might be able to prove more damages if reasonableness is not a limitation. See also remedies discussed in §§12.31-12.32, 12.84-12.91.

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§11.30 E. Injury to Persons

Parties injured by nuisances or dangerous conditions of public property can recover for personal injuries. *Day v City of Fontana* (2001) 25 C4th 268, 105 CR2d 457 (overgrown vegetation surrounded intersection and caused automobile accident). In *Day*, the injured party was an uninsured motorist, so the court limited recovery against the public entity defendant to economic damages and held noneconomic damages were barred under CC §3333.4. For additional discussion of the scope of §3333.4, see *Chude v Jack in the Box, Inc.* (2010) ___ CA4th ___, ___ CR3d ___, 2010 Cal App Lexis 776; *Anaya v Superior Court* (2002) 96 CA4th 136, 116 CR2d 660.

A nuisance cause of action may also be alleged if a property owner enters onto neighboring private property and sustains personal injuries because of a dangerous condition. If the entry on the property was for recreational use, immunity under CC §846 (see §11.43A) may apply.

Damages may be recovered for annoyance and discomfort and for mental suffering, without physical injury, resulting from a nuisance or trespass. *Acadia, Cal., Ltd. v Herbert* (1960) 54 C2d 328, 337, 5 CR 686 (plaintiff could recover for loss of wife's services when she received extensive medical treatment and hospitalization because of defendant's willful conduct); *Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 C2d 265, 272, 288 P2d 507; *Lew v Superior Court* (1993) 20 CA4th 866, 873, 25 CR2d 42. But see *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442, 459, 102 CR3d 32 (nonresident owners cannot recover damages for annoyance and discomfort).

Plaintiff need not prove impairment of health. *Bartleson v U.S.* (9th Cir 1996) 96 F3d 1270; *Judson v Los Angeles Suburban Gas Co.* (1910) 157 C 168, 106 P 581. In some instances, an owner may recover damages for mental suffering caused by fear for his or her safety or that of family members and guests. *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 997, 25 CR2d 550 (exposure to toxic emissions); *Herzog v Grosso* (1953) 41 C2d 219, 259 P2d 429; *Macy's Cal., Inc. v Superior Court* (1995) 41 CA4th 744, 48 CR2d 496 (scratch from hypodermic needle possibly contaminated with AIDS virus); *Koll-Irvine Ctr. Prop. Owners Ass'n v County of Orange* (1994) 24 CA4th 1036, 1041, 29 CR2d 664; *Alexander v McKnight* (1992) 7 CA4th 973, 9 CR2d 453 (negligently and intentionally caused emotional distress by problem neighbors).

Damages for mental suffering can be recovered even if the nuisance does not injure or decrease the value of the property. *Coats v Atchison, T. & S. F. Ry. (*1905) 1 CA 441, 82 P 640. Damages for discomfort flowing from a nuisance are recoverable in addition to damages for injury to real property caused by the nuisance. *Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 C2d 265, 288 P2d 507; *Spaulding v Cameron* (1954) 127 CA2d 698, 274 P2d 177; *Ingram v City of Gridley* (1950) 100 CA2d 815, 224 P2d 798; *Bartleson v U.S., supra*.

For further discussion of theories of recovery and defenses in personal injury actions, see California Tort Damages (2d ed Cal CEB 2002); California Attorney's Guide to Damages (2d ed Cal CEB 2004). For discussion of the independent tort of intentional infliction of emotional distress, see Tort Damages, chap 6.

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§11.31 F. Lost Profits

Lost profits may be a proper measure of damages for a trespass and nuisance. *Natural Soda Prods. Co. v City of Los Angeles* (1943) 23 C2d 193, 143 P2d 12. To recover lost profits, the plaintiff must show probable income and expense of the business as a whole, based on operating experience, sufficient to permit a reasonable estimate to be made. *Guttinger v Calaveras Cement Co.* (1951) 105 CA2d 382, 233 P2d 914.

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§11.32 G. Attorney Fees

Attorney fees are not recoverable in California unless authorized by statute or contract. CCP §1021. There is no general statutory provision for attorney fees in tort actions (*Falk v Waterman* (1874) 49 C 224), but attorney fees may be awarded in a tort action between contracting parties if their contract so provides (see *Santisas v Goodin* (1998) 17 C4th 599, 71 CR2d 830; *Xuereb v Marcus & Millichap, Inc.* (1992) 3 CA4th 1338, 1342, 5 CR2d 154). On recovery of attorney fees generally, see California Attorney's Guide to Damages (2d ed Cal CEB 2004).

Civil Code §3496 provides for recovery of costs, including costs of investigation, discovery, and attorney fees, in certain public nuisance cases brought by a governmental agency. Also, attorney fees may be awarded under the private attorney general theory codified in CCP §1021.5 or under the nonstatutory substantial benefit rule for litigation that effectuates state environmental policies. See California Attorney Fee Awards, chap 2 (3d ed Cal CEB 2010). For discussion of the Equal Access to Justice Act (28 USC §2412) and other federal statutes that permit an award of attorney fees, see Guide to Damages §5.36.

Code of Civil Procedure §1021.9 authorizes an award of attorney fees when a trespass occurs on land under cultivation or used for grazing. A back yard or an urban garden does not qualify. *Quarterman v Kefauver* (1997) 55 CA4th 1366, 64 CR2d 741. Attorney fees are recoverable when there is subsurface trespass to land under cultivation. *Starrh & Starrh Cotton Grower*s, 153 CA4th 583, 608, 63 CR3d 165. Attorney fees are also recoverable even if the land is not being used for livestock or cultivation at the time of the trespass, provided that there is an intent to farm the land. *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442, 465, 102 CR3d 32 (owner who had raised livestock on ranch destroyed by negligent fire and who intended to resume such activity allowed attorney fees under CCP §1021.9).

It is unnecessary, however, that the cultivation or grazing be conducted for commercial purposes. *Haworth v Lira* (1991) 232 CA3d 1362, 284 CR 62.

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§11.33 H. Prejudgment Interest

Prejudgment interest from the date of injury is generally not recoverable in nuisance and trespass actions, because the damages are unliquidated. CC §§3287-3288; *Perkins v Blauth* (1912) 163 C 782, 127 P 50. But if the damages sought are liquidated or are sufficiently capable of calculation, they may qualify for an award under CC §3287(a). *Amador Valley Investors v City of Livermore* (1974) 43 CA3d 483, 117 CR 749 (interest allowed on damages for wrongful discharge of sewage onto plaintiff's property in inverse condemnation action). Prejudgment interest may also be recovered as a cost in contribution actions under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 USC §§9601-9675). 42 USC §§9607(a), 9613(f).

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§11.34 I. Punitive Damages

Civil Code §3294(a) provides that, in an action for breach of an obligation not arising from contract, exemplary and punitive damages are recoverable when clear and convincing evidence prove that the defendant is guilty of oppression, fraud, or malice. Malice includes not only conduct that the defendant intended to cause injury to the plaintiff, but also "despicable" conduct carried on with a "willful" and conscious disregard of the rights or safety of others. CC §3294(c)(1).

Under older case law, punitive damages were recoverable when a nuisance was willfully created, was dangerous, and substantially impaired the use and enjoyment of the property (*McIvor v Mercer-Fraser Co.* (1946) 76 CA2d 247, 254, 172 P2d 758), but recovery would be governed by the current standards created under more recent amendments to CC §3294. Punitive damages have also been allowed for encroachment. *Goshgarian v George* (1984) 161 CA3d 1214, 208 CR 321. Punitive damages, however, are not recoverable when the defendant has made a good faith effort to control the nuisance or trespass. See 13 Witkin, Summary of California Law, *Equity* §153 (10th ed 2005). On appealing excessive punitive damage awards, see §12.87.

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§11.35 J. Statutory Limitations on Recovery

The California legislature has enacted statutes that limit the recovery of damages arising from certain types of activities. Parties must research this subject as it applies to the facts of their case. These limitations apply if the conduct or condition alleged to be a nuisance is expressly authorized or so clearly implied that it is apparent that the legislative body contemplated protection of the acts causing the nuisance. See *Greater Westchester Homeowners Ass'n v City of Los Angeles* (1979) 26 C3d 86, 160 CR 733. Some examples of these statutes are:

- Outdoor shooting ranges (CC §3482.1);
- Preexisting agricultural activities, operations, or facilities (CC §3482.5); and
- Preexisting agricultural processing activities, operations, and facilities involving dairy products, meat, rendering plants, eggs, fruits, grains, beer and wine, and collection centers (CC §3482.6).

It is the court's decision whether the plaintiff's claim is contrary to the legislative policy in a particular statute or regulation. For example, the California Supreme Court held that property owners may not seek damages against a public utility for diminution in property value caused by fear of electromagnetic fields, because such a recovery would interfere with Public Utilities Commission policies as adopted in public utilities regulations. *San Diego Gas & Elec. Co. v Superior Court* (1996) 13 C4th 893, 55 CR2d 724. See also Coon, *Case Comment: San Diego Gas & Electric Co*., 19 CEB Real Prop L Rep 209 (Oct. 1996).

For a case giving a narrower application of statutory limitations, see *Jones v Union Pac. R.R.* (2000) 79 CA4th 1053, 94 CR2d 661.

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VII. DEFENSES

§11.36 A. Comparative Fault

Proposition 51 (CC §§1431-1431.5) limits liability for noneconomic damages to the amount allocated to the defendant in direct proportion to that defendant's percentage of fault. Noneconomic damages are defined as subjective, nonmonetary losses, including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation, and humiliation. CC §1431.2(b)(2). A defendant's liability for noneconomic damages is limited to its proportionate share of fault relative to all those responsible for the injuries, whether or not they are parties to the lawsuit.

Comparative negligence is a defense when the nuisance action seeks personal injury, property, or wrongful death damages resulting from negligent conduct. It is not a defense when the harm is intentional or the result of recklessness. *Tint v Sanborn* (1989) 211 CA3d 1225, 1229, 259 CR 902. When the nuisance is the result of an abnormally dangerous condition or activity, contributory negligence is a defense only if the plaintiff has voluntarily and unreasonably subjected him- or herself to the risk of harm. *Tint v Sanborn, supra;* Restatement (Second) of Torts §840B (1979). Comparative fault is not a defense when the plaintiff seeks an injunction as the remedy. *Kafka v Bozio* (1923) 191 C 746, 749, 218 P 753.

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B. Statutes of Limitations and Repose

§11.37 1. Public Nuisance and Trespass

There is no statute of limitations for a public nuisance. CC §3490; *Wade v Campbell* (1962) 200 CA2d 54, 61, 19 CR 173. A public nuisance may not be legalized by lapse of time. CC §3490. Therefore, the statute of limitations and consent are not defenses to public nuisance. There are no prescriptive rights to maintain a public nuisance. See *Golden Gate Water Ski Club v County of Contra Costa* (2008) 165 CA4th 249, 80 CR3d 876 (development over several decades without requesting land use and related permits violated county land use restrictions, as well as state and local health, planning, and building codes, including requirements for water, sewage, floodplain management, and land preservation). This rule does not apply to a private nuisance action for damages or a private action to abate an unlawful condition. *Mangini v Aerojet-General Corp. (Mangini I)* (1991) 230 CA3d 1125, 1142, 281 CR 827. In spite of the general rule, laches may apply to a public nuisance if there is no reasonable explanation for the delay and it resulted in prejudice. The same result may follow on the theory of estoppel. See *City & County of San Francisco v Pacello* (1978) 85 CA3d 637, 645, 149 CR 705. But see *Golden Gate Water Ski Club*, 165 CA4th 249 for discussion of situation in which estoppel does not apply.

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§11.38 2. Private Nuisance and Trespass

Applicable statutes of limitations for a private nuisance are 2 years for bodily injury and 3 years for property damage. CCP §§335.1, 338(b). In actions involving trespass or nuisance, the injury is considered to be to the property itself, not to the owner. Once the statute of limitations bars a claim, all claims of subsequent owners of the injured property are also barred. The statute does not commence to run anew every time ownership of the property changes hands. *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 1215, 52 CR2d 518. See also *CAMSI IV v Hunter Technol. Corp.* (1991) 230 CA3d 1525, 1534, 282 CR 80. The expiration of the limitation period bars an action by all successors in interest. *Beck Dev. Co. v Southern Pac. Transp. Co., supra; Camsi IV v Hunter Technol. Corp., supra*. This rule means that a party can acquire a prescriptive right to maintain a private nuisance.

In a nuisance action, the plaintiff can recover damages that accrue between the commencement and the conclusion of the action. CC §3283; *Renz v 33rd Dist. Agric. Ass'n* (1995) 39 CA4th 61, 68, 46 CR2d 67. (Note, however, that *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 218 CR 293, suggests the contrary in dicta at 39 C3d at 869.)

To calculate when the statute of limitations begins to run in a nuisance action, counsel must ascertain whether the nuisance is permanent or continuing. See §§11.39-11.41.

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§11.39 a. Permanent Nuisance and Trespass

The statute of limitations for permanent nuisance commences from the time that (1) the permanent nuisance is created; (2) the property suffers actual and appreciable harm; and (3) the plaintiff discovers or should have discovered the injury and its cause through reasonable diligence. *Wilshire Westwood Assocs. v Atlantic Richfield Co.* (1993) 20 CA4th 732, 24 CR2d 562. The cause of action for nuisance accrues when the consequential damages are sufficiently apparent to give a reasonable person notice that he or she has a duty to pursue legal remedies. In contamination cases, the actual and appreciable harm is the placing of hazardous material in the soil or groundwater and not the order to clean up the property. In contrast, a cause of action for trespass accrues when the land is entered. *CAMSI IV v Hunter Technol. Corp.* (1991) 230 CA3d 1525, 1534, 282 CR 80.

The fact that the plaintiff is not aware of the cause of action or the wrongdoer does not necessarily toll the statute. *Angeles Chem. Co. v Spencer & Jones* (1996) 44 CA4th 112, 51 CR2d 594 (federal environmental cleanup "discovery rule" supersedes state limitation period; see §11.40). California's late discovery rule postpones the running of the statute of limitations until the plaintiff discovers or should have discovered all facts essential to its cause of action. A plaintiff is charged with presumptive knowledge when it has notice or information of circumstances to put a reasonable person on inquiry or has the opportunity to obtain knowledge from sources open to its investigation. This is an objective test based on whether the facts would make a reasonably prudent person suspicious. *Wilshire Westwood Assocs. v Atlantic Richfield Co., supra*.

When the complaint demonstrates on its face that the cause of action is barred by the statute of limitations, the plaintiff has the burden to plead the reasons for the late discovery. The plaintiff must specifically plead facts that show the time and manner of discovery and the inability to have made an earlier discovery despite reasonable diligence. *CAMSI IV v Hunter Technol. Corp., supra*. Whether a plaintiff's late discovery is justified is a factual question that may be decided by a jury. See *Smith v County of Los Angeles* (1989) 214 CA3d 266, 281, 262 CR 754 (noting determination of when statute of limitations on cause of action began to run is question of fact).

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§11.40 b. Continuing Nuisance and Trespass

Because plaintiffs may bring successive actions for damages until the nuisance or trespass is abated, a continuing nuisance or trespass effectively has no statute of limitations. If the nuisance is continuing, every continuation or repetition of the nuisance gives rise to a separate claim for damages caused by the nuisance. If the nuisance is continuing, the person harmed may bring successive actions for damage until the nuisance is abated. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 218 CR 293; *Wilshire Westwood Assocs. v Atlantic Richfield Co.* (1993) 20 CA4th 732, 24 CR2d 562.

The continuing nature of the nuisance refers to continuing damage caused by the offensive conduct, not to the acts causing the offensive conditions to occur. *Mangini v Aerojet-General Corp. (Mangini I)* (1991) 230 CA3d 1125, 1147, 281 CR 827. When continuing or recurring injury results from a wrongful act or from a condition wrongfully created and maintained, there is not only a cause of action for the original wrong arising when the wrong is committed, but separate and successive causes of action for the consequential damages that arise as and when such damages are sustained. Therefore, as long as the cause of action exists and damage continues, the plaintiff may recover for the damages that have occurred within the statutory period, even if the cause of action based solely on the original wrong is barred. *Phillips v City of Pasadena* (1945) 27 C2d 104, 162 P2d 625; *Kafka v Bozio* (1923) 191 C 746, 751, 218 P 753.

The policy of the law is to construe a nuisance as continuing rather than permanent. See §11.16. Therefore, if the permanency of an injury caused by a nuisance is in doubt, the courts favor the right to successive actions. See, *e.g., Kafka v Bozio, supra*. However, in *McCoy v Gustafson* (2009) 180 CA4th 56, 103 CR3d 37, the court focused on the ability to abate rather than the permanency of the damage. The court held that the lack of evidence on the ability to reasonably abate a nuisance compelled the court to consider the nuisance permanent and to hold that the 3-year statute of limitations that ran from the date of discovery barred the action.

The courts should be reluctant to enlarge the category of permanent nuisance. See *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 872, 218 CR 293. Otherwise the effect would be to give the defendant, because of its wrongful act, the right to continue the wrong. *Kafka v Bozio, supra*.

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Source: Real Property/California Real Property Remedies and Damages/11 Remedies for Nuisance and Trespass/ §11.40A (1) Actions for Construction Defects

§11.40A (1) Actions for Construction Defects

Code of Civil Procedure §337.15 provides a 10-year statute of repose in nearly all actions for construction defects, including those based in nuisance law, arising from real property improvements. Code of Civil Procedure §337.15 was drafted by, and passed at the behest of, real estate developers and the construction industry. The statute is designed to protect developers, design professionals, consultants, contractors, and land developers, and to promote the construction business in general. In enacting the statute, the legislature believed that indefinite liability could imperil the construction industry. *Lantzy v Centex Homes* (2003) 31 C4th 363, 374, 2 CR3d 655. The statute of repose does not extend the statute of limitations that ordinarily applies to the action, but it establishes an outside absolute limit. 31 C4th at 366. See California Construction Contracts, Defects, and Litigation, chap 11 (Cal CEB 2008).

There are exceptions to the application of CCP §337.15. The statute does not apply to personal injury or wrongful death actions. It also cannot be asserted as a defense by "any person in actual possession or the control, as owner, tenant or otherwise, of such an improvement, at the time the deficiency in the improvement constitutes the proximate cause for which it is proposed to bring an action." CCP §337.15(e). See also *Leaf v City of San Mateo* (1980) 104 CA3d 398, 405, 163 CR 711. In *Leaf,* the court held that the defendant city could not assert a CCP §337.15 defense because it was the owner, rather than the developer, of the offending improvements. Because most alleged inverse condemnations are caused by, or at the behest of, the owner of the improvement, this exception may render the statute inapplicable in nearly all such actions. *Magnuson-Hoyt v County of Contra Costa* (1991) 228 CA3d 139, 144, 278 CR 770.

NOTE: The plaintiff homeowner in *Magnuson-Hoyt* argued that granting CCP §337.15 immunity to the defendant county conflicted with the public policy underlying inverse condemnation actions. This policy states that the government cannot take property without just compensation and that the loss inflicted on the individual by a public improvement should be distributed throughout the relevant community. See McNichols, From Sovereign Immunity to Strict Liability: Using Inverse Condemnation in Water Damage Actions, 27 CEB Real Prop L Rep 93 (July 2004). The court held that since the county no longer owned the improvement (unlike in *Leaf v City of San Mateo, supra*), there was no conflict. *Magnuson-Hoyt v County of Contra Costa,* 228 CA3d at 144. Had the county retained control and ownership of the improvement, the public policy underlying inverse condemnation might have trumped the statutory policy of CCP §337.15.

As discussed in §11.13, each repetition of a continuing nuisance or trespass is considered a separate wrong that commences a new period in which to bring an action for recovery based on the new injury. See also §11.16. However, the continuing nature of a defect or nuisance caused by an improvement does not extend the 10-year limit imposed by CCP §337.15. *Gaggero v County of San Diego* (2004) 124 CA4th 609, 21 CR3d 388 (county not liable for landfill subsidence caused by continuing methane gas leaks on property it owned more than 30 years earlier); *Magnuson-Hoyt v County of Contra Costa*, *supra* (county had not owned or controlled street alleged to cause continuing nuisance on homeowner's property in over 10 years, thus could not be held liable for damage). Both cases hold that CCP §337.15 is applicable to government and public entities.

In *Chevron U.S.A., Inc. v Superior Court* (1994) 44 CA4th 1009, 1017, 54 CR2d 324 (cited approvingly in *Gaggero v County of San Diego, supra*), the court laid out this rejection of the long-standing rationale for the accrual of a cause of action for a continuing nuisance, stating:

> The continuing nuisance or trespass theory allows for deferral of the starting date of the statute of limitations in much the same way as does the discovery rule. Neither theory or rule may override the statute of repose created by the Legislature's fixed starting point and outer limit for latent construction defects [contained in CCP §337.15].

In *San Diego Unified Sch. Dist. v County of San Diego* (2009) 170 CA4th 288, 87 CR3d 796, however, the statute of repose did not bar the district's claims because the district sufficiently pled independent contractual and statutory duties for environmental remediation that obviated the need for a claim based on a latent construction defect.

NOTE: An unsettling result of the *Chevron* case is that the party that actually contaminated the property was exempted by CCP §337.15, while the later innocent property owner was held accountable for cleanup costs. It is doubtful that the legislature intended this kind of result when it enacted the statute. The *Chevron* court acknowledged the unfairness of its holding and suggested that the legislature create a pollution exception. Another solution is for courts to reexamine the legislature's intent in enacting CCP §337.15 as it applies in a contamination context.

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§11.40B (2) Nuisance Actions Under CERCLA

Nuisance actions covered by the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 USC §§9601-9675) are not triggered until discovery of the contamination. *Angeles Chem. Co. v Spencer & Jones* (1996) 44 CA4th 112, 51 CR2d 594. CERCLA creates a federally mandated discovery rule that preempts state law.

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§11.41 (3) Special Rules for Pollution Cases

The distinction between continuing and permanent nuisance or trespass presents important and complex issues in assessing the statute of limitations defense in cases involving soil and groundwater contamination. The key cases on this subject are *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 52 CR2d 518 and *Mangini v Aerojet-General Corp. (Mangini II)* (1996) 12 C4th 1087, 51 CR2d 272. Together they establish alternative rules for establishing whether a nuisance or trespass is continuing or permanent. *Starrh & Starrh Cotton Growers v Aera Energy* (2007) 153 CA4th 583, 593, 63 CR3d 165. The basic question is whether the nuisance or trespass can be discontinued or abated, and there are three alternative tests:

- Whether the tortious activity is currently continuing, which indicates that the nuisance or trespass is continuing;
- Whether the effects of the nuisance or trespass will vary over time, indicating a continuing nuisance or trespass; or
- Whether the nuisance can be abated at any time, in a reasonable manner and for reasonable cost, and is feasible by comparison of the benefits and detriments to be gained by abatement.

In *Mangini II*, the court applied only the third test because the polluting activity had stopped long before the suit was filed and there was no evidence that the effects of the toxic materials would vary over time. The court held that, in order to treat the soil contamination as a continuing rather than a permanent nuisance, the plaintiff must present substantial evidence that the contaminated condition is subject to remediation or cleanup and that cleanup costs are reasonable. The plaintiff had failed to present any such evidence. The supreme court concluded that the claim was for permanent nuisance and was barred by the statute of limitations.

Whether regarded from a practical, equitable, public policy, or a legal point of view, *Mangini II* presents many problems for innocent owners who discover contamination on their property well after the polluting activity has stopped. The result of the case was that the defendant, which had created severe contamination that would be very expensive to remediate, was not required to compensate the plaintiff for the loss of use of the property and other damages while the property was under remediation. This result can be expected to be duplicated in similar situations.

Before *Mangini II*, the courts had consistently stated that, when there is doubt as to whether a nuisance is continuing or permanent, the court should opt for a continuing nuisance to protect the plaintiff from contingencies such as unforeseen future injury, to prevent the plaintiff from being barred by the statute of limitations, and to encourage termination of the condition causing the nuisance. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 870, 218 CR 293; *Capogeannis v Superior Court* (1993) 12 CA4th 668, 678, 15 CR2d 796; *Mangini v Aerojet-General Corp. (Mangini I)* (1991) 230 CA3d 1125, 1148, 281 CR 827. See §11.16. *Mangini II* appears to make permanent nuisance a preferred option in cases in which damage continues long after the polluting activity has stopped —at least for purposes of the statute of limitations. Also, before *Mangini II*, the courts had consistently held that in doubtful cases the plaintiff had the option to elect to treat the nuisance as permanent or continuing. See §11.15. The court in *Mangini II* ignored this rule and denied the plaintiff the option to elect.

Mangini II leaves landowners in a precarious position for many reasons and creates much confusion and uncertainty in the law of nuisance. It is unclear whether continuing nuisance will remain the default holding when there is doubt as to whether the nuisance is continuing or permanent for purposes of injunction and damages. It is apparently not the rule for purposes of the statute of limitations. It is equally unclear whether plaintiffs can elect to characterize the nuisance as continuing or permanent for purposes of damages and injunction. Again, for the statute of limitations, this rule no longer seems to apply.

Finally, it is uncertain whether characterizing the nuisance as continuing or permanent for statute of limitations purposes will apply in the same way on the issue of remedies. If the plaintiff needs to show that the nuisance can be abated at a reasonable cost in order to prove a continuing nuisance for statute of limitations purposes, and is not required to make the same showing to prove that a nuisance is continuing for other purposes, such as the remedy, the same situation could be a permanent nuisance for statute of limitations purposes and continuing for damages or

injunction purposes. See *Mangini II*, 12 C4th at 1104.

In *Starrh & Starrh Cotton Growers v Aera Energy* (2007) 153 CA4th 583, 63 CR3d 165, the court attempted to clarify some of these issues. It stated that *Mangini II* was limited to cases where a property owner, on the theory that the nuisance is continuing in nature, seeks to maintain a nuisance action after the 3-year statute of limitations applicable to the polluting activity has expired. To prove a case of continuing nuisance, the plaintiff must present evidence that abatement of the nuisance can be accomplished at a reasonable cost. However, the court in *Starrh* stated that, for determining the proper statute of limitations under *Mangini II*, only conditions and structures that are truly permanent should be classified as permanent nuisances; otherwise remedial efforts should be encouraged. 153 CA4th at 596.

The court in *Starrh* further rejected the defendant's argument that even though the trespass was found to be continuing for deciding the statute of limitations issue, the trespass may be considered permanent for the purpose of measuring damages. Even though language in *Mangini II* had suggested that possibility, the court of appeal in *Starrh* affirmed the trial court's finding that the defendant's trespass was continuing because the defendant persisted in pumping water into its unlined ponds, it was unknown how long the trespass would continue, and the defendant might stop or alter its disposal practices in the future. Consequently, it would be impossible to ascertain the full extent of future damages to plaintiff's groundwater and a permanent measure of damages would not be appropriate. 153 CA4th at 599.

The court in *McCoy v Gustafson* (2009) 180 CA4th 56, 88, 103 CR3d 37 criticized the *Starrh* decision for implying that there is a possibility of a nuisance being continuing without regard to the cost of abatement.

NOTE: Because the criticism in *McCoy* came from a different District Court of Appeal, it is likely that the California Supreme Court will eventually need to clarify this issue.

McCoy involved 16-year-old complaints about oil discharged from a laundry. The jury could not determine whether the plaintiff's property could be repaired or abated by reasonable means and at a reasonable cost, but found in favor of the plaintiff. The trial court denied a motion for a new trial and a motion for judgment notwithstanding the verdict. The appellate court reversed, holding that the lack of evidence of an ability to abate precluded a determination that the nuisance was continuing, resulting in a time bar based on the 16-year-old complaint that started the running of the 3-year statute of limitations period for property damage. 180 CA4th at 90.

To extend the statute of limitations on contamination remaining after polluting activity has ceased, the plaintiff may be able to argue that a nuisance was continuing for a period of time and became permanent at a later time. This argument was accepted by the court in *Bartleson v U.S.* (9th Cir 1996) 96 F3d 1270.

For further analysis and criticism of *Mangini II*, including its effects on future land contamination cases, as well as owner strategies for coping with uncertainty about the feasibility and cost of remediation, see McNichols, *Revisiting* Mangini II: *Should the Burden of Proof in Contamination-Nuisance Cases Be Re-Examined?*, 25 CEB Real Prop L Rep 93 (Apr. 2002).

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§11.42 C. Laches

A public nuisance cannot be legalized by the passage of time. CC §3490. Laches, however, is an available defense in public nuisance actions if the delay results in prejudice and there is no reasonable explanation for the delay. *City & County of San Francisco v Pacello* (1978) 85 CA3d 637, 645, 149 CR 705. But see *Golden Gate Water Ski Club v County of Contra Costa* (2008) 165 CA4th 249, 80 CR3d 876 for an analysis of the situations in which laches will not apply. Laches may be raised as a defense to a private nuisance or trespass action.

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D. Coming to the Nuisance

§11.43 1. Former Common Law Defense

The defense of coming to the nuisance does not apply to the current law of nuisance. The former rule stated that, if a noxious trade were established in a place remote from habitation, those who afterward acquired property in the vicinity were barred from obtaining either damages or an injunction, having assumed the risk of the nuisance by purchasing property with knowledge of the conditions. See *Williams v Blue Bird Laundry Co.* (1927) 85 CA 388, 392, 259 P 484.

This defense has generally been repudiated, *i.e.,* the plaintiff may obtain injunctive relief or damages even if the nuisance was in operation when it acquired the property. See, *e.g., Mangini v Aerojet-General Corp. (Mangini II)* (1996) 12 C4th 1087, 51 CR2d 272 (proving temporary nuisance and reasonable cleanup costs entitles plaintiff to damages for loss of use). See also 13 Witkin, Summary of California Law, *Equity* §166 (10th ed 2005). In addition, even though a business was entirely unobjectionable when established, it may become objectionable because of the growth in the area or change in the surroundings. *Ex Parte Hadacheck* (1913) 165 C 416, 420, 132 P 584; *Friedman v Pacific Outdoor Advertising Co.* (1946) 74 CA2d 946, 952, 170 P2d 67. That the owner acquired and improved the property with knowledge of the nuisance is a factor to consider. See *Hellman v La Cumbre Golf & Country Club* (1992) 6 CA4th 1224, 8 CR2d 293 (errant golf balls from country club).

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§11.43A 2. Statutory Defenses

A statutory defense that is similar to the coming to the nuisance defense is CC §846. It immunizes owners and those having "any estate or any other interest in real property" from liability for personal injuries arising from recreational use of the property. Three exceptions exist. An owner can be liable for injuries to recreational users (1) if a failure to warn or guard against a danger was "willful or malicious"; (2) if consideration was paid in return for permission to enter the property; or (3) if the injured person was expressly invited onto the property by the owner. The provisions of §846 protect not only owners but also persons holding interests in real property created by easements and encroachment agreements. *Hubbard v Brown* (1990) 50 C3d 189, 266 CR 491; *Miller v Weitzen* (2005) 133 CA4th 732, 35 CR3d 73. For further discussion of §846, see California Easements and Boundaries: Law and Litigation, chaps 1, 8, 10 (Cal CEB 2008).

Similarly, CC §3482.5 exempts certain agricultural activities from nuisance liability. This statute was enacted to eliminate suits by individuals who move into a new housing development in the country and find the existing agriculture activity bordering on their property offensive. "Suits against agricultural operations for dust, wind, machine or tractor noise, livestock or poultry smells, *and other things commonly associated with the operation of an agricultural enterprise* are becoming more prevalent as urban development reaches out to meet agricultural areas. AB 585 [Stats 1981, ch 545, §1] will stop this dangerous cycle by allowing agriculture to operate without undue pressure from urbanization. Keeping agricultural land in agricultural use is the goal." See *Rancho Viejo, LLC v Tres Amigos Viejos, LLC* (2002) 100 CA4th 550, 562, 123 CR2d 479 (quoting from legislative history of CC §3482.5).

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§11.44 E. Consent

Although consent is not a defense to a public nuisance (*Friedman v Pacific Outdoor Advertising Co.* (1946) 74 CA2d 946, 170 P2d 67), consent may be a defense to a private nuisance claim (*Mangini v Aerojet-General Corp. (Mangini I)* (1991) 230 CA3d 1125, 281 CR 827). Consent is a factual defense and cannot generally be resolved on the basis of demurrer. 230 CA3d at 1140. For the defense of consent to apply, the activity must have been lawful when it was done. *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 344, 23 CR2d 377. Applying this test, one court found that the activity (fuel storage) was lawful when it was operated and done in an open and notorious manner. Because a former owner was also the operator of the reservoir, the activity was conducted with the owner's consent. The court found that the developer purchased the property with full knowledge of its past use and was barred by the statute of limitations from claiming damages. See *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 52 CR2d 518. See also *Mangini v Aerojet-General Corp. (Mangini I)* (1991) 230 CA3d 1125, 1139, 281 CR 827.

Consent can also be shown by the terms of a lease; *i.e.*, an owner's action against a lessee for nuisance cannot be sustained if the owner contractually consented to the lessee's specific use of the property or conduct that caused the condition. 230 CA3d at 1138; *SPPI-Somersville, Inc. v TRC Cos., Inc.* (ND Cal, Aug. 3, 2009, No. C04-2648) 2009 US Dist Lexis 71463.

The consent defense is not applicable, however, if the current owner sues a prior owner and the condition causing the nuisance was caused but not disclosed by a prior owner. *Newhall Land & Farming Co. v Superior Court, supra*. In *Capogeannis v Superior Court* (1993) 12 CA4th 668, 15 CR2d 796, the court allowed a new owner of the property to sue the prior owner and a long-term tenant because the new owner was unaware of the property's contamination at the time of purchase.

Consent can be a valid defense in nuisance actions involving easements over private land for public works. *Sutro Heights Land Co. v Merced Irrig. Dist.* (1931) 211 C 670, 690, 296 P 1088.

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§11.45 F. Balancing the Equities

When an injunction is sought, the court must first balance the conflicting interests to determine whether a nuisance exists. See §11.6. Then there is a further balancing to decide whether to grant an injunction. See §11.23. See also California Civil Procedure Before Trial, chap 32 (4th ed Cal CEB 2004); 13 Witkin, Summary of California Law, *Equity* §166 (10th ed 2005). Case law and commentators use various labels for this function: "relative hardship doctrine," "balancing of equities," "balancing conveniences," and "comparative injury." *Woodridge Escondido Prop. Owners Ass'n v Nielsen* (2005) 130 CA4th 559, 573, n15, 30 CR3d 15. The defendant can argue that, even if the court found the activity or condition to be a nuisance, it should deny injunctive relief. The courts, however, will refuse to balance a hardship in favor of a defendant who willfully created the nuisance. See *Morgan v Veach* (1943) 59 CA2d 682, 689, 139 P2d 976. The courts have created and applied specific rules on balancing the equities when a party seeks an injunction ordering removal of an encroachment. See, *e.g., Fairrington v Dyke Water Co.* (1958) 50 C2d 198, 323 P2d 1001; *Harrison v Welch* (2004) 116 CA4th 1084, 11 CR3d 92; *Kapner v Meadowlark Ranch Ass'n* (2004) 116 CA4th 1182, 11 CR3d 138; *Hirshfield v Schwartz* (2001) 91 CA4th 749, 759, 110 CR2d 861; *Christensen v Tucker* (1952) 114 CA2d 554, 250 P2d 660. See also §11.19. If the nuisance is also a violation of a homeowner association's declaration of covenants, conditions, and restrictions (CC&Rs), and the action is brought by the homeowners association to enforce the restrictions, the courts enforce the express terms of the CC&Rs and do not balance the equities. *Woodridge Escondido Prop. Owners Ass'n*, 130 CA4th at 573. For further discussion of balancing the equities, see California Easements and Boundaries: Law and Litigation, chaps 1, 8, 10 (Cal CEB 2008).

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§11.46 G. Due Care

Due care is not a defense to a nuisance or trespass action. It is the effect of the nuisance, not whether the act or omission that causes it is intentional, negligent, or careful in the way it is performed, that determines whether it is a nuisance. *People ex rel Robarts v Russ* (1901) 132 C 102, 64 P 111.

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§11.47 H. Use Consistent With Applicable Zoning

Some courts have held that a plaintiff cannot obtain an injunction against a business that is operated in accordance with applicable zoning laws unless the methods used are unnecessary and injurious. CCP §731a; *Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 C2d 265, 271, 288 P2d 507 (holding that ginning mill, lawfully operated in properly zoned location, could not be abated under §731a); *Sierra Screw Prods. v Azusa Greens, Inc.* (1979) 88 CA3d 358, 366, 151 CR 799.

The plaintiff has the burden of showing unnecessary and injurious methods of operation. *Christopher v Jones* (1964) 231 CA2d 408, 411, 41 CR 828. A person may not use his or her own property, even in and about a business that is itself lawful, in a manner that seriously interferes with a neighbor's enjoyment of its rights and the use of its property. That a business operation is conducted with the government's consent, is legal, and is conducted in a district zoned for industry may not be a defense. *Vowinckel v N. Clark & Sons* (1932) 216 C 156, 13 P2d 733 (court required pipe, tile, and pottery factory adjacent to residential area to abate nuisance by discontinuing use of some areas and erecting firewall).

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§11.48 I. Separation of Powers, Immunity, and Preemption

In rare instances, the separation of powers may provide a defense in a nuisance or trespass action. For example, one court held that it could not provide a remedy for a city's failure to remedy traffic conditions in a neighborhood, because that power is delegated to the city by the legislature. Court interference would violate the separation of powers. See *Friends of H Street v City of Sacramento* (1993) 20 CA4th 152, 24 CR2d 607. See also CC §3482 (nothing done or maintained under express authority of statute can be deemed a nuisance); *Farmers Ins. Exch. v State* (1985) 175 CA3d 494, 221 CR 225 (medfly eradication program).

Some courts have interpreted CC §3482 very narrowly. See *SLPR, LLC v The San Diego Unified Port District* (SD Cal, June 30, 2008, No. 06-CV-1327 W) 2008 US Dist Lexis 51624 (allowing nuisance claim regarding dredging, because statutes authorizing dredging do not specifically authorize dredging that causes shoreline erosion); *Adobe Lumber, Inc. v Hellman* (ED Cal, Oct. 1, 2008, No. Civ 05-1510 WBS) 2008 US Dist Lexis 78072 (city may be liable for nuisance arising out of operation of statutorily authorized sewer if nuisance is result of failure of sewer to relocate contaminants). See also *Greater Westchester Homeowners Ass'n v City of Los Angeles* (1979) 26 C3d 86, 160 CR 733 (despite §3482, supreme court approved availability of personal injury damages in homeowners' nuisance action against airport); *Varjabedian v City of Madera* (1977) 20 C3d 285, 142 CR 429 (affirming award of damages for noxious odors emanating from sewer plant).

Public entities, public officers, and employees also have various immunities under California law. See, *e.g.,* Govt C §§815.2, 820.2, 820.4, 821.6, 821.8, 822.2, 831.25. See also *Ogborn v City of Lancaster* (2002) 101 CA4th 448, 124 CR2d 238 (discussing immunities for city and individual city officials from claims arising out of city's demolition of home declared to be nuisance). In *Schooler v State* (2000) 85 CA4th 1004, 102 CR2d 343, the court held that the state was immune from liability for damage to plaintiff's property caused by erosion of a state-owned adjacent bluff. The court found that the government entity had immunity from nuisance liability for injuries caused by natural conditions under Govt C §831.25.

A court may be deprived of jurisdiction because the federal government or the state has granted exclusive regulatory authority to other public entities. *Hartwell Corp. v Superior Court* (2002) 27 C4th 256, 115 CR2d 874, illustrates this situation. In *Hartwell*, residents of two counties brought two actions against three different kinds of parties: (1) water providers regulated by the PUC; (2) water providers not regulated by the PUC; and (3) a private industrial entity. The residents sought injunctive relief and damages for injuries to persons and property caused by harmful chemicals found in the water. The causes of action included trespass and both public and private nuisance. The PUC commenced an investigation and one court stayed the proceedings. The trial court in the second county sustained the PUC-regulated utilities' demurrers without leave to amend based on a finding that the PUC had statutory authority and jurisdiction over water quality that preempted the plaintiff's claims against these utilities. The supreme court noted that the statute relating to the PUC deprives the superior court of jurisdiction to review any order or decision of the PUC or to interfere with the PUC's performance of its official duties. However, plaintiffs' damage claims against the regulated utilities alleging past violations of federal and state drinking water standards were not preempted. Finally, the court held that the statutes did not bar plaintiffs' claims against the nonregulated water providers and the industrial defendant.

In another preemption decision, *Koponen v PG&E* (2008) 165 CA4th 345, 81 CR3d 22, the court followed *Hartwell* in concluding that the superior court lacks jurisdiction to hear disputes over the exercise of regulatory authority. But the court in *Koponen* recognized (1) that the PUC enabling statute did not bar property owners' claims for damages resulting from unauthorized uses of the utility's rights of way located on their property, and (2) that the owners were entitled to seek injunctive relief against invasion of their property rights by the utility's grant of leases or licenses allowing others to use the rights of way.

A state court action for nuisance may be preempted by federal law. See, *e.g., Kathleen R. v City of Livermore* (2001) 87 CA4th 684, 104 CR2d 772 (action for nuisance under California law against city library for allowing minor to download sexually explicit photos from Internet held preempted by 47 USC §230, which prohibits holding interactive computer services liable for their failure to edit, withhold, or restrict access to offensive material).

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§11.49 J. Scope of Injunction

An injunction (see §11.23) should not impose burdens beyond the necessities of the case. *Anderson v Souza* (1952) 38 C2d 825, 841, 243 P2d 497; *People v Mason* (1981) 124 CA3d 348, 177 CR 284. The defendant may apply for a modification or dissolution of an injunction if there is "a material change in the facts" (or a change in the law) on which the injunction was based, or if "the ends of justice would be served." CCP §533. See also CCP §532 (modifying or dissolving injunction against water diversion). An injunction will be reversed on appeal if it causes unnecessary hardship or goes beyond what is reasonably necessary. See *Anderson v Souza, supra*. If the injunction is broad in scope, the court may refuse (or adjust) a request for compensatory damages. See *Farmy v College Hous., Inc.* (1975) 48 CA3d 166, 121 CR 658. The court will not enjoin the conduct of the defendant's entire business when the business is not a nuisance per se, if a lesser restriction will give the plaintiff relief. *Vowinckel v N. Clark & Sons* (1932) 216 C 156, 13 P2d 733. If the injunction curtails liberty or speech, the courts require proof by clear and convincing evidence and will carefully scrutinize the injunction to make sure that it does not burden the constitutional rights of association or speech more than is necessary to achieve a significant governmental interest. See *Balboa Island Village Inn, Inc. v Lemen* (2007) 40 C4th 1141, 57 CR3d 320; *People v Englebrecht* (2001) 88 CA4th 1236, 1264, 106 CR2d 738.

WARNING: Seeking to enjoin an action that furthers a defendant's right of petition or free speech may subject the plaintiff to an anti-SLAPP motion and an award of attorney fees and costs under CCP §425.16. See *Huntingdon Life Sciences, Inc. v Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 CA4th 1228, 29 CR3d 521. See also *Castillo v Pacheco* (2007) 150 CA4th 242, 58 CR3d 305 (anti-SLAPP motion not available in action seeking to enjoin conduct furthering right of free exercise of religion); California Attorney Fee Awards §§3.110-3.120 (3d ed Cal CEB 2010).

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§11.50 VIII. RELATED ACTIONS

The following are torts and other actions that are related to nuisance and trespass:

- **Violation of seller's duty to disclose.** Under CC §1102.6, a seller of residential property must disclose any neighborhood noise problems and other nuisances to a potential buyer. A violation subjects the seller to damages. CC §1102.13. See *Alexander v McKnight* (1992) 7 CA4th 973, 9 CR2d 453 (disclosure requirement justified award of diminution in value damages to plaintiff in nuisance action). Under the common law, when a seller knows facts materially affecting the value or desirability of the property, and knows that these facts are not known to or within the reach of the diligent attention and observation by the buyer, the seller has a duty to disclose them to the buyer. *Preston v Goldman* (1986) 42 C3d 108, 227 CR 817. A breach of that duty allows the buyer to obtain either rescission or damages. *Karoutas v HomeFed Bank* (1991) 232 CA3d 767, 771, 283 CR 809. See chaps 1, 3-4. For further discussion of disclosure obligations, see California Real Property Sales Transactions §§6.29-6.70 (4th ed Cal CEB 2007) and Handling Real Property Sales Transactions, steps 4-8 (Cal CEB Action Guide March 2009).
- **Violation of federal contamination statutes**
- The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) (42 USC §§9601-9675) provides for recovery of cleanup costs and natural resource damages. 42 USC §9601. Responsible parties may bring an action for contribution under 42 USC §9613(f)(1), which provides that anyone who incurs cleanup costs or is required to reimburse the government for cleanup costs may seek appropriate contribution from other responsible parties. Innocent parties (*i.e.*, federal, state, or local government) can bring cost recovery actions. See 42 USC §9607. See also California Attorney's Guide to Damages, chap 5 (2d ed Cal CEB 2004).
- Under the Resource Conservation and Recovery Act of 1976 (RCRA) (42 USC §§6901-6992k), a private party cannot recover the cost of past cleanup efforts but may bring suit against certain responsible persons, including former owners who contributed to the contamination. See 42 USC §6972(a); *Meghrig v KFC W., Inc.* (1996) 516 US 479, 134 L Ed 2d 121, 116 S Ct 1251. See also Guide to Damages, chap 5.

PRACTICE TIP: State common-law actions, such as nuisance and trespass, are necessary supplements to a landowner dealing with contaminated property. Under federal law, plaintiffs can recover only costs of response, such as the cost of a health assessment study. Also under federal law, plaintiffs cannot recover other damages or economic losses, personal injury, or punitive damages. The plaintiff can generally obtain injunctions more easily under state common-law claims.

- **Actions by secured lenders.** In limited situations, a secured lender may bring an action for breach of contract against a borrower for breach of any environmental covenant made by the borrower relating to the real property security, for the recovery of damages, and for enforcement of the covenant; that action or failure to first foreclose against collateral does not violate the one-action rule. CCP §736(a). This remedy does not apply to the parties' obligations contracted for before January 1, 1992. CCP §736(e). Damages are limited to reimbursement or indemnification of costs relating to a reasonable and good faith cleanup, remediation, or other response action concerning a release, plus attorney fees and costs incurred by the lender relating to the breach. See CCP §736(b)-(c). For further discussion of lender's rights regarding environmentally impaired property and the one-action rule, see California Mortgages, Deeds of Trust, and Foreclosure Litigation §§4.54-4.57 (4th ed Cal CEB 2009).

PRACTICE TIP: If a landlord is held liable for its tenant's conduct in an action to enforce contamination statutes or environmental covenants, the landlord can seek indemnity from the tenant. The landlord should look to the express indemnity provisions in the lease and remedies for implied indemnity.

- **Wrongful occupancy.** The measure of damages for the wrongful occupation of real property resulting from a

trespass is the value of the use of the property during the time of the occupancy (not to exceed 5 years before the start of the action for damages), the reasonable cost of repair or restoration of the property, plus costs of recovering possession. CC §3334. The landowner can recover damages under §3334 even if the owner is not using the land. See *Don v Trojan Constr. Co.* (1960) 178 CA2d 135, 2 CR 626. The value under §3334 is reasonable rental value. But if the benefit to the defendant exceeded reasonable rental value, the plaintiff may recover the greater amount. CC §3334(b)(1); *Bourdieu v Seaboard Oil Corp.* (1941) 48 CA2d 429, 438, 119 P2d 973.

- **Wrongful holding over.** The measure of damages for a wrongful holding over of real property "by a person who entered upon the same, as guardian or trustee for an infant, or by right of an estate terminable with any life or lives, after the termination of the trust or particular estate, without the consent of the party immediately entitled after such termination," is the value of the profits received during the holding over. CC §3335.
- **Waste.** A landlord can file an action against a tenant for waste, seeking damages or injunctive relief restraining the tenant from practices that are damaging to the property. See Guide to Damages, chap 4. Generally, the measure of damages for a tenant's waste is the diminution in value of the estate. Any aggrieved person, presumably including a lender holding a security interest, may bring an action against the tenant for treble damages. CCP §732. See also CC §2929; Mortgage Deed of Trust Foreclosure, chaps 2, 6.
- **Tenant's breach of lease.** When a tenant commits a nuisance, the landlord may bring an action for damages for breach of the lease, whether the tenant is in possession of the property or has abandoned it. See California Landlord-Tenant Practice, chaps 8-9 (2d ed Cal CEB 1997). The landlord may evict the tenant, using the unlawful detainer procedure, and in a separate action recover the value of the past and future rent that is not paid, plus any other amount necessary to compensate the landlord for all damages caused by the breach. This amount can include a brokerage commission, tenant improvements, and cleanup costs of the premises. The tenant, however, is entitled to a credit for the amount of rent or other damages that the tenant can prove could have been reasonably avoided. Thus, the landlord has a duty to mitigate its damages. CC §1951.2; *Danner v Jarrett* (1983) 144 CA3d 164, 192 CR 535; *Sanders Constr. Co. v San Joaquin First Fed. Sav. & Loan Ass'n* (1982) 136 CA3d 387, 401, 186 CR 218; see Landlord-Tenant §§8.46-8.54. If the nuisance involves the use of weapons or controlled substances, in certain counties the city attorney or district attorney may file an eviction action against a tenant. CC §§3485, 3486.
- **Forcible entry or unlawful detainer.** In an action for forcible entry on, or forcible or unlawful detainer of, real property, on a showing of malice the plaintiff may be awarded statutory damages of up to $600, in addition to actual damages, including rent found due. CCP §1174(b). See CCP §735 on treble damages for forcible or unlawful entry with regard to a building or cultivated real property. On forcible entry and forcible or unlawful detainer, see CCP §§1159-1161. For a comprehensive discussion of unlawful detainer procedure, see California Eviction Defense Manual (2d ed Cal CEB 1993) and Landlord-Tenant, chaps 9-13.
- **Breach of the covenant of quiet enjoyment.** In the absence of language to the contrary, every lease contains an implied covenant of quiet enjoyment and possession of the premises. CC §1927; *Andrews v Mobile Aire Estates* (2005) 125 CA4th 578, 583, 22 CR3d 832. See Landlord-Tenant §§3.5-3.7. If the interference is caused by a neighbor or another tenant of the same landlord, the aggrieved tenant has an actionable claim for breach of the covenant of quiet enjoyment. Activities on neighboring premises not owned or controlled by the landlord may also interfere with the tenants' quiet enjoyment; however, such conduct does not amount to a breach of the covenant of quiet enjoyment between the tenant and the landlord. 125 CA4th at 590.
- **Intrusion.** The tort of intrusion requires the invasion of a private place, conversation, or matter in a manner that is offensive to a reasonable person. See CC §1708.8; Restatement (Second) of Torts §652B (1977); California Tort Damages §9.9 (2d ed Cal CEB 2002).
- **Inverse condemnation.** Nuisance or trespass and inverse condemnation are frequently pleaded as alternatives in an action involving a public entity. See §11.16A.

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Source: Real Property/California Real Property Remedies and Damages/11 Remedies for Nuisance and Trespass/ §11.51 IX. FORM: COMPLAINT FOR DAMAGES AND FOR INJUNCTION (NUISANCE, INFLICTION OF EMOTIONAL DISTRESS, AND/OR TRESPASS)

§11.51 IX. FORM: COMPLAINT FOR DAMAGES AND FOR INJUNCTION (NUISANCE, INFLICTION OF EMOTIONAL DISTRESS, AND/OR TRESPASS)

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_ _[*Name of attorney; State Bar number*]_ _
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Attorney for Plaintiff, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	
	)	**COMPLAINT FOR DAMAGES**
vs	)	**AND FOR INJUNCTION**
	)	**(NUISANCE, INFLICTION OF**
_ _[*Name(s)*]_ _, **and Does 1-50,**	)	**EMOTIONAL DISTRESS**
	)	**AND/OR TRESPASS**
Defendant(s)	)	
	)	
_____	)	

Plaintiff alleges:

GENERAL ALLEGATIONS

1. Plaintiff _ _[*name*]_ _ **at all times relevant to this complaint was and is** _ _[*e.g., individual, partnership, corporation, LLC*]_ _ **and was and is the** _ _[*e.g., owner, occupier, possessor*]_ _ **of certain real property situated at** _ _[*address*]_ _, _ _[*city*]_ _, _ _ _ _ _ _ **County, California, which is more particularly described in Exhibit A, attached to and expressly incorporated in this complaint (hereafter "Plaintiff's Property").**

2. Plaintiff's Property consists of _ _[*describe structure and relevant physical characteristic of Plaintiff's Property*]_ _ **and is used for** _ _[*describe use*]_ _**.**

3. At all times relevant to this complaint, Defendants _ _[*names*]_ _ **were the** _ _[*e.g., owners, occupiers, possessors*]_ _ **of a parcel of real property situated at** _ _[*address*]_ _**,** _ _ _ _ _ _ **County, California, which property is** _ _[*describe location in relation to Plaintiff's Property, e.g., contiguous, adjacent, in the vicinity of*]_ _ **Plaintiff's Property and is more particularly described on Exhibit B attached to and expressly incorporated in this complaint (hereafter "Defendant's Property").**

4. Defendant's Property consists of _ _[*describe structure and relevant physical characteristic of the property*]_ _ **and is used for** _ _[*describe use*]_ _**.**

5. The acts and omissions alleged herein took place in _ _ _ _ _ _ County, California.

6. Plaintiff does not know the true names, capacities, or basis for liability of Defendants sued in this action as Does 1 through 50, inclusive, and will amend this complaint when that information is ascertained. Plaintiff is informed and believes, and on that basis alleges, that each Doe Defendant was in some manner intentionally, negligently, recklessly, or as a result of extrahazardous activities, responsible and/or the cause of the events, happenings, and occurrences alleged in this complaint that resulted in damage and injury to the Plaintiff.

7. Plaintiff is informed and believes, and on that basis alleges, that at all times relevant to this complaint each defendant, including any defendant fictitiously named, was acting as the agent, servant, employee, partner, or joint venturer of each other defendant in doing the things alleged, was acting within the course and scope of such agency, employment, partnership, or joint venture with the knowledge and consent or ratification of each other defendant in doing the things alleged, and is responsible in some manner for the damages claimed by plaintiff.

8. At all times relevant to this complaint, Defendants _ _[*names*]_ _ have been using and maintaining their property _ _[*allege ultimate facts relating to conditions or conduct constituting nuisance or trespass*]_ _.

9. At all times relevant to this complaint, Defendants' above-described use and maintenance of their property interfered and continue to interfere with Plaintiff's comfortable enjoyment and use of Plaintiff's Property, obstructed and continue to obstruct the free use of Plaintiff's Property, and injured and continue to injure Plaintiff's health, and was and is offensive to Plaintiff's senses.

10. At all times relevant to this complaint, Defendants owed Plaintiff a duty to refrain from doing the acts that interfere with Plaintiff's comfortable enjoyment of Plaintiff's Property, obstruct the free use of Plaintiff's Property, and injure Plaintiff's health and offend Plaintiff's senses.

FIRST CAUSE OF ACTION
(Damages for Nuisance by Plaintiff(s) _ _[*name(s)*]_ _ Against Defendant(s) _ _[*name(s)*]_ _)

11. Plaintiff incorporates by reference into this cause of action each allegation of paragraphs 1 through 10 of the General Allegations.

12. Defendants' use and maintenance of its property, as described above, constitute a nuisance under Civil Code §3479.

[*If applicable, add one or more of the following options*]

[*Option 1: Nuisance per se*]

13. Defendants' use and maintenance of its property, as described above, constitute a nuisance per se in that _ _[*name of agency*]_ _ has expressly declared Defendants' activity, use, or conduct to be a nuisance in _ _[*cite applicable statute, ordinance, or regulation*]_ _. Plaintiff is a private citizen who seeks to enjoin the nuisance because it is specifically injurious to him in that _ _[*state facts*]_ _.

[*Option 2: Both public and private nuisance*]

[14.] Defendants' use and maintenance of this property, as described above, constitute both a public and private nuisance. It is a public nuisance in that it _ _[*specify one or more of the bases for public nuisance, e.g., it affects at the same time a community, a neighborhood, or a large number of persons, or it has been expressly declared by law to be a public nuisance under a specific statute, ordinance, regulation*]_ _. It is also a private nuisance because it obstructs Plaintiff's use and enjoyment of Plaintiff's Property, which is a different kind of nuisance from that suffered by the public in general because _ _[*state applicable facts*]_ _.

[*Continue*]

[*Add one of the following alternatives*]

[*Alternative 1: Continuing nuisance*]

[15.] Defendants' use and maintenance of the property, as described above, constitute a continuing nuisance because _ _[*state facts*]_ _ and it can be substantially abated in a reasonably feasible manner and at a reasonable cost_ _[*, it is the result of continuing activity, and the impact of the condition does not vary over time*]_ _.

[*Alternative 2: Permanent nuisance*]

[16.] Defendants' use and maintenance of the property, as described above, constitute a permanent nuisance because it cannot be abated in a reasonably feasible manner or at a reasonable cost_ _[*, it is not the result of continuing activity, and the impact of the condition varies over time because _ _[state facts*]_ _]_ _.

[*If applicable, add the following option to Alternative 2*]

[17.] Defendants' use and maintenance of the property, as described above, was a continuing nuisance until _ _[*describe facts*]_ _ and became a permanent nuisance on _ _[*date*]_ _, because _ _[*state facts*]_ _.

[*Continue*]

[18.] Plaintiff is informed and believes that the nuisance was discovered on _ _[*date*]_ _, when _ _[*state facts*]_ _, causing Plaintiff's Property to suffer appreciable harm on _ _[*date*]_ _, and the damages became sufficiently apparent to give a reasonable person notice on _ _[*date*]_ _ when _ _[*state facts*]_ _.

[19.] On or about _ _[*date*]_ _, Plaintiff gave notice to Defendants _ _[*names*]_ _ to abate the nuisance _ _[*state substance of notice or attached a copy of letter to Defendants*]_ _, but Defendants, and each of them, have _ _[*failed to reply to Plaintiff's notice/expressly refused*]_ _ to abate the nuisance.

[*Insert one or more of the following damages options*]

[*Option 1: Property damage, remediable*]

[20.] As a proximate result of the of the above-described acts and omissions by Defendants, Plaintiff's Property has been damaged _ _[*describe damage*]_ _. The property can be remediated by reasonable means and at a reasonable cost. Plaintiff has incurred, to the date of filing of this complaint, the amount of $_ _[*dollar amount*]_ _ to _ _[*describe what has been done*]_ _. Plaintiff is informed and believes that it is necessary to _ _[*describe future repairs*]_ _, the cost of which will be determined by proof at trial.

[*Option 2: Property damage, irremediable*]

[21.] As a proximate result of the above-described acts and omissions by Defendants, Plaintiff's Property has been diminished in value because _ _[*describe circumstances, e.g., Plaintiff will be required to disclose the existence of the nuisance to future buyers of its property because the nuisance is irremediable*]_ _. The exact amount of diminution in value will be determined by proof at trial.

[*Option 3: Lost profits*]

[22.] As a proximate result of the above-described acts and omissions by Defendants, Plaintiff has suffered loss of profits from the use of the property _ _[*describe use*]_ _ in an amount to be determined by proof at trial.

[*Option 4: Fear of future harm; relocation costs*]

[23.] As a proximate result of the above-described acts and omissions by Defendants, Plaintiff is in a constant fear of eminent harm and has been compelled to change his place of residence, at periodic times, from Plaintiff's Property to a place of safety at great expense and to pay rent for a new dwelling resulting in damage, the exact amount to be determined by proof at trial.

[*Option 5: Discomfort and annoyance; emotional distress*]

[24.] As a proximate result of the above-described acts and omissions of Defendants, Plaintiff has suffered discomfort and annoyance and endured mental suffering caused by the fear for his own safety and that of his family. As a result of such injury, Plaintiff has sustained damage in an amount to be determined by proof at trial.

[*Option 6: Personal injury; emotional distress*]

[25.] As a proximate result of the above-described acts and omissions of Defendants, Plaintiff has been hurt and injured in his health, strength, and activity, sustaining injury to his body, and shock, anxiety, and injury to his nervous system and person, all of which have caused Plaintiff great mental, physical, and nervous pain, distress, and suffering. As a result of such injury Plaintiff has sustained damage in an amount to be determined by proof at trial.

[*Option 7: Personal injury; medical costs; physical disability*]

[26.] As a proximate result of the above-described acts and omissions by Defendants, Plaintiff was required to obtain medical services and treatment and will, in the future, be compelled to incur additional obligations for medical treatment in an amount to be determined by proof at trial. Plaintiff is informed and believes and thereon alleges that he has suffered permanent loss of _ _[*specify*]_ _ as a proximate result of the nuisance

created by Defendants.

[*Option 8: Lost wages, past and future*]

[27.] As a proximate result of the above-described acts and omissions by Defendants, Plaintiff has suffered a loss of earnings in the past, and his earning capacity in the future has been impaired in an amount to be determined by proof at trial.

[*Continue*]

WHEREFORE, Plaintiff requests judgment against all Defendants, and each of them, as set forth below.

SECOND CAUSE OF ACTION
(Injunctive Relief for Abatement of Nuisance by Plaintiff(s) _ _[*name(s)*]_ _ Against Defendant(s) _ _[*name(s)*]_ _)

[28.] Plaintiff incorporates by reference into this cause of action each allegation of paragraphs 1 through 10 of the General Allegations and paragraphs 12 through _ _ of the First Cause of Action.

[29.] Plaintiff is informed and believes, and on that basis alleges, that unless Defendants are restrained and enjoined by order of this Court, Defendants will continue to engage in the above-described acts and omissions constituting a nuisance. Such conduct will result in irreparable harm to Plaintiff, in that _ _[*describe irreparable nature of injury*]_ _. The threat of such irreparable and permanent damage justifies the issuance by this Court of an injunction, as well as the award of monetary damages as expressly authorized by Code of Civil Procedure §§526 and 731. _ _[*If appropriate, add other allegations justifying injunctive relief, such as, monetary relief not adequately compensating plaintiff for harm that could otherwise be enjoined, or injunction necessary to prevent multiple lawsuits*]_ _.

[*If applicable, add the following option*]

[30.] Plaintiff has no adequate remedy at law for the injuries that Plaintiff has suffered and will continue to suffer in the future.

[*If appropriate, allege facts supporting punitive damages*]

[*If appropriate, allege facts regarding governmental claims*]

WHEREFORE, Plaintiff requests judgment against all Defendants, and each of them, as set forth below.

THIRD CAUSE OF ACTION
(Damages for Intentional Infliction of Emotional Distress by Plaintiff(s) _ _[*name(s)*]_ _ against Defendant(s) _ _[*name(s)*]_ _)

[31.] Plaintiff incorporates by reference into this cause of action each allegation of paragraphs 1 through 10 of the General Allegations and paragraphs 12 through _ _ of the First Cause of Action.

[32.] As a direct and proximate result of defendants' failure to abate the nuisance, Plaintiff suffered extreme emotional distress in that _ _[*specify physical or other manifestations of distress*]_ _, all to Plaintiff's damage in an amount according to proof.

[33.] Said Defendants' failure to abate the nuisance was knowing, intentional, and willful, because they had full knowledge or knew with substantial certainty of the extreme emotional distress that the failure would cause Plaintiff. _ _[*Add other specific facts demonstrating defendants' outrageous conduct.*]_ _

[34.] Furthermore, said Defendants' conduct was malicious and oppressive, in that _ _[*allege specific facts supporting malice or oppression*]_ _, and therefore Plaintiff is entitled to punitive damages in an amount according to proof.

WHEREFORE, Plaintiff requests judgment against all Defendants, and each of them, as set forth below.

FOURTH CAUSE OF ACTION
(Damages for Trespass by Plaintiff(s) _ _[*name(s)*]_ _ Against Defendant(s) _ _[*name(s)*]_ _)

[35.] Plaintiff incorporates by reference into this cause of action each allegation of paragraphs 1 through 10 of the General Allegations.

[36.] From and after _ _[*date*]_ _, Defendants, without the consent or authority and against the will of Plaintiff, entered Plaintiff's Property as follows: _ _[*describe facts constituting trespass*]_ _. _ _[*Allege the period of time during which the trespass occurred and any notice to defendants to terminate the trespass.*]_ _

[37.] Because of Defendants' above-described conduct, Plaintiff has been deprived of the use and possession of his property for _ _[*specify period of time*]_ _, all to Plaintiff's damage in an amount to be determined by proof at trial. _ _[*Allege other damages as set forth in the cause of action for nuisance.*]_ _

_ _[If appropriate, allege facts indicating that the trespass occurred on cultivated land or land intended to be used for raising livestock; this allegation provides a basis to recover fees under CCP §1021.9.]_ _

WHEREFORE, Plaintiff prays for judgment against Defendants, and each of them, as follows:

A. For a preliminary and permanent injunction enjoining Defendants from _ _[*state conduct to be enjoined with sufficient specificity for an order*]_ _;

B. For special damages according to proof;

C. For general damages according to proof;

D. For costs of suit;

E. _ _[*For prejudgment interest*]_ _;

[F]. _ _[*For punitive damages according to proof*]_ _;

[G]. _ _[*For attorney fees*]_ _; and

[H]. For any other and further relief as the court may deem just and proper under the circumstances.

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file in state court when summons issued); copies for service (one for each defendant party); office copy; client copy.

Comment: If an injunction is sought on the basis of the complaint rather than on declarations, the complaint should be verified. CCP 527(a). On preparing and serving complaints, see California Civil Procedure Before Trial, chaps 21-25 (4th ed Cal CEB 2004). On captions and formats for court papers, see Cal Rules of Ct 2.111; Civ Proc Before Trial §§11.6-11.26. See Cal Rules of Ct 2.112, which requires each cause of action in a complaint to separately identify the number of the cause of action, the legal theory, and all parties on whose behalf and against whom the cause of action is asserted. On pleading requirements in limited civil cases, see Comment to form complaint in §1.45.

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12

Landslide and Subsidence Liability

Carol K. Watson

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I. INTRODUCTION

§12.1 A. Landslide and Subsidence Defined

The term "landslide" as used in this chapter includes not only the movement of dry rock and earth or other materials down a slope but also the movement of wet soil and rocks; *i.e.,* mudslides, "creep," and "flows." Landslides in California are commonly caused by internal swelling of soil components when moisture accumulates from inadequate drainage during rainy seasons. Erosion is another kind of land failure caused by inadequate drainage.

The term "subsidence" as used in this chapter means a downward lateral shifting of the soil resulting from the lowering of a water table or subsurface oil pools and may also result from excessive weight being placed on the supporting soil. Slump failure is the breaking away of a block of soil at the edge of a slope, often in a back-tilted manner, resulting in a mass moving either intact or in a few large segments.

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§12.2 B. Preliminary Steps for Plaintiff's Counsel

Nothing is more important for an attorney handling a landslide or subsidence case than to understand the nature and extent of the problems affecting the client. Conducting an interview with the client as soon as possible and preferably at the client's residence will allow the attorney to examine first hand the types of damages suffered and ascertain whether the problem is site specific or broader in its scope. This type of meeting also permits the attorney to advise the client on how to monitor the progressive nature of damages to the property and to keep a diary of the events affecting the client's life as a result of injury to the homestead.

Another crucial step the attorney should take is to retain a proper expert, such as a geological engineer, geologist, or other soils expert, to identify any safety issues, recommend repair or relocation, and then investigate the cause of the landslide. On retaining experts, see California Expert Witness Guide (2d ed Cal CEB 1991).

As with any property damage case, anyone suffering loss from a landslide or subsidence should in most circumstances immediately put his or her property insurance carrier on notice of the loss if required by the policy terms. See California Liability Insurance Practice: Claims & Litigation (Cal CEB 1991). Whether to make a claim on the owner's first-party property (homeowners') policy must be carefully weighed, however, because coverage for land failure may be excluded in any event and future insurability may be affected. See California Construction Contracts, Defects, and Litigation §§10.39-10.44 (Cal CEB 2008).

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§12.3 C. Chapter Scope

This chapter discusses landslide and subsidence liability, including the theories a property owner might use to recover damages for a land failure as well as defenses to those theories of liability.

Parties potentially liable for land failures include land developers (see §§12.4-12.32), former owners of property (see §§12.33-12.72), adjacent property owners (see §§12.73-12.91), and public entities. The scope of this chapter, however, is limited to private owners. For liability of public entities/owners, see Condemnation Practice in California (3d ed Cal CEB 2005) and California Government Tort Liability Practice (4th ed Cal CEB 1999).

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Source: Real Property/California Real Property Remedies and Damages/12 Landslide and Subsidence Liability/§12.3A D. Mediation Requirements for Construction Defect Litigation

§12.3A D. Mediation Requirements for Construction Defect Litigation

If a landslide suit will be based on developer or contractor liability for residential construction defects, two separate statutes, CC §§1375-1375.1 and CC §§895-945.5 (see §§14.4A-14.4B), require the parties to engage in prelitigation dispute resolution. These laws are detailed, varied, and procedurally complex. One applies to common interest communities only. The other applies to all residences and not only alters the building standards for residential structures but also creates multiple statutes of repose depending on the type of defect. For complete discussion, see Advising California Common Interest Communities, chap 10 (Cal CEB 2003); California Construction Contracts, Defects, and Litigation, chap 15 (Cal CEB 2008).

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II. LIABILITY OF DEVELOPER AND ITS AGENTS

A. Potential Defendants

§12.4 1. Owners and Developers

A person who has owned a fee interest in real property or has developed the property may be liable for subsequent landslide damage.

An "owner" is defined as one who has held or continues to hold an interest in property. This interest may vary from a fee simple to a mere right to collect future rents. A "developer" is normally a person who assumes an active decision-making role in planning and constructing a real estate project. The developer may be the owner or a planner, a general contractor, or a superintendent or coordinator of the project and may also be associated with the owner as a joint venturer or partner.

The owner often takes complete responsibility for the project by retaining others and coordinating their activities. In determining liability, the business relationship and relative responsibilities between the owner and those developing or building on the property must be examined.

PRACTICE TIP: Because the developer is often out of business when a defect in the development is found, investigation of alter ego theories as a source of solvent defendants should be kept in mind. See *Del Mar Beach Club Owners Ass'n v Imperial Contracting Co.* (1981) 123 CA3d 898, 176 CR 886, which permitted pleadings naming shareholders and officers of the developers as defendants.

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§12.5 2. Lenders

Lending institutions may be held liable for landslide damage resulting from misrepresentation and negligence, including negligent inspection if the lender has assumed an entrepreneurial or other active role in a development (see §12.11).

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§12.6 3. Tract and Other Design Engineers

Much of the planning and design for housing construction projects is done by a "tract engineer." This is a civil engineer who is also occasionally known as a "subdivision engineer." Negligent performance of duties may expose the tract engineer to liability for subsequent landslide damage.

The tract engineer's basic function is to design the layout of a subdivision tract, *e.g.,* planning all earth movement work, including the heights and slopes of cuts and fills; determining drainage patterns for the slopes; planning for slope grading, planting on the slopes, and slope irrigation; and designing the street layout, including roads adapted to hillside drainage and grade conditions. The tract engineer prepares detailed drawings of improvements affecting drainage, such as splash walls and inlet and outlet structures, and sometimes provides the schedules of prevailing regulations and ordinances governing grading problems.

The physical work on the plan prepared by the tract engineer is often performed by a general contractor, who usually retains subcontractors for specific functions (*e.g.,* sewage, grading, paving). The owner, developer, or tract engineer, however, might hire such specialty contractors. If a soils engineer (see §12.7) is retained to make a preliminary site investigation and report, the tract engineer will probably use this report while preparing the plans.

Independently of the tract engineer, various specialty design engineers may be hired by the general contractor or subcontractors, *e.g.,* to design retaining walls and other infrastructure not included in an ordinary tract plan.

The tract engineer or design engineer often has no responsibility for directing or supervising grading, other site preparation operations, or construction; these operations are frequently under the purview of the various contractors and the consultants they engage.

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§12.7 4. Soils Engineers; Geologists

A developer often seeks the services of a soils engineer or a geologist to study the soil mechanics of the construction site. The study includes investigation of the soil's reaction to compaction, its stability in filled slopes, and the effect of subsurface water.

Many California county and city building authorities require a soils investigation certificate as a condition for approval of plans and specifications for tract development projects. These codes generally require that the governing agency be provided with (a) a preliminary investigation by a qualified soils engineer before the tract development begins and (b) a report by a soils engineer of compaction and bearing capacity of the soil after construction has been completed. When a soils report or geologic report is prepared specifically for a subdivision, each report must be kept on file for public inspection by the city or county having jurisdiction. Govt C §66434.5.

Geologists differ from soils engineers in that their specialization is directed to the structure, stratification, and attitudes of "natural" ground. Geologists are being consulted with increasing frequency in larger development projects or those with particularly serious soil problems. Like soils engineers, geologists act as independent contractors who may be either retained by the developer or owner, or brought in by a soils engineer as a consultant. Some local ordinances require that a qualified geologist make a formal study of a development site.

When a soils study has been prepared and is available for examination by any interested party, a party cannot later complain that it had no knowledge of adverse soil conditions. See *Wiechmann Eng'rs v State* (1973) 31 CA3d 741, 107 CR 529.

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§12.8 5. Architects; Designers

A developer may hire an architect to design buildings and other structures. Although the architect may occasionally be consulted early in the development process (*e.g.,* to advise on site selection), ordinarily he or she is initially retained when plans and specifications for the structures are needed. The architect studies any reports that have been submitted by soils engineers or geologists (see §12.7) and frequently consults with structural, mechanical, electrical, or other specialty engineers when preparing the drawings. Either the architect or the developer may retain these consultants.

The architect not only drafts the plans but also specifies the materials to be used. The architect may also assist in preparing bidding documents and may review building contractors' bids.

An architect may also specifically agree to supervise construction of the project, usually as an agent of the developer rather than as an independent contractor. See *Trane Co. v Gilbert* (1968) 267 CA2d 720, 726, 73 CR 279; *Wallich v Salkin* (1963) 219 CA2d 157, 33 CR 125. When acting as a supervisory agent, the architect has a duty to exercise due care and may be held liable for negligent supervision. *Palmer v Brown* (1954) 127 CA2d 44, 61, 273 P2d 306.

The extent to which an architect supervises construction is ordinarily defined by contract, which may require general supervisory duties such as regular and thorough inspections, auditing of contractors' accounts, authorizing payments, obtaining necessary certificates of occupancy, and securing guaranties and releases (*e.g.,* mechanics' liens).

Although architects are usually retained in tract development, some developers rely on nonprofessional "designers." This practice is especially common in smaller developments, in which only one or two basic residences are designed and then used as patterns for the entire development.

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§12.9 6. Contractors

The owner or developer of a construction project often hires a general contractor to perform or supervise site preparation and construction. The general contractor may perform all these duties with its own equipment and personnel. More often, however, the general contractor retains subcontractors for specific purposes. For example, a tract engineer may prepare the site (see §12.6) or a grading contractor may do the actual work of altering grades by cutting and filling.

The contractual and working relationships among owners, developers, general contractors, and subcontractors are important in determining liability for subsequent landslide damage.

PRACTICE TIP: A basic issue is often whether a party was an independent contractor or merely an agent or an employee. Because these relationships are often complex and vary a good deal from project to project, the appropriate written and oral agreements must be closely analyzed.

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B. Theories of Liability

§12.9A 1. Negligence

An essential element for a negligence cause of action is the existence of a duty to use due care toward the interests of others. In a nonconstruction context, the California Supreme Court held that whether this duty exists in a particular situation is a question of law and must be decided on a case-by-case basis. *Bily v Arthur Young & Co.* (1992) 3 C4th 370, 11 CR2d 51. When contractual privity is not present, the issue of duty is analyzed under the policy factors recited in *Bily* and *Biakanja v Irving* (1958) 49 C2d 647, 320 P2d 16. For an analysis of duty in a construction context, see *Weseloh Family Ltd. Partnership v K. L. Wessel Constr. Co*. (2004) 125 CA4th 152, 22 CR3d 660, which held that design engineers engaged by a subcontractor as consultants for retaining walls for a construction project owed no duty of care to either the owner or the general contractor. For further discussion, see California Construction Contracts, Defects, and Litigation, chaps 8, 10-11 (Cal CEB 2008); California Tort Guide, chap 1 (3d ed Cal CEB 1996).

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§12.10 a. Owners and Developers

An owner or a developer is liable for its own negligence when it actively participates (*e.g.*, as a contractor, engineer, architect) in the development process. *Sabella v Wisler* (1963) 59 C2d 21, 27 CR 689 (builder liable for negligence in soil compaction); *Conolley v Bull* (1968) 258 CA2d 183, 65 CR 689 (builder/seller liable for negligence in failing to provide adequate drainage facilities).

An owner or a developer with an ownership interest is liable on traditional respondeat superior principles for the tortious acts or omissions of its agents, servants, and employees while acting within the scope of their employment and whether or not they acted in excess of their authority or contrary to instructions. CC §2338.

Generally, a principal who employs an independent contractor is not liable for injuries resulting from the negligence of the contractor or any of its subcontractors over whom the principal has no control or supervision. See *Johnson v Cal-West Constr. Co.* (1962) 204 CA2d 610, 612, 22 CR 492; Restatement (Second) of Torts §409 (1965). A well-established exception to the general rule is the "peculiar risk" doctrine, most commonly applied in personal injury cases. See, *e.g*., *Toland v Sunland Hous. Group, Inc.* (1998) 18 C4th 253, 74 CR2d 878. Under this doctrine, a person who hired an independent contractor to do inherently dangerous work, and who should have known that the contractor's activities posed a special risk of harm but failed to take adequate preventive measures, can be held liable for tort damages if the contractor causes injury to others by performing the work negligently. This doctrine is also applied to impose liability for property damage. See *Henderson Bros. Stores v Smiley* (1981) 120 CA3d 903, 174 CR 875 (owner liable for fire damage to neighbor's property caused when subcontractor's tar kettle exploded). For extended discussion of the peculiar risk doctrine in personal injury actions arising from construction activity, see California Construction Contracts, Defects, and Litigation, chap 10 (Cal CEB 2008).

Another major exception to the nonliability rule for the hirer of an independent contractor is the strict liability doctrine, applicable in construction defect actions brought by homebuyers. See §§12.15-12.16. The doctrine imposes liability on the developer or contractor for defective work or material supplied by subcontractors or suppliers, even if subcontractors are independent contractors. On a contractor's liability for property damage resulting from a subcontractor's negligent installation of plumbing, see *Sabella v Wisler, supra*.

WARNING: Before filing an action against a developer or contractor for construction defects in a residence, counsel should review the Calderon Procedures (CC §§1375-1375.1) and the Right to Repair Act (CC §§895-945.4) (discussed in §§12.3A, 14.4A-14.4B), which mandate prelitigation dispute resolution. The Right to Repair Act establishes residential building standards and statutes of repose based on the type of defect. See Advising California Common Interest Communities, chap 10 (Cal CEB 2003); Const Contracts and Defect, chaps 11, 15.

For further discussion of owner and contractor general tort liability, see Const Contracts and Defect, chap 10. For further discussion of construction defect liability, see Const Contracts and Defect, chaps 11-15.

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§12.11 b. Lenders

One who acts solely as a lender is probably not liable to ultimate purchasers for negligence in inspecting, or failing to inspect, the subject property. See *Bradler v Craig* (1969) 274 CA2d 466, 79 CR 401. When, however, the institutional lender is a participant in the construction project, the lender may be liable to buyers for negligence in inspecting the property.

In *Connor v Great W. Sav. & Loan Ass'n* (1968) 69 C2d 850, 73 CR 369**,** the majority (in a sharply divided court) found that the lending institution's participation in the development, although not that of a joint venturer, was sufficient to expose it to negligence liability to the home buyers. 69 C2d at 864. The court ruled that Great Western's inspections were negligently performed and that it was no defense that inspections were also made by county inspectors. See §12.30. Following *Connor,* the California legislature enacted CC §3434 to limit a financial institution's liability to a borrower. In general, a lender owes no duty of care to a borrower when its involvement in a loan transaction does not exceed the scope of its usual role as a mere lender of money. *Nymark v Heart Fed. Sav. & Loan Ass'n* (1991) 231 CA3d 1089, 283 CR 53.

A lender is liable to a buyer, however, for negligent and false representations made to the buyer by the lender's employee. *De Zemplen v Home Fed. Sav. & Loan Ass'n* (1963) 221 CA2d 197, 34 CR 334.

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§12.12 c. Engineers

An engineer (whatever the particular specialty) has the duty "to exercise the ordinary skill and competence" of members of the engineering profession (*Gagne v Bertran* (1954) 43 C2d 481, 489, 275 P2d 15) and is held to the standard of a reasonably prudent person with the same training and knowledge (see *Dillenbeck v City of Los Angeles* (1968) 69 C2d 472, 483, 72 CR 321). The standard of care must be determined from expert testimony unless the allegedly negligent conduct is within the common knowledge of lay persons. *Chaplis v County of Monterey* (1979) 97 CA3d 249, 267, 158 CR 395 (no expert testimony required to prove ordinary negligence in failing to obtain building permits); *Allied Props. v John A. Blume & Assocs.* (1972) 25 CA3d 848, 858, 102 CR 259 (expert testimony required to prove negligent design of piers by marine engineer).

When testing an engineer's competence, the knowledge of the members of the profession at the time of the engineer's employment must be considered. *Bonadiman-McCain, Inc. v Snow* (1960) 183 CA2d 58, 70, 6 CR 52. The engineer may be judged by the level of competence only in the locality in which he or she is employed. See *Paxton v County of Alameda* (1953) 119 CA2d 393, 398, 259 P2d 934. In landslide cases the "locality" may include a large landslide-prone area (*e.g.,* Orange, Los Angeles, Ventura, and Santa Barbara counties may be considered as a single locality in which the engineer's competence is judged).

A person who purports to have engineering expertise is held to the standard of care required of a person actually having that expertise. Thus, in *Gagne v Bertran, supra,* a person who was neither a soils engineer nor a geologist, but who held himself out to be qualified to test soils for fill, was found negligent based on the standard of care required of those in the business of soils testing.

Engineers employed to investigate the structural integrity of a building who are informed that the owner does not intend to take remedial action to make repairs have a duty to warn the occupants or local building authorities that an imminent risk of injury to the occupants is present. 68 Ops Cal Atty Gen 250 (1985).

The signing of plans and similar documents by a civil engineer imposes no duty on the engineer to supervise construction of projects based on those plans. Bus & P C §6735.1. Moreover, a civil engineer who signs plans and similar documents is not liable for damages caused by later changes or uses of the plans that were not authorized or approved by the engineer, unless the engineer's original services are also a proximate cause of the damage. Bus & P C §6735(b).

The engineer's contract defines the obligations and authority he or she assumes in addition to those imposed by law. If a landslide is traced to the engineer's conduct, those contractual duties should be reviewed to determine liability. A design engineer who is engaged by a subcontractor but who has no privity of contract with either the owner or the general contractor will be liable in negligence to the owner or general contractor only if the court finds under the circumstances that the engineer owed a duty of care to them. See *Weseloh Family Ltd. Partnership v K. L. Wessel Constr. Co*. (2004) 125 CA4th 152, 22 CR3d 660, which applied the restrictive liability principles recognized in *Bily v Arthur Young & Co.* (1992) 3 C4th 370, 11 CR2d 51. Note that the court in *Weseloh* distinguished the tort of negligent misrepresentation, one of the principal theories in *Gagne v Bertran, supra*.

A soils engineer's preliminary report (see §12.7) is usually considered an expression of professional opinion, the quality of which is measured by professional standards and judged by experts. Similarly, when courts examine a soils engineer's "after-completion" report, the professional standards test is applied and expert testimony is necessary to prove the engineer's negligence in preparing the report. Whether the engineer participated in the construction or merely gave a professional opinion in preparing the after-completion report is a question of fact. See *Oakes v McCarthy Co.* (1968) 267 CA2d 231, 73 CR 127.

No one may use the title "soil(s) engineer" or "geotechnical engineer," unless he or she qualifies for the title based on requirements and criteria set by the State Board of Registration for Professional Engineers and Land Surveyors. Bus & P C §6736.1.

Special pleading requirements have been imposed in suits against engineers, architects, and surveyors for professional negligence. See CCP §411.35.

For further discussion of engineer liability, see California Construction Contracts, Defects, and Litigation, chap 8 (Cal CEB 2008).

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§12.13 d. Architects

An architect is held to a standard of care based on the customary practice of architects in his or her locality. *Paxton v County of Alameda* (1953) 119 CA2d 393, 259 P2d 934. In the event of personal injury, the architect may be liable to both the client and to anyone "who foreseeably and with reasonable certainty may be injured" by his or her failure to use ordinary care, even though the client has accepted his work. *Montijo v Swift* (1963) 219 CA2d 351, 353, 33 CR 133. Architect and engineer liability is often determined by similar standards. See *Bonadiman-McCain, Inc. v Snow* (1960) 183 CA2d 58, 6 CR 52. Absent a special agreement, the architect does not guarantee the client a perfect plan or design. A showing of negligent conduct is necessary. *Palmer v Brown* (1954) 127 CA2d 44, 273 P2d 306. When a roof, floor, or wall cracks or buckles, or when doors and windows jam, or sewer, water, or other utility lines rupture and inundate the soil, however, it is possible that such damage resulted, at least in part, from errors in architectural plans or specifications or from negligent inspection of the execution of those plans.

The architect may be liable for subsequent damage to the structure if the plans fail to disclose to the contractor or workers all the pertinent features of the site. *Mallow v Tucker, Sadler & Bennett, Architects & Eng'rs, Inc.* (1966) 245 CA2d 700, 54 CR 174. Although it may be a defense that the contractor failed to follow the plans or specifications, the architect may still be liable if he or she had a contractual duty to supervise the contractor's work and failed to do so properly. *Pancoast v Russell* (1957) 148 CA2d 909, 307 P2d 719. This duty to supervise may give rise to liability separate and distinct from any liability of the party who actually performed the work in a negligent manner. *Wallich v Salkin* (1963) 219 CA2d 157, 33 CR 125.

An architect may incur liability for hiring an incompetent consultant. See *Scott & Payne v Potomac Ins. Co.* (Ore 1959) 341 P2d 1083. A licensed architect who signs and stamps plans and similar documents is not liable for damages caused by later changes or uses of the plans that were not authorized or approved in writing by the architect (as long as the written approval is not unreasonably withheld) unless the architect's original services are also a proximate cause of the damage. Bus & P C §5536.25(a). The signing and stamping of plans and similar documents by a licensed architect imposes no duty on the architect to observe construction of projects based on those plans. Bus & P C §5536.25(b). The words "certify" or "certification" used by a licensed architect do not create a warranty or guarantee, either express or implied, but represent merely an expression of the architect's professional opinion about the certified facts or findings. Bus & P C §5536.26.

For special pleading requirements in suits for negligence against architects, see CCP §411.35.

For further discussion of architect liability, see California Construction Contracts, Defects, and Litigation, chap 8 (Cal CEB 2008).

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§12.14 e. Building Contractors

Contractors are not liable for defects in plans and specifications under which they agree to perform work. *Barnthouse v California Steel Bldgs. Co.* (1963) 215 CA2d 72, 74, 29 CR 835 (when contractor performs work in accordance with plans and specifications furnished by owner, which contractor is bound to follow, and owner accepts completed work, contractor is not liable to third persons for injuries resulting from structural defect). Even if they follow plans and specifications, however, contractors can be liable for dangerous conditions they create based on those plans if the danger should have been obvious to a licensed contractor. *Rawlings v D. M. Oliver, Inc.* (1979) 97 CA3d 890, 896 n1, 159 CR 119.

If the plans are not faulty, and the contractor fails to do its work as prescribed in the plans and specifications, the contractor is liable not only for breach of the contract with the other contracting party, but also to any purchaser who later suffers damage. See *Alisal Sanitary Dist. v Kennedy* (1960) 180 CA2d 69, 4 CR 379 (property damage claim by third party). General contractors are liable for the negligence of subcontractors they hire and the subcontractors' servants, agents, or employees. See *Sabella v Wisler* (1963) 59 C2d 21, 28, 27 CR 689 (liability for subcontractors); *Dow v Holly Mfg. Co.* (1958) 49 C2d 720, 725, 321 P2d 736 (contractor's liability for finished product).

To prove negligence in design or construction of a building that suffers landslide damage, the plaintiff must present expert opinion evidence because "the average layman has neither training nor experience in the construction industry and ordinarily cannot determine whether a particular building has been built with the requisite skill and in accordance with the standards prescribed by law or prevailing in the industry." *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 702, 106 CR 1.

WARNING: Before filing any residential construction defect suit against a contractor or developer, see warning about mandatory prelitigation ADR in §12.10.

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Source: Real Property/California Real Property Remedies and Damages/12 Landslide and Subsidence Liability/ 2. Strict Liability in Tort/§12.15 a. Manufacturers of Defective Housing

2. Strict Liability in Tort

§12.15 a. Manufacturers of Defective Housing

Applying the rationale of products liability law, a builder of mass-produced housing may be held strictly liable for construction defects. *Stearman v Centex Homes* (2000) 78 CA4th 611, 92 CR2d 761.

The burden is on the plaintiff to establish that the "product" (*e.g.,* a house) was defectively designed or manufactured and that the defect proximately caused the injury; expert opinion evidence is required for this purpose. *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 703, 106 CR 1.

The California Supreme Court has set forth a two-pronged test for determining whether a product is defective in design. A product may be found defective in design if (1) the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or (2) the benefits of the challenged design do not outweigh the risk of danger inherent in such design, assuming that the product satisfies ordinary consumer expectations. *Barker v Lull Engineering Co.* (1978) 20 C3d 413, 432, 143 CR 225. Once a plaintiff shows that the injury complained of was proximately caused by the product's design, the burden shifts to the defendant to prove that the product is not defective. 20 C3d at 431.

A strict products liability cause of action can be stated against the builder/developer of a planned multiunit residential development for the defective design and construction of, and defects in, buildings, pavement, and recreational facilities. Architects, soils engineers, and structural engineers, however, supply only guidance to the developers (a service) and can be liable only for negligence or intentional misconduct. *Del Mar Beach Club Owners Ass'n v Imperial Contracting Co.* (1981) 123 CA3d 898, 913, 176 CR 886 (part of multiunit residential project built on unstable bluff).

The doctrine of strict liability, as it relates to developers of residential housing, applies only to mass producers of housing and not to the isolated or occasional construction and sale of residences. Whether a residence is a mass-produced home is a question to be decided on a case-by-case basis. *Oliver v Superior Court* (1989) 211 CA3d 86, 259 CR 160 (developer who built two different homes in two different locations could not be held strictly liable for defects). See also *Swett v Gribaldo, Jones & Assocs.* (1974) 40 CA3d 573, 115 CR 99 (developers, subdividers, and builders of tract houses, but not soils engineers, can be strictly liable to purchasers of tract housing); *Hyman v Gordon* (1973) 35 CA3d 769, 111 CR 262 (homebuilder strictly liable for defective design in placement of water heater); *Stuart v Crestview Mut. Water Co.* (1973) 34 CA3d 802, 110 CR 543 (developer, but not designing engineer, may be strictly liable for defective water system).

Strict tort liability has been imposed on manufacturers and suppliers to protect individual consumers, users, and injured bystanders who are not in a position to protect themselves from defective products, and to spread the cost of injuries. Because a lender whose resources are lent to facilitate the mass construction of homes is not in such a vulnerable position, a lender may not recover from the manufacturer on the ground of strict liability. *United States Fin. v Sullivan* (1974) 37 CA3d 5, 18, 112 CR 18.

A contractor who manufactures a product, such as housing or finished residential lots, may be held strictly liable in tort even though the product was not sold directly to the public but to another commercial entity. *GEM Developers v Hallcraft Homes of San Diego, Inc.* (1989) 213 CA3d 419, 261 CR 626. See also *Blackhawk Corp. v Gotham Ins. Co.* (1997) 54 CA4th 1090, 1099, 63 CR2d 413. Likewise, the manufacturer of a component, such as windows, installed in mass-produced housing during construction may be strictly liable in tort for harm resulting from defects in the component, including resulting physical damage to other parts of the house. *Jimenez v Superior Court* (2002) 29 C4th 473, 127 CR2d 614.

The purchase of assets from a manufacturer can expose the purchaser to liability for the defects of the defunct manufacturer's products. A corporation that purchases the principal assets of another, however, does not assume the product liability of the selling corporation unless (1) there is an express or implied agreement of assumption of liability, (2) the transaction amounts to a consolidation or merger of the two corporations, (3) the purchasing corporation is a mere continuation of the seller, (4) the transfer of assets to the purchaser is for the fraudulent purpose of escaping

liability, or (5) the successor corporation receives the benefit of continuing the predecessor's business and goodwill. *Ray v Alad Corp.* (1977) 19 C3d 22, 136 CR 574. (See the application of the *Ray v Alad* test in *Henkel Corp. v Hartford Acc. & Indem. Co.* (2003) 29 C4th 934, 129 CR2d 828 (predecessor company's insurance coverage not continued to cover successor)). The *Ray v Alad* test, however, applies only to strict products liability, not to negligence. *Monarch Bay II v Professional Serv. Indus., Inc.* (1999) 75 CA4th 1213, 1218, 89 CR2d 778 (no liability for landslide damage to apartment complex for successor of all assets of engineering services company that negligently certified building site). Strict products liability cannot be imposed on a successor corporation when the defendant purchased the assets from the trustee in bankruptcy and the defendant was not a causal factor in the bankruptcy. *Stewart v Telex Communications, Inc.* (1991) 1 CA4th 190, 1 CR2d 669.

For further discussion of owner and contractor strict liability, see California Construction Contracts, Defects, and Litigation, chaps 11, 15 (Cal CEB 2008).

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§12.16 b. Developers of Defective Lots

A plaintiff homeowner may state a cause of action for strict liability by alleging improper cutting, filling, and compacting in preparing the lot, with resulting landslide damage. *Avner v Longridge Estates* (1969) 272 CA2d 607, 77 CR 633. When a developer negligently designs, builds, or maintains a dangerous condition in a subdivision and later dedicates the dangerous work to the government, the developer is not thereby relieved of liability. *Fisher v Morrison Homes, Inc.* (1980) 109 CA3d 131, 167 CR 133. In *Fisher,* however, the court characterized the kind of work performed by the contractor (road building) as a service, thus precluding strict liability and requiring the plaintiff to prove negligence. 109 CA3d at 138. See also *County of Mariposa v Yosemite W. Assocs.* (1988) 202 CA3d 791, 809, 248 CR 778 (that county had approved and accepted developer's improvements did not absolve developer of negligence or relieve it of its contractual duties).

A public entity sued for inverse condemnation can cross-complain against a third party for equitable indemnity, even when the third party is private and the cross-complaint is based on negligence or fraud. *County of San Mateo v Berney* (1988) 199 CA3d 1489, 245 CR 738 (public entity, sued for inverse condemnation, allowed to cross-complain against developers for fraudulent use and nondisclosure of improper fill).

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3. Breach of Warranty

§12.17 a. Seller's Warranty of Land Stability

The parties to a real estate sales agreement or deposit receipt may insert an express warranty of soil stability. A seller who warrants soil stability may be liable if the land is otherwise and the buyer suffers landslide damage.

An express warranty of soil stability not included in the deed is generally considered collateral to the deed and will not be merged into it. *Stiles v Bodkin* (1941) 43 CA2d 839, 111 P2d 675. To prove the existence and enforceability of the warranty, the buyer must show that the seller's representation of soil stability was intended by the seller to be a promise. *Miller v Germain Seed & Plant Co.* (1924) 193 C 62, 222 P 817. The buyer must also show that he or she bought in reliance on that promise. *McLennan v Ohmen* (1888) 75 C 558, 561, 17 P 687. The trier of fact may find that the seller's expression was merely one of opinion or belief and did not constitute a warranty. *The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Cavanaugh* (1963) 217 CA2d 492, 32 CR 144.

When the seller conveys unimproved land and expressly warrants the soil conditions, the warranty is personal to the immediate grantees and does not constitute a covenant running with the land. Subsequent grantees have no remedy for breach of warranty against grantors with whom they are not in privity. This rule was applied in *Bell v Renaldo* (1975) 51 CA3d 779, 124 CR 233, in which the court upheld the demurrer by remote grantors who warranted subdivided lots as suitable for building despite subsurface water problems.

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§12.18 b. Warranty of Fitness of Materials Used in Construction Project

A subdivider or a developer of new buildings sometimes gives the buyer a certificate or guaranty against defects in workmanship and material for a stated period of time, such as 6 months or 1 year. This guaranty may constitute an express warranty.

Although Com C §§2313-2315 (defining warranties) relate only to "goods," warranty principles may also apply to contracts for labor performed and materials used on real property. Materials may be supplied under an express warranty or an implied warranty of merchantability; if landslide damage is traced to defective materials used to build or repair real property, the owner may have a cause of action against the builder or other supplier. The developer who hired the builder may also be liable under respondeat superior principles. There is "no justification for refusing to imply a warranty of suitability for ordinary uses merely because an article is furnished in connection with a construction contract rather than one of sale." *Aced v Hobbs-Sesack Plumbing Co.* (1961) 55 C2d 573, 583, 12 CR 257.

A contractor who complies with specifications prepared by the plaintiff's architect or engineer is not liable on an implied warranty theory. *The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Cavanaugh* (1963) 217 CA2d 492, 32 CR 144. See also *Trane Co. v Gilbert* (1968) 267 CA2d 720, 73 CR 279, on liability of person providing specifications.

Steel beams were held to be goods within the meaning of Com C §§2712(1)-(2) and 2105 in *U.S. ex rel Bartec Indus., Inc. v United Pac. Co.* (9th Cir 1992) 976 F2d 1274, modified (9th Cir 1994) 15 F3d 855, despite the fact that the contract for their sale included a provision that the seller would specially manufacture them. The court held that the special fabrication was incidental to the predominant purpose of the contract and noted that the supplier performed no work at the construction site. The California Supreme Court has held builders and sellers of new construction to an implied warranty that the completed structure was designed and built in a reasonably workmanlike manner. *Pollard v Saxe & Yolles Dev. Co.* (1974) 12 C3d 374, 115 CR 648. In *Pollard,* recovery was denied, however, because the plaintiff had failed to give timely notice of the breach of warranty (defective ceilings, doors, and patio decks not reported for almost 4 years). The court applied the reasonable time notice requirement of Com C §2607(3).

The implied warranty under *Pollard* applies only to new construction (*East Hilton Drive Homeowners' Ass'n v Western Real Estate Exch., Inc.* (1982) 136 CA3d 630, 186 CR 267) and only to purchasers in privity with commercial developers, *i.e.,* persons or entities in the business of building new homes for sale (*Siders v Schloo* (1987) 188 CA3d 1217, 233 CR 906).

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§12.19 c. Warranty in Contracts to Perform Services

Architects, engineers, and building contractors occasionally give express warranties about the quality of the services they will perform. See *Bause v Anthony Pools, Inc.* (1962) 205 CA2d 606, 23 CR 265 (express warranty by contractor). An injured plaintiff seeking to claim the existence of an express warranty, however, may have difficulty establishing that what was said was indeed a warranty and not merely the expression of opinion. Opinion cannot be the basis of a warranty. Com C §2313(2); *The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Cavanaugh* (1963) 217 CA2d 492, 504, 32 CR 144.

In *Gagne v Bertran* (1954) 43 C2d 481, 275 P2d 15, no express written warranty agreement was found, and the court refused to hold that an implied warranty existed by which a soils tester could be held liable (the defendant was held liable for deceit, however). Soils engineers may be liable to developers and property owners for improper or insufficient soils testing that results in land subsidence, particularly in filled earth and cut slope operations, because the buyer, architect, or engineer, and immediate and successive property owners often rely on the soils engineer's report of the suitability of the site for development. If erroneous, this report may be the basis of a breach of warranty action; the language used in these reports, however, may be such that a warranty would be difficult to establish. For a case in which cautionary language used in a soils report served to negate an express warranty, see *Swett v Gribaldo, Jones & Assocs.* (1974) 40 CA3d 573, 115 CR 99. See also *White v Berrenda Mesa Water Dist.* (1970) 7 CA3d 894, 87 CR 338.

A professional does not impliedly warrant his or her services. *Allied Props. v John A. Blume & Assocs.* (1972) 25 CA3d 848, 102 CR 259 (marine engineer).

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4. Failure to Comply With Regulatory Legislation

§12.20 a. Statutory Requirements

Subdividers of land must satisfy several statutory requirements regarding soil stability before they may commence development. Failure to comply may be a basis for subsequent action when a building suffers landslide damage.

A "subdivision" is defined as a division of property into five or more lots. Bus & P C §11000. Under 10 Cal Code Regs §2792(a)(10), the application for a final subdivision public report must contain "information on "hazards and other unusual conditions within or in the vicinity of the subdivision." Bus & P C §11010 requires anyone intending to sell or lease subdivided lands to file an application for a public report referencing any soils or geologic reports prepared for the subdivision, stating whether fill is used or proposed to be used in the subdivision and giving the name and location of the public agency where information on soil conditions in the subdivision is available. Under Bus & P C §11018.2 a person is prohibited from selling, leasing, or offering to sell or lease in California any subdivision lots or parcels without first obtaining a public report from the Real Estate Commissioner.

California's Earthquake Protection Law (Health & S C §§19100-19217) requires that all houses in city limits built after May 26, 1933, be designed and built to resist stresses produced by lateral forces as provided in the California Building Standards Code (Health & S C §§18935-18944.7). Health & S C §19150.

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§12.21 b. Remedies for Failure to Comply

Sale or lease of any subdivision lot without first obtaining a report from the Real Estate Commissioner is prohibited. Bus & P C §11018.2. Failure to provide a buyer with a copy of the commissioner's report before the execution of a contract for the sale or lease of any lot or parcel in a subdivision is a violation of Bus & P C §11018.1 and may be a proper ground for the buyer to rescind the contract and recover the purchase money.

A seller's failure to notify the commissioner of the proposed subdivision was ground for rescission by the buyer in *Bachenheimer v Palm Springs Mgmt. Corp.* (1953) 116 CA2d 580, 254 P2d 153. See also *Perkins v Sommers* (1953) 117 CA2d 32, 254 P2d 913. It is unclear whether a plaintiff may bring an action for damages rather than for rescission; no statute specifically authorizes an action for damages based on violation of these statutory provisions. See *Barrett v Hammer Builders, Inc.* (1961) 195 CA2d 305, 16 CR 49 (damages allowed on tort theory; judgment reversed on other grounds).

PRACTICE TIP: Notice of rescission should be given by a buyer who wishes to rescind on grounds of noncompliance with real estate laws, although it is unclear whether such notice is required.

Purchasers with grievances against subdividers should not overlook the importance of the public remedies available to the state. If a subdivider fails to comply with the Subdivided Lands Act (Bus & P C §§11000-11200), there are grounds for rescission by subdivision purchasers and for discipline by the Real Estate Commission. See Bus & P C §11000.2. Under Bus & P C §10177(d), the commissioner may suspend or revoke a real estate license if the statutory provisions are "willfully disregarded or violated." Reading this phrase disjunctively, the court in *Handeland v Department of Real Estate* (1976) 58 CA3d 513, 518, 129 CR 810, upheld the 30-day suspension of a real estate license for negligent and unintentional violations of Bus & P C §§11010 and 11018.2. The court stated that the disciplinary procedures of §10177(d) "are to protect the public not only from conniving real estate salesmen but also from the uninformed, negligent, or unknowledgeable salesman." *Handeland v Department of Real Estate, supra.*

Prosecution of violations of the Subdivided Lands Act by the Attorney General and the local district attorney as civil violations of state consumer protection statutes may result in direct financial benefits for aggrieved purchasers. In *People v Pacific Land Research Co.* (1977) 20 C3d 10, 141 CR 20, the Attorney General sought injunctive relief and civil penalties from a developer who failed to comply with the subdivision statutes. The complaint was based on theories of unfair competition under CC §3369 and former CC §3370.1 and of false advertising under Bus & P C §§17500 and 17536. (Former CC §3370.1 has been repealed and replaced by Bus & P C §17206.) In addition, the complaint sought restitution on behalf of aggrieved purchasers under Bus & P C §17535.

When a consumer protection suit, such as that in *People v Pacific Land Research Co., supra,* concerns a claim for restitution to defrauded purchasers, the trial court may in its discretion permit the purchasers to intervene under CCP §387. *People v Superior Court (Good)* (1976) 17 C3d 732, 131 CR 800.

On criminal penalties for the falsification of public reports issued by the Real Estate Commissioner to persons intending to sell or lease subdivided lands, see Bus & P C §11020.

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§12.22 c. Local Ordinances

All jurisdictions in California are required to enact ordinances that require as a precondition to subdivision development a preliminary soils report prepared by a qualified civil engineer. The report requirement may be waived if the local building department is already familiar with the soil quality of the subdivision lots. Health & S C §17953. If the soils report indicates a potential threat of structural damage to buildings to be constructed, the building department has authority to require corrective action as a condition to issuance of a building permit. Health & S C §§17954-17955.

In *Cassell v McGuire & Hester* (1960) 187 CA2d 579, 10 CR 33, the defendant operated heavy trucks on a sidewalk in violation of a local ordinance. The vibrations caused damage to the plaintiff's property, and the court held that the defendant's activity was negligence per se. See also *Firemen's Ins. Co. v Indermill* (1960) 182 CA2d 339, 6 CR 469.

PRACTICE TIP: A property owner who has suffered landslide damage should ascertain whether any city or county ordinances afford additional relief. Many localities have "minor subdivision" ordinances forbidding subdivisions that would be lawful under state law.

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C. Defenses

§12.22A 1. Statutes of Limitation and Repose; Effect of SB 800 (2002)

If a landslide suit will be predicated on developer or contractor liability for construction defects in a residence first sold on or after January 1, 2003, a law adopted in 2002 (known as SB 800 (2002) and cited in §14.4B) mandates prelitigation dispute resolution of such claims and significantly alters existing statutes of repose (see §§12.26-12.27) by shortening periods for filing specific types of defect actions. For example, defect actions on faulty electrical systems must be brought within 4 years after the close of escrow (CC §896(f)); on substantial cracking in exterior sidewalks and driveways, within 4 years (CC §896(g)(1)); and on untreated wood posts, within 2 years (CC §896(g)(8)). For complete discussion, see California Construction Contracts, Defects, and Litigation, chap 15 (Cal CEB 2008); Advising California Common Interest Communities, chap 10 (Cal CEB 2003). See also Gerrish & Marks, *Construction Defect Litigation: The Playing Field Has Changed; A Navigational Guide to Senate Bill 800*, 26 CEB Real Prop L Rep 106 (May 2003).

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§12.23 a. Negligence and Strict Liability

Actions based on negligence or strict liability arising from landslide damage are traditionally considered to be tort actions for injury to real property and thus must be brought within 3 years. CCP §338(b). If a plaintiff's cause of action is based on breach of implied warranty (*e.g.,* of fitness for use) and is brought against one who plans, constructs, supervises, or otherwise participates in the building project, however, the appropriate periods of limitation may be 2 years (if an oral contract; see CCP §339(1)) or 4 years (if a written contract; see CCP §337(1)). See *Merchants Fire Assur. Corp. v Retail Credit Co.* (1962) 206 CA2d 55, 23 CR 544. Deciding whether a cause of action is barred by a statute of limitations is a mixed question of law and fact. *Avner v Longridge Estates* (1969) 272 CA2d 607, 617, 77 CR 633. Excepted from the 2-year limitation (CCP §339(1)) are actions for breach of contract between merchants, for which a 4-year limitation applies (CCP §337(1); Com C §2725). On statute of limitations for breach of warranty, see §12.24.

WARNING: Practitioners sometimes confuse the statutes of limitations with the statutes of repose. A statute of limitations is based on the theory of recovery and normally begins to run when the plaintiff suffers appreciable harm. A statute of repose applies to most construction-related contract and tort theories except fraud, fixes an outside time period for actions (regardless of when damage or loss is appreciable), and runs from the date of project completion, except for specified defects affected by SB 800 (2002) (applicable to homes first sold on or after January 1, 2003; see §§12.3A, 12.22A), for which the statutes of repose run from the date escrow closes. See §§12.26-12.27 for brief discussion of statutes of repose (CCP §337.1 (patent defects) and CCP §337.15 (latent defects)). On how the statutes of repose dovetail with the statutes of limitations, see California Construction Contracts, Defects, and Litigation, chap 11 (Cal CEB 2008).

The statute of limitations begins to run from the time the damage "is sufficiently appreciable to a reasonable man," which may be long after the negligent act occurred. *Oakes v McCarthy Co.* (1968) 267 CA2d 231, 255, 73 CR 127. See also *Seelenfreund v Terminix of N. Cal., Inc.* (1978) 84 CA3d 133, 139, 148 CR 307; *Allred v Bekins Wide World Van Servs.* (1975) 45 CA3d 984, 120 CR 312. Under the discovery rule, the cause of action accrues when the plaintiff knew or could have known of both the injury and its negligent cause. The "could have known" portion of this rule is often phrased in terms of the party's being on "inquiry notice" (*i.e.,* the party had notice of information sufficient to alert that party to the necessity for investigation). *Leaf v City of San Mateo* (1980) 104 CA3d 398, 163 CR 711. For discussion of the discovery rule and when a plaintiff is deemed to be on inquiry notice, see *California Sansome Co. v United States Gypsum Co.* (9th Cir 1995) 55 F3d 1402.

To invoke the discovery rule exception to the bar of the statute of limitations, a plaintiff must specifically plead facts showing (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. Conclusory assertions of reasonable delay are insufficient to withstand a general demurrer. *Saliter v Pierce Bros. Mortuaries* (1978) 81 CA3d 292, 146 CR 271. The discovery rule exception is inapplicable to construction defect actions governed by CCP §337.15 (see §12.27) because as a statute of repose it fixes the outside time limit at 10 years for bringing the action and runs from project completion.

Separate times begin to run as each separate defect is discovered. *Anderson v Brouwer* (1979) 99 CA3d 176, 160 CR 65. It is apparently the plaintiff's burden to show why a reasonable inspection following the initial discoveries would not have disclosed defects found later. See also *Winston Square Homeowner's Ass'n v Centex W., Inc.* (1989) 213 CA3d 282, 261 CR 605.

Because commencement of a statute of limitations does not occur until the last essential element of the cause of action occurs, a delayed injury (an injury that takes place after the wrongdoing) is not a tolling of the running of the statute; it is an element of accusal. See *California Sansome Co. v United States Gypsum* Co. (9th Cir 1995) 55 F3d 1402, 1406.

A previous owner's knowledge of defects is imputed to current owners for purposes of starting the running of the statute of limitations. *Bradler v Craig* (1969) 274 CA2d 466, 79 CR 401. An exception to this rule arises when the

previous owner is an agent of the developer. *Valenzuela v Superior Court* (1992) 3 CA4th 1499, 5 CR2d 186.

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§12.24 b. Breach of Warranty

A breach of warranty, either express or implied, based on an oral contract is governed by the 2-year limitation period of CCP §339(1), if based on a written contract, the 4-year period of CCP §337(1), or if the transaction is between merchants, falling under the Commercial Code, the 4-year period of Com C §2725. See, *e.g., Aced v Hobbs-Sesack Plumbing Co.* (1961) 55 C2d 573, 12 CR 257.

In *The Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v Cavanaugh* (1963) 217 CA2d 492, 32 CR 144, an architect and a contractor relied on a picture in a brochure, and this representation was held to constitute the implied warranty. The appropriate statute of limitations was CCP §337(1). Different rules apply for specified warranties on homes first sold after January 1, 2003, and covered by SB 800 (2002) (see CC §§900-907; see also §12.22A), for which the statutes of limitations and repose may be established under that law or by contract (but note that SB 800 (2002) may not apply to express warranties that fall outside of its covered enhanced protection agreements; see CC §943).

In *Mack v Hugh W. Comstock Assocs., Inc.* (1964) 225 CA2d 583, 37 CR 466, the plaintiff claimed both written and oral express warranties, but the court rejected the argument that either CCP §337(1) (written contracts) or CCP §339(1) (oral contracts) was the appropriate statute of limitations. Instead, it applied CCP §338, the 3-year statute of limitations on actions relating to damage to real and personal property.

The statute of limitations begins to run in transactions between merchants when the breach occurs, despite the aggrieved party's lack of knowledge of the breach. Com C §2725(2). If a warranty explicitly extends to future performance of the goods, the accrual of the warranty claim is extended to the time of performance, when the breach is or should have been discovered. Com C §2725(2). This "future performance" exception is strictly construed. The exception does not apply unless the seller explicitly agrees to warrant its product for a defined period of time. *Cardinal Health 301, Inc. v Tyco Electronics Corp*. (2008) 169 CA4th 116, 130, 87 CR3d 5. Also, unless the discovery of the breach must necessarily await future performance, the future performance exception will not apply. 169 CA4th at 133. When repairs are undertaken by the seller of the original work, the statute of limitations may be tolled during the time the seller honestly tries to make repairs to enable the product to fit the warranty, or determines that the warranty cannot be met. *Mack v Hugh W. Comstock Assocs., Inc., supra.* A repair by a third party, however, does not provide a basis for tolling and may result in a shorter limitation period. *A & B Painting & Drywall, Inc. v Superior Court* (1994) 25 CA4th 349, 30 CR2d 418.

WARNING: The late-discovery rule applicable to most statutes of limitations do not apply to the statutes of repose (see §§12.22A, 12.26-12.27), which establish time limits for filing suits at 4 or 10 years after a project's completion date. Absent fraud or conduct justifying equitable estoppel, *e.g.,* conduct that induces the plaintiff to refrain from filing suit within the 10-year period, that period is not extended while the seller makes promises or attempts to make repairs. *Lantzy v Centex Homes* (2003) 31 C4th 363, 384, 2 CR3d 655. See also Warning in §12.23.

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§12.25 c. Violation of Real Estate Laws

The 3-year limitation period of CCP §338(a) (actions on a liability created by statute) applies to suits for rescission based on an alleged violation of subdivision regulation statutes (Bus & P C §§11018.1-11018.2, 11027).

Business and Professions Code §11021 provides that, in "any deed, lease or contract of sale conveying property sold or leased," the cause of action shall be considered to have accrued no earlier than the time of recording. An action may also be commenced before recordation. The limitation period commences again with the recording of each such instrument. 27 Ops Cal Atty Gen 66 (1956).

Because rescission for illegality is based on a violation of the statutes rather than on equitable principles, it has been held that the normal equitable defense of laches is inapplicable. *Murphy v San Gabriel Mfg. Co.* (1950) 99 CA2d 365, 222 P2d 85.

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d. Statutes of Repose

§12.26 (1) Patent Defects

The statute of repose in CCP §337.1(a) applies to certain actions for injury to real or personal property, for personal injuries, or in wrongful death actions, arising from "any patent deficiency in the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to, or survey of, real property." Such actions must be brought within 4 years after the "substantial completion" of the project. If the injury occurs during the fourth year, however, the cutoff date is extended to 1 year after the occurrence. CCP §337.1(b). See *Eden v Van Tine* (1978) 83 CA3d 879, 148 CR 215, which construed the phrase "substantial completion" as used in the statute. On how the statutes of repose dovetail with the statutes of limitation, see California Construction Contracts, Defects, and Litigation, chap 11 (Cal CEB 2008).

The applicability of CCP §337.1 is narrow because owner-occupied, single-unit residences are excluded from its scope. CCP §337.1(f). Nevertheless, if the defect is patent, the statute applies to anyone "performing or furnishing the design, specifications, surveying, planning, supervision or observation of construction or construction of an improvement to real property." CCP §337.1(a). This group could conceivably include architects, structural engineers, soils engineers, tract engineers, grading and other contractors, and possibly others who provide plans for any portion of the project (*e.g.,* sewer contractors, landscape architects, swimming pool contractors). Section 337.1 rarely applies to actions against former owners or occupiers of the building, because those parties usually do not engage in planning, design, or construction activities; the 3-year limitation of CCP §338(b) would apply to such defendants. See §12.23. The activities of an institutional lender might also be covered by CCP §337.1 if the lender shared in control of the development to the extent of "planning, supervision or observation of construction." See §12.11.

In *Nicholson-Brown, Inc. v City of San Jose* (1976) 62 CA3d 526, 533, 133 CR 159, disapproved on other grounds in *Bullis v Security-Pac. Nat'l Bank* (1978) 21 C3d 801, 815 n18, 148 CR 22, the court held that after discovery of the damage, the 4-year limitation period in CCP §337.1, rather than the 2-year period in CCP §339, applies to cases of architectural malpractice. *Nicholson* is the minority view on interpreting the statutes of repose and is arguably superseded by *Lantzy v Centex Homes* (2003) 31 C4th 363, 366, 2 CR3d 655. See also *Roger E. Smith, Inc. v SHN Consulting Eng'rs & Geologists, Inc.* (2001) 89 CA4th 638, 107 CR2d 424.

Whether the defect is patent or latent, the statutes of repose apply separately to each separate area of damage. Thus, a contractor's attempt to repair one area of damage does not toll a statute of repose for other distinct areas of damage. *Winston Square Homeowner's Ass'n v Centex W., Inc.* (1989) 213 CA3d 282, 261 CR 605.

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Source: Real Property/California Real Property Remedies and Damages/12 Landslide and Subsidence Liability/§12.27 (2) Latent Defects

§12.27 (2) Latent Defects

The statute of repose in CCP §337.15 prescribes a 10-year limit on filing actions for *latent* deficiencies in planning or construction of improvements to real property. Under CCP §337.15(a), (g), an action based on latent defects against a developer or contractor or their sureties is barred 10 years after "substantial completion" of the work. See *Lantzy v Centex Homes* (2003) 31 C4th 363, 366, 2 CR3d 655; *Nelson v Gorian & Assocs., Inc.* (1998) 61 CA4th 93, 71 CR2d 345 (soil subsidence claim; court rejected homeowners' argument that 10-year period began to run on date notice of completion was signed).

An action is barred against an individual contractor 10 years after substantial completion of that contractor's work, even though the developer of the entire project did not finish the project until many years later. In other words, CCP §337.15 applies differently for each contractor and each developer. *Liptak v Diane Apartments, Inc.* (1980) 109 CA3d 762, 167 CR 440. This also means that a homeowner may be able to sue a developer even though actions against individual contractors are time barred. An important issue is what in fact constitutes the "development" or "improvement" relative to the owner's injury. See, *e.g., Gaggero v County of San Diego* (2004) 124 CA4th 609, 21 CR3d 388. See also *Winston Square Homeowner's Ass'n v Centex W., Inc.* (1989) 213 CA3d 282, 261 CR 605 (CCP §337.15 applies separately to each separate area of damage; contractor's attempt to repair one area of damage does not toll the statute on other distinct areas of damage).

In actions for latent defects, a plaintiff may not rely on the 10-year period under §337.15 after the defect has been discovered. In such circumstances, the limitations period under CCP §338 (3 years) or CCP §337 (4 years) applies. An action must be brought within one of those periods after discovery, but in no event later than 10 years after substantial completion. *North Coast Bus. Park v Nielsen Constr. Co.* (1993) 17 CA4th 22, 21 CR2d 104. For further discussion of how the statutes of repose dovetail with the statutes of limitation, see California Construction Contracts, Defects, and Litigation, chap 11 (Cal CEB 2008).

Code of Civil Procedure §337.15 applies to actions in contract as well as in tort. Thus, an action for latent defects brought against the architect 13 years after the project's completion based on the architect's alleged breach of contract was barred. *Moseley v Abrams* (1985) 170 CA3d 355, 216 CR 40. Section 337.15 also applies to causes of action based on strict products liability. *Stoneson Dev. Corp. v Superior Court* (1987) 197 CA3d 178, 242 CR 721.

Under CCP §337.15(c), a general contractor can file a cross-complaint for indemnity against a subcontractor more than 10 years after a subcontractor's services have been substantially completed as long as the main action against the general contractor was properly filed within the 10-year period. No direct action for indemnity, however, may be filed if that period has already run. *Valley Circle Estates v VTN Consol., Inc.* (1983) 33 C3d 604, 189 CR 871. See also *Grange Debris Box & Wrecking Co. v Superior Court* (1993) 16 CA4th 1349, 20 CR2d 515, overruled in part by *Lantzy v Centex Homes* (2003) 31 C4th 363, 367, 2 CR3d 655 (CCP §337.15(c) applies to claims for both implied and express indemnity). Similarly, a tolling agreement solely between a property owner and a developer that extends the deadline under CCP §337.15 does not automatically extend the limit for the developer to file cross-complaints for indemnity against construction participants. *FNB Mortgage Corp. v Pacific Gen. Grp.* (1999) 76 CA4th 1116, 90 CR2d 841.

PRACTICE TIP: If the plaintiff's action was timely filed, a defendant's indemnity rights may be assigned to the plaintiff, permitting the plaintiff to recover its damages directly from the cross-defendant, even if the cross-defendant's work was completed more than 10 years before the action. *Fleck v Bollinger Home Corp.* (1997) 54 CA4th 926, 63 CR2d 407.

A cross-complaint for indemnity under CCP §337.15(c) must be transactionally related to the original complaint. To be transactionally related, liability must arise from the same improvement or set of improvements that forms the basis of the original complaint. *Sandy v Superior Court* (1988) 201 CA3d 1277, 247 CR 677. Whether a defendant and cross-defendant contributed to the same development or work of improvement is ordinarily an issue of fact. *Time for Living, Inc. v Guy Hatfield Homes/All Am. Dev. Co.* (1991) 230 CA3d 30, 280 CR 904. A defendant's cross-complaint for

comparative equitable indemnity is almost always transactionally related to the claims asserted by the plaintiff because a claim for equitable indemnity depends on the allegation that the same harm for which the plaintiff seeks to hold the defendant liable is at least partially attributable to acts of the cross-defendant. 230 CA3d at 39.

The 10-year period in CCP §337.15 does not apply to personal injury actions. *Martinez v Traubner* (1982) 32 C3d 755, 187 CR 251. See also *Geertz v Ausonio* (1992) 4 CA4th 1363, 6 CR2d 318.

Even if the defect is latent and the damage is to property, CCP §337.15 does not apply if the plaintiff's action is based on the builder's or developer's willful misconduct or fraudulent concealment. CCP §337.15(f); *Allen v Sundean* (1982) 137 CA3d 216, 186 CR 863; *Barnhouse v City of Pinole* (1982) 133 CA3d 171, 183 CR 881. In that event, the applicable statute of limitations is CCP §338, applying to actions for fraud and actions for property damage, which starts to run on the discovery that a cause of action exists. See also *Felburg v Don Wilson Builders* (1983) 142 CA3d 383, 191 CR 92. Absent fraud or conduct that justifies equitable estoppel, *e.g.,* conduct inducing the plaintiff to refrain from filing suit within the 10-year period, that period may not be extended, *i.e.,* is not subject to equitable tolling, for any time during which the defendant promises or attempts to make repairs. *Lantzy v Centex Homes* (2003) 31 C4th 363, 384, 2 CR3d 655.

Normally, there is a new cause of action with each new subsidence that results from the destruction of lateral and subjacent support. See *Bellman v County of Contra Costa* (1960) 54 C2d 363, 5 CR 692. When the plaintiff alleges damages caused by fraudulently concealed latent defects that manifest themselves only after lateral subsidence, however, the action begins to run on discovery of the defect. There is no new cause of action with each additional incident of damage caused by the continuing subsidence. *McCloskey v Carlton Builders* (1985) 165 CA3d 689, 211 CR 659.

Code of Civil Procedure §337.15 may not be used as a defense by anyone in actual possession or control of the improvement at the time the defect proximately caused the injury. CCP §337.15(e). See *Leaf v City of San Mateo* (1980) 104 CA3d 398, 163 CR 711.

PRACTICE TIP: Characterization of a defect as patent or latent is to be made as of the time of construction completion, not at the time of the plaintiff's purchase. See *Eden v Van Tine* (1978) 83 CA3d 879, 148 CR 215, for an illustration of the importance of characterizing a defect as latent or patent.

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§12.28 2. Disclaimers

Soils engineers, building contractors, or other consultants may refuse to perform soils investigation or work that depends on stability of the soil unless they can obtain a disclaimer. Although these parties cannot completely shield themselves from liability for their own negligence, cautionary language in the agreement with the owner or developer may afford some protection. See *Swett v Gribaldo, Jones & Assocs.* (1974) 40 CA3d 573, 115 CR 99.

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§12.29 3. Comparative Negligence; Assumption of Risk

Contributory negligence is no longer a defense to tort actions in California. The California Supreme Court has adopted comparative fault as the standard in both negligence actions (*Li v Yellow Cab Co.* (1975) 13 C3d 804, 119 CR 858) and in strict liability actions (*Daly v General Motors Corp.* (1978) 20 C3d 725, 144 CR 380).

After the supreme court's decision in *Li,* a controversy arose over the validity of assumption of risk as a defense and bar to liability. This controversy was finally settled in *Knight v Jewett* (1992) 3 C4th 296, 11 CR2d 2. The supreme court in *Knight* described two categories of assumption of risk: "primary assumption of risk" and "secondary assumption of risk." Under the former category, the defendant has no duty to protect the plaintiff from a particular risk. Under the latter, the defendant owes a duty of care to the plaintiff even though the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty. Primary assumption of risk will completely bar the plaintiff's recovery because the defendant has not breached a legal duty of care to the plaintiff. However, in a secondary assumption of risk case, comparative fault principles will be applied to apportion liability. 3 C4th at 314. The question of the existence and scope of the defendant's duty of care (whether a case entails a primary or secondary assumption of risk) is a legal question to be decided by the court rather than the jury, based on the nature of the activity in question and on the parties' relationship to that activity. 3 C4th at 313. See also *Ford v Gouin* (1992) 3 C4th 339, 11 CR2d 30 (companion case to *Knight*); *Souza v Squaw Valley Ski Corp.* (2006) 138 CA4th 262, 41 CR3d 389; *Van Dyke v S.K.I. Ltd.* (1998) 67 CA4th 1310, 79 CR2d 775.

The court in *Knight* also reaffirmed the doctrine of express assumption of risk as a bar to liability and analogized the doctrine to a primary assumption of risk. An express assumption of risk arises when the plaintiff expressly consents in advance to relieve the defendant of an obligation to the plaintiff and the plaintiff takes his or her chances of injury from a known risk arising from what the defendant is to do or leaves undone. *Knight v Jewett* (1992) 3 C4th 296, 308 n4, 11 CR2d 2.

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§12.30 4. Reliance on Building Inspection

In *Firemen's Ins. Co. v Indermill* (1960) 182 CA2d 339, 6 CR 469, a building contractor failed to inspect the soil's stability before excavating for caisson holes but instead relied on a favorable soil report prepared by a county building inspector; such reliance was customary in the community. The court held, however, that the reliance was no defense in the negligence action against the contractor; there was a duty of care that could be higher than general practice or custom in the locality.

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D. REMEDIES

§12.31 1. Negligence and Strict Liability

The amount of recovery in tort actions is the sum that "will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not." CC §3333. It has been held that full compensation must be made for all losses sustained as a result of a defendant's negligent conduct. *Givens v Markall* (1942) 51 CA2d 374, 124 P2d 839. The same rule applies in cases based on strict liability in tort. Damages may be awarded not only for detriment already caused but also for detriment certain to result in the future. CC §3283; Restatement (Second) of Torts §910 (1979).

The basic measure of damages in land failure cases is the difference between fair market value before the injury and fair market value after the injury. *Sabella v Wisler* (1963) 59 C2d 21, 27 CR 689.

An alternative measure of damages is the cost of repairs plus the value of the use of the property while the owner is deprived of its use. See *Linforth v San Francisco Gas & Elec. Co.* (1909) 156 C 58, 103 P 320 (trespass case). This method of calculating damage can be advantageous to the owner when the cost of repairs is greater than the decline in the market value of the property.

In *Kell v Jansen* (1942) 53 CA2d 498, 127 P2d 1033, the court applied the cost-of-repair measure of damages. If the cost of repairing the injury and restoring the property to its original condition is less than the value of the property before the injury, then cost of repair is the proper measure of damages, but if the cost of restoration exceeds such value then the value of the property is the proper measure of damages. 53 CA2d at 503. See *Natural Soda Prods. Co. v City of Los Angeles* (1943) 23 C2d 193, 143 P2d 12.

In *Bause v Anthony Pools, Inc.* (1962) 205 CA2d 606, 23 CR 265, the plaintiff sued on negligence, breach of warranty, and other theories for loss of a swimming pool. Judgment was affirmed for damages based on the amount paid for the unusable pool plus the cost of removing it and refilling the excavation.

The lesser of loss of market value or cost of repair is not necessarily a limit on the amount of damages recoverable for damage to real property. Instead, damages under CC §3333 must be determined based on the individual requirements of the case. *Raven's Cove Townhomes, Inc. v Knuppe Dev. Co.* (1981) 114 CA3d 783, 171 CR 334. Arguably, when total and complete repairs are not possible, *e.g.,* when stabilization measures leave some risk of future injury, the appropriate measure of damages can include residual loss of market value above and beyond the cost of repair.

EXAMPLE: The importance of arguing damages appropriate to the unique circumstances of each case is well illustrated by two reported decisions. The defendant in *Heninger v Dunn* (1980) 101 CA3d 858, 862, 162 CR 104, mistakenly cut a road across the plaintiff's property. The road increased the value of the plaintiff's property, but it destroyed trees and other vegetation of special value to the plaintiff. The court held that recovery of restoration costs was appropriate in the circumstances and that the costs would be doubled under CC §3346 for wrongful injury to trees. The court did not allow recovery, however, for both the value of the trees lost and the cost of their restoration. In *Ferraro v Southern Cal. Gas Co.* (1980) 102 CA3d 33, 50, 162 CR 238, the plaintiff recovered for the diminution in the value of his property and was thus precluded from claiming damages for loss of use.

Alternative measures of damages were allowed in *People v Southern Pac. Co.* (1983) 139 CA3d 627, 188 CR 913, which distinguished *Heninger v Dunn, supra*. In *Southern Pac.,* the plaintiffs' trees were damaged by fire, reducing the property's value. The plaintiffs were required to replant the property to a certain minimum density. Because the plaintiffs suffered separate injuries, the trial court properly allowed the jury to award compensation for both the fair market value of the lost timber and the cost of restoring the property through reforestation. *Southern Pac.* illustrates the courts' continuing flexibility in fashioning damages to the particular circumstances of a property damage case.

Heninger was also relied on by the court in *Orndorff v Christiana Community Builders* (1990) 217 CA3d 683, 266 CR 193, which awarded the costs of repair and temporary relocation expenses, even though repair costs exceeded diminution of value. The court in *Orndorff* held that the award of repair costs is justified when (1) the plaintiffs have

personal reasons to repair the damages; (2) the plaintiffs intend to make the necessary repairs; and (3) the costs of repair are reasonable in light of the premises' value before the injury and the actual damage sustained. The court rejected the defendants' argument that personal reasons cannot be considered because the plaintiff's home was mass produced and principles of strict liability applied. The court also rejected the argument that the plaintiffs can recover only the cost of repairing damage caused by a defect, rather than damages to cure the defect. Because the defect at issue in *Orndorff* (improperly compacted soil) could cause further damage after the structure's repair, a damage award that cured the defect was appropriate.

However, the "personal reasons" exception under *Orndorff* was held not to apply when the diminution in value exceeds the cost of repair in *Safeco Ins. Co. v J & D Painting* (1993) 17 CA4th 1199, 21 CR2d 903. In *Safeco,* by the time repairs were made to a negligently damaged house, the housing market in general had dropped and the value of the house was $300,000 less than it would have been because of the damage. The court held that the owners could have sold it (in its damaged condition) before the market went down and then sued the insurance company for the difference in value resulting from the damage. See also *Shaffer v Debbas* (1993) 17 CA4th 33, 21 CR2d 110, in which the value of a new house dropped by $585,000 because of negligent construction; the cost to repair the negligence was only $130,000. The court limited the plaintiff owners' damages to the cost of repair, holding that the personal reasons exception of *Orndorff* might apply to owners who prefer to sell but are forced to continue living on the property, but it does not apply when the owners want to, and do, sell the property. See 16 CEB Real Prop L Rep 316 (Oct. 1993) for further discussion of *Shaffer.*

In a case where the property was rendered unmarketable by the damage, and the plaintiff intended to restore the property as his primary residence, the court affirmed an award of restoration costs which exceeded the value of the property by 67 percent. *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442, 452, 102 CR3d 32. The court applied the "personal reason" rule in *Orndorff* because the property owner's only meaningful alternative was to restore, rather than sell the property. 179 CA4th at 454.

Economic damages for a construction defect cannot be recovered under either a negligence theory or a strict liability theory unless the construction defect causes property damage. *Aas v Superior Court* (2000) 24 C4th 627, 101 CR2d 718; *County of Santa Clara v Atlantic Richfield Co.* (2006) 137 CA4th 292, 40 CR3d 313. See *Jimenez v Superior Court* (2002) 29 C4th 473, 127 CR2d 614, for discussion of the economic loss rule. When the transaction is between merchants, the Commercial Code governs, and recovery of economic loss caused by negligence is precluded. See *Sacramento Regional Transit Dist. v Grumman Flxible* (1984) 158 CA3d 289, 204 CR 736. See also *Livermore Amador Valley Wastewater Mgmt. Agency v Northwest Pipe & Casing Co.* (ND Cal 1995) 915 F Supp 1066, 1072.

After the *Aas* decision, CC §§895-945.5, known as the Right to Repair Act or SB 800, repealed the economic loss rule for construction defect claims arising from a violation of the Act's building standards. To pursue a claim for a violation of the standards, a homeowner need only demonstrate, "that the home does not meet the applicable standard," subject to specified affirmative defenses. "No further showing of causation or damages is required … provided that the violation arises out of, pertains to, or is related to, the original construction." CC §942.

When a builder is liable to the homeowner under the Right to Repair Act, the builder may bring an equitable indemnity action against the product manufacturer to recover economic losses caused by the manufacturer's violation of the standards in the Act, but the builder may not recover for these losses in a negligence action against the manufacturer. *Greystone Homes, Inc. v Midtec, Inc.* (2008) 168 CA4th 1194, 86 CR3d 196.

Damages to be recovered from professional advisers (*e.g.,* architects, engineers) for negligent malpractice can be measured by out-of-pocket loss as in fraud cases, *i.e.,* the difference between the amount the owner paid for the property and its actual value at the time of purchase if its true condition had then been known. See *Gagne v Bertran* (1954) 43 C2d 481, 275 P2d 15 (negligent act was giving incorrect information).

On recovery for the negligent infliction of severe emotional distress, see §12.86.

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§12.32 2. Punitive Damages

Punitive (exemplary) damages may be awarded in a tort action when the defendant is guilty of oppression, fraud, or malice (either express or implied). CC §3294. See generally §12.87. An assignee of a cause of action, however, is not entitled to punitive damages. *French v Orange County Inv. Corp.* (1932) 125 CA 587, 13 P2d 1046.

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III. LIABILITY OF FORMER PROPERTY OWNERS AND THEIR AGENTS

A. Potential Defendants

§12.33 1. Sellers and Their Agents

Sellers and their agents are liable for fraud they commit. When the seller's agent misleads the purchaser, the seller may not retain any of the benefits resulting from the agent's fraud. *Lingsch v Savage* (1963) 213 CA2d 729, 29 CR 201 (failure to disclose); *Worthen v Jackson* (1956) 139 CA2d 615, 293 P2d 797 (misrepresentation about filled land). Sellers can be liable for damages, on respondeat superior grounds, for fraudulent nondisclosures and misrepresentations of the broker (sellers' agent). If the broker fails to reveal to the purchaser an adverse material fact that was communicated from the seller to the broker, the seller will be liable to the purchaser as a principal for the tortious nondisclosure of the agent. *Herzog v Capital Co.* (1945) 27 C2d 349, 164 P2d 8. Sellers are also liable for their own failures to communicate an adverse fact directly to the purchaser. *Rothstein v Janss Inv. Corp.* (1941) 45 CA2d 64, 113 P2d 465 (nondisclosure of fill). See also *Wilbur v Wilson* (1960) 179 CA2d 314, 3 CR 770 (seller gave broker false information). Brokers can also be personally liable for their own fraudulent representations. *Rothstein v Janss Inv. Corp.* (1941) 45 CA2d 64, 73, 113 P2d 465. See also *Prichard v Reitz* (1986) 178 CA3d 465, 223 CR 734.

To make the seller responsible for the broker's acts, the purchaser must first prove that the broker was the seller's agent. See *Blackburn v McCoy* (1934) 1 CA2d 648, 37 P2d 153. The existence of a listing agreement between the seller and the broker may show that an agency in fact exists (*Williamson v Clapper* (1948) 88 CA2d 645, 199 P2d 337), but a written agreement is not essential to an agency (*Wilbur v Wilson* (1960) 179 CA2d 314, 317, 3 CR 770). Even when the seller and broker have a listing agreement, however, the seller can sometimes prove that the broker was really the purchaser's agent. *Wright v Lowe* (1956) 140 CA2d 891, 296 P2d 34. Payment of a commission may also be evidence of agency. *Feckenscher v Gamble* (1938) 12 C2d 482, 85 P2d 885.

On the effect of an exculpatory clause in the contract, see §12.52. See also §12.34 on the broker's liability.

Sellers (*e.g.,* subdividers or developers) who make fraudulent representations or fail to disclose material facts (see §§12.39-12.45) to the immediate buyer may be liable to subsequent purchasers for their fraud; no privity is required. *Massei v Lettunich* (1967) 248 CA2d 68, 56 CR 232. But a former landowner is not liable for any injury that results from an easily discoverable (*i.e.*, patent) defect created by the owner if the injury occurs after it relinquished ownership and control of the property. *Preston v Goldman* (1986) 42 C3d 108, 227 CR 817.

See §§12.15-12.16 on strict liability in tort, and §12.21 on rescission for violation of state or local subdivision laws. For further discussion of fraud in real property sales, see chap 3.

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2. Real Estate Agents

§12.34 a. General Fraud Liability

If a broker participates in defrauding a buyer, the broker is properly joined in a damage action. *Ach v Finkelstein* (1968) 264 CA2d 667, 70 CR 472; *Crawford v Nastos* (1960) 182 CA2d 659, 6 CR 425. The broker and the seller have the same duty of disclosing defects of which they are aware. *Lingsch v Savage* (1963) 213 CA2d 729, 29 CR 201. A broker may be merely an innocent conduit of another's fraud, but even then may be liable to a principal for constructive fraud (see §12.46) if the broker passes on the misstatements as true without investigating them. *Schoenberg v Romike Props.* (1967) 251 CA2d 154, 59 CR 359; *Tackett v Croonquist* (1966) 244 CA2d 572, 53 CR 388.

A broker who participated in the fraud and received a commission out of the purchase price can be joined as a defendant to compel restoration of the commission. *Tampico v Wood* (1963) 222 CA2d 211, 34 CR 885. An agent's actual fraud or bad faith will bar his or her right to a commission. Negligence and constructive fraud, however, will not. *Tackett v Croonquist* (1966) 244 CA2d 572, 578, 53 CR 388.

The root of the real estate broker's fiduciary duty in dealing with a prospective purchaser is found in the Real Estate Law (Bus & P C §§10000-10580), the primary purpose of which is to require real estate brokers and salespeople to be honest, truthful, and of good reputation. *Riley v Chambers* (1919) 181 C 589, 185 P 855. An acknowledgment of this statutory purpose can be found in *Nguyen v Scott* (1988) 206 CA3d 725, 253 CR 800.

The grounds for suspending or revoking a broker's license and the requirements for a hearing are covered in Bus & P C §§10175-10185. On petition of the licensee, the Real Estate Commissioner can now substitute a monetary penalty for an actual license suspension if the commissioner finds that this action will adequately serve the public interest and welfare. Bus & P C §10175.2.

When a real estate agent's acts are questioned by the principal, and the fiduciary relationship between them has been established, the agent has the burden of proving that there was no breach of a fiduciary duty. *Timmsen v Forest E. Olson, Inc.* (1970) 6 CA3d 860, 871, 86 CR 359 (broker allegedly breached fiduciary agreement by failing to explain nature and implications of subordination agreement).

Nondisclosure of defects of the property may subject the agent to liability for fraud or constructive fraud. The agent has the duty to inspect the property and to disclose defects. See §§3.21-3.33, 12.43. See §12.33 on seller's liability for broker's fraud, and §§3.90, 12.35 on the extent to which a fraud judgment against an insolvent broker may be satisfied from the Real Estate Fund. See California Real Estate Brokers: Law and Litigation (Cal CEB 2009); California Real Property Sales Transactions, chap 2 (4th ed Cal CEB 2007) on discipline of real estate licensees and on their general duties to buyers and sellers in real property sales.

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§12.35 b. Claims Against Insolvent Brokers and Salespeople; Real Estate Fund

One who has obtained a judgment against an insolvent real estate broker or salesman for fraud (see §12.34) may seek collection of the judgment from the "Recovery Account" of the Real Estate Fund. Statutes governing this fund are Bus & P C §§10470-10481. For applications filed after January 1, 2009, the maximum amount of claims that may be made against the fund is $50,000 per transaction and $250,000 per licensee. Bus & P C §10474. Although both prejudgment and postjudgment interest can be recovered from the fund, the maximum recovery is capped at these statutory limits. *Morris v Department of Real Estate* (1988) 203 CA3d 1109, 250 CR 432; *Antonio v Hempel* (1977) 71 CA3d 128, 139 CR 309; *Nordahl v Department of Real Estate* (1975) 48 CA3d 657, 121 CR 794. An exception is made for additional interest if the account becomes insolvent. See Bus & P C §10476.

Under Bus & P C §10471(a), an aggrieved person may recover from the fund based on the broker's or salesperson's "fraud, misrepresentation, or deceit, made with intent to defraud, or conversion of trust funds" in connection with licensed real estate activities. In *Andrepont v Meeker* (1984) 158 CA3d 878, 204 CR 887, the court interpreted Bus & P C §10471 to allow recovery based on the agent's negligence as well as intentional misrepresentation. The claimant must have received a final judgment (including a criminal restitution order against the licensee) or an arbitration award. Bus & P C §10471(a).

A claimant basing a claim on a judgment against a salesperson must show that he or she obtained a judgment against the salesperson's employing broker and has diligently tried to collect from the broker's assets. A judgment against a broker is not necessary if the claimant can prove with clear and convincing evidence that the salesperson was not employed by a broker during the transaction or that the broker would not have been liable, because the salesperson was acting outside the scope of his or her authority. Bus & P C §10471(d).

The measure of recovery from the fund is equal to the out-of-pocket loss, not the benefit of the bargain. The statutory scheme "is not intended to ensure that applicants recover profits, rather the intent is to prevent applicants from suffering losses on money actually paid." *Dierenfield v Stabile* (1988) 198 CA3d 126, 133, 243 CR 598.

Pain and suffering damages cannot be recovered from the fund (*Temple v Kerwin* (1989) 209 CA3d 1087, 257 CR 651) nor can punitive damages and attorney fees (*Acebo v Real Estate Educ., Research & Recovery Fund* (1984) 155 CA3d 907, 202 CR 518).

Punitive damages against the insolvent realtor, even within the statutory maximum, have been disallowed. *Circle Oaks Sales Co. v Smith* (1971) 16 CA3d 682, 94 CR 232. See also *Slaughter v Edwards* (1970) 11 CA3d 285, 90 CR 144, in which punitive damages were awarded and the award became final because a timely appeal was not taken.

To be eligible for payment from the fund, a claim must have arisen from a transaction requiring a broker's or salesperson's license. Bus & P C §10471. The courts have strictly enforced the requirement, precluding recovery from the fund when the broker was an owner of the property (license not required under Bus & P C §10133) (*Robinson v Murphy* (1979) 96 CA3d 763, 158 CR 246; *McGaughey v Fox* (1979) 94 CA3d 645, 156 CR 593) and when the salesperson was unlicensed at the time of the transaction (*Powers v Fox* (1979) 96 CA3d 440, 158 CR 92).

Persons who may recover from the fund include only real estate clients and members of the general public and not real estate licensees. *Middelsteadt v Karpe* (1975) 52 CA3d 297, 302, 124 CR 840. There is an exception to this general rule: A defrauded licensee who acts as a principal in a transaction and whose conduct does not require a real estate license is not precluded from recovering from the fund by virtue of his or her status as a licensee. *Buccella v Mayo* (1980) 102 CA3d 315, 327, 162 CR 369. A licensee, however, does not assume the status of a principal for purposes of this exception by receiving an assignment of rights from his or her clients. *Wallace v Onate* (1991) 2 CA4th 549, 3 CR2d 3.

When multiple claims against the fund exceed the statutory limit, Bus & P C §10474.5 directs payment in the ratio of each claim to the aggregate of claims or in some other equitable manner, without regard to priorities based on time of judgment or order of claims. Without a priority system, it is unclear what happens when payment is made to one claimant and later claimants assert sufficient claims to exceed the statutory limit. In *Shirai v Karpe* (1976) 57 CA3d 276, 127 CR 549, the court held that, because payment must be made without regard to temporal priorities, it is unclear

whether and when payment of any claim becomes final. The recovery statute does not require publishing a notice to prospective claimants of the filing of any claim, nor is there a cutoff date for filing claims.

The Real Estate Commissioner can petition the court to require that all claimants and prospective claimants against one licensee be joined in one action to adjudge the respective rights of all claimants. Bus & P C §10474.5.

A claimant of the account must apply for payment within 1 year after the judgment against the licensee becomes final. The claimant makes the claim by filing a verified application with the Department of Real Estate, serving a copy of the application on the judgment debtor, and also by serving the judgment debtor with a notice of claim. Bus & P C §§10471-10471.1. Contents of the application must comply with Bus & P C §10471(c). The application form and other Department of Real Estate forms are available on the Department's website: http://www.dre.ca.gov/. Contents of the notice are specified in Bus & P C §10471.1.

The applicant can effect service on the commissioner by certified mail addressed to the Department of Real Estate, Recovery Account Unit, P.O. Box 187007, Sacramento, CA 95818-7007; for additional information, go to http://www.dre.ca.gov/. If the judgment debtor/defendant is currently licensed, service can be made by registered mail to the debtor's latest address or the mailing address on file with the department. If the debtor is not licensed and personal service cannot be made through exercising reasonable diligence, service can be made through publication. Bus & P C §10471.1(b). A debtor wishing to contest payment from the fund must respond in writing to the department at its headquarters office within 30 days after service of the notice and application and must mail or deliver a copy of the response to the claimant. A debtor who fails to mail or deliver a timely response waives his or her right to present objections to payment. Bus & P C §10471.1(d). If the claimant's application is denied by the commissioner, the claimant can apply for an order directing payment from the fund by filing a verified application in the court where judgment was entered. The application must be filed within 6 months after the mailing of the notice of the commissioner's denial. Bus & P C §§10472-10473.

When payment is made from this fund, the license of the broker or salesperson is automatically suspended and is not reinstated until he or she reimburses the fund for the amount, with interest. Bus & P C §10475.

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3. Engineers; Architects; Contractors; Others

§12.36 a. Incorrect Professional Advice as Fraud

If a buyer conditions the purchase on obtaining a satisfactory inspection and report on the property from an expert third person and the report is later found to be inaccurate, the buyer may have an action for fraud or negligent misrepresentation against that expert. See, *e.g., Hardy v Carmichael* (1962) 207 CA2d 218, 24 CR 475. See also *Robinson Helicopter Co. v Dana Corp.* (2004) 34 C4th 979, 22 CR3d 352 (economic loss rule not applicable to intentional misrepresentation claims based on duties independent from contract and arising from tort law); *Intelligraphics, Inc. v Marvell Semiconductor, Inc.* (ND Cal, Feb. 10, 2009, C07-02499) 2009 US Dist Lexis 9875. Even an inaccurate report following a careless examination may constitute constructive fraud, because it is a positive assertion incident to a sale. CC §1573; *Gagne v Bertran* (1954) 43 C2d 481, 275 P2d 15. This rule has been applied against surveyors (*Roberts v Karr* (1960) 178 CA2d 535, 3 CR 98), soil analysts (*Gagne v Bertran, supra*), and estimators (see *McCauley v Dennis* (1963) 220 CA2d 627, 34 CR 90). It is potentially available against architects and engineers. See *Bily v Arthur Young & Co.* (1992) 3 C4th 370, 410, 11 CR2d 51; *Weseloh Family Ltd. Partnership v K. L. Wessel Constr. Co*. (2004) 125 CA4th 152, 22 CR3d 660. The buyer is entitled to the same damages he or she would recover from a fraudulent seller. *Greenberg v Hastie* (1962) 202 CA2d 159, 20 CR 747.

Positive assertions incident to a sale may constitute actual fraud under CC §1572(2) or deceit under CC §1710(2).

PRACTICE TIP: In practice, complaints of this sort based on fraud are unusual; instead, the aggrieved plaintiff generally alleges negligence by the expert in preparing the report (see §12.12).

Without an express warranty agreement, an expert is not strictly liable for the accuracy of his or her report. *Gagne v Bertran* (1954) 43 C2d 481, 487, 275 P2d 15 (professionals who sell services "for the guidance of others in their economic, financial, and personal affairs are not liable in the absence of negligence or intentional misconduct"). See, *e.g., Swett v Gribaldo, Jones & Assocs.* (1974) 40 CA3d 573, 115 CR 99 (judgment for plaintiff against soils engineer reversed on grounds that the jury was erroneously instructed on theory of strict liability, evidence showed there was no express warranty, and no showing of negligence).

Even an action for simple negligence may be difficult to maintain if the plaintiff lacks contractual privity with the defendant and is unable to show that the defendant owed the plaintiff a duty of care. See *Weseloh Family Ltd. Partnership v K. L. Wessel Constr. Co*. (2004) 125 CA4th 152, 22 CR3d 660, cited in §§12.9A, 12.12. See §§12.12-12.14 on negligence of professional advisers.

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§12.37 b. Claims Against Contractors' Bonds

A purchaser of real property may have a cause of action against a building contractor if the contractor's activities (*e.g.,* improper structural construction) contribute to subsequent landslide or subsidence damages. An appropriate means of pursuing this cause of action is against the contractor's bond. See *Balfour, Guthrie & Co. v Hansen* (1964) 227 CA2d 173, 38 CR 525 (building contractor failed to install steel reinforcing in silo as required by plans, causing structure to collapse after completion).

As a condition precedent to issuance or renewal of a contractor's license, the licensee must file a contractor's bond. The licensee must file or have on file a contractor's bond of $12,500. Bus & P C §7071.6. See Bus & P C §§7071.5-7071.15 for provisions on contractor's bonds. The protection of the contractor's bond extends to homeowners and home improvement contracts, to a property owner and related contract to construct a single-family home, as well as to any person damaged "by the fraud of the licensee in the execution or performance of a construction contract." Bus & P C §7071.5(c). Licensees bound by the bond requirement include general building contractors, general engineering contractors, and a wide variety of specialty contractors. See Bus & P C §§7055-7059.

"No license may be renewed, reissued, or reinstated while any judgment or admitted claim in excess of the amount of the bond remains unsatisfied." Bus & P C §7071.11(b). A contractor who has failed to satisfy license-related judgments to specified persons, such as subcontractors, suppliers, consumers, and employees, must disclose that fact to the licensing board when renewing a license and post a bond sufficient to guarantee payment of an amount equal to the unsatisfied judgments. Bus & P C §7071.17. The bond for disciplined contractors (licenses suspended or revoked as a result of disciplinary action) is a minimum of $15,000 and a maximum of $125,000. Bus & P C §7071.8(b). See Bus & P C §7071.6(a).

The contractors' bond procedure differs from the realty fund procedure (see §12.35): It provides a broader and easier course of action for the injured purchaser, who is not required to bring an action against the contractor and secure judgment first, but may proceed directly with an action against the bond. Bus & P C §7071.11. However, the contractor may protest the claim and instruct the surety not to make payment from the bond. Bus & P C §7071.11(f). Moreover, a contractor's bond action is available not only in fraud situations but also when any violation of the contractors' licensing laws has occurred, including failure to properly account for funds, disregard of plans or specifications, violation of state or local building codes, failure to keep records, or breach of contract. Bus & P C §§7071.5, 7108-7113.

PRACTICE TIP: Be mindful of the statue of limitations. Generally, an action against a contractor's bond must be brought within 2 years after the end of the license period when the act occurred, or if the license was inactivated, cancelled, or revoked after the wrongful act or omission, then within 2 years after the date the active license would have expired, had it not been inactivated, cancelled, or revoked. Bus & P C §7071.11(c).

A claim made on a license bond is a serious matter for the contractor, because a contractor who does not protest the claim must submit proof of payment of the amount owed to the surety and any judgment or admitted claim in excess of the bond within a specified time or the contractor's license will be suspended by operation of law. No license may be renewed, reissued, or reinstated while any surety remains unreimbursed for losses and expenses sustained on a bond. Bus & P C §7071.11(g). For further discussion of license bond claims and the Contractors' State License Law (Bus & P C §§7000-7191), see California Mechanics' Liens and Related Construction Remedies, chaps 1-4, 10 (3d ed Cal CEB 1998); California Construction Contracts, Defects, and Litigation, chap 1 (Cal CEB 2008).

A contractor cannot defend an action for faulty work on the ground that the plaintiff knew that the contractor was unlicensed. Because the purpose of the contractors' license law is to protect the public, the plaintiff cannot be considered equally at fault with the unlicensed contractor. *Domach v Spencer* (1980) 101 CA3d 308, 312, 161 CR 459.

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§12.38 4. Lenders; Escrow Agents

A lender whose misrepresentation induces the buyer to purchase is liable for damages for fraud. Lack of privity is no defense. *Smith v Schuttpelz* (1934) 1 C2d 158, 33 P2d 836; *De Zemplen v Home Fed. Sav. & Loan Ass'n* (1963) 221 CA2d 197, 34 CR 334. See also *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800 (soil failure on partially filled lot). The court in an action for rescission held that the lender (and holder of purchase money trust deed) was not an indispensable party (although it was a necessary party). 5 CA3d at 255. If a lender assumes an entrepreneurial role in a development or construction activity, it may be liable for negligence or strict liability. See §12.11. See also California Real Property Sales Transactions (4th ed Cal CEB 2007); California Mechanics' Liens and Related Construction Remedies, chap 1 (3d ed Cal CEB 1998).

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B. Theories of Liability

1. Fraudulent Representations

§12.39 a. "Sales Talk"

A willful misrepresentation of material fact can be the basis of an action by a purchaser for fraud. CC §1572(1). The more general the representation, the more difficult it is to establish that the representation was one of fact on which the purchaser was entitled to rely and did rely. If the statement is construed by a court to be mere opinion, or "sales talk," an action for fraud will not succeed. *Williams v Lowenthal* (1932) 124 CA 179, 12 P2d 75. It is not always easy to predict whether a particular representation is actionable; some guidelines appear from reported cases such as *Hauter v Zogarts* (1975) 14 C3d 104, 111, 120 CR 681, *Harazim v Lynam* (1968) 267 CA2d 127, 72 CR 670, and *Wilke v Coinway, Inc.* (1967) 257 CA2d 126, 64 CR 845.

Expressions of opinion have been treated as actionable misrepresentations when (1) the person expressing the opinion does not in fact entertain it, (2) the opinion is expressed in a manner implying a factual basis that does not exist, (3) the opinion is expressed as a fact, and (4) the party expressing the opinion has "superior knowledge." *Pacesetter Homes, Inc. v Brodkin* (1970) 5 CA3d 206, 211, 85 CR 39.

For contrasting holdings when the seller represents to the buyer that a house is "in perfect condition in all respects," "in perfect shape" or "in sound condition and adequate repair," see *Herzog v Capital Co.* (1945) 27 C2d 349, 164 P2d 8 (seller's agent knew that house leaked badly and that repeated efforts to repair it were unsuccessful), *Wood v Kalbaugh* (1974) 39 CA3d 926, 114 CR 673 (although statement was misrepresentation of material fact, rescission was not justified, because there was no showing that plaintiff relied on that representation and would not have purchased house without it, and defect was only leaky gas line that was later repaired in one day), and *Prichard v Reitz* (1986) 178 CA3d 465, 223 CR 734 (real estate broker selling own home knew of defective foundation at time of making statement).

See also *Cooper v Jevne* (1976) 56 CA3d 860, 128 CR 724, holding that plaintiffs had stated a cause of action for misrepresentation by false opinion and negligent fraud or deceit by alleging that real estate sales agents knew of substantial structural defects but represented that certain condominiums were luxurious in nature and an outstanding investment.

For further discussion of fraud and nondisclosure in real property sales and damage remedies, see chap 3. On rescission based on fraud, see chap 1.

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§12.40 b. Representations of "Solid Ground"

A plaintiff buying in reliance on a representation by a seller that property is on solid, "original" ground, when in fact the ground is wholly or partially composed of "fill" soil and rocks, can state a cause of action for fraud against the seller or the agent of the seller. See §12.44 on duty to disclose material defects. Some untrue statements held to be actionable are (1) the lot is a "solid lot" when in fact it had 19 feet of fill (*Blackman v Howes* (1947) 82 CA2d 275, 185 P2d 1019; *Rothstein v Janss Inv. Corp.* (1941) 45 CA2d 64, 66, 113 P2d 465); (2) a building is "built on 'the original land'" when it was actually on compacted fill (*Burkett v J. A. Thompson & Son* (1957) 150 CA2d 523, 525, 310 P2d 56); (3) a lot is "cut and on hard ground" when it was on inadequately compacted fill (*Buist v C. Dudley DeVelbiss Corp.* (1960) 182 CA2d 325, 330, 6 CR 259); (4) the land is on cut and heavy rains caused landslide that exposed filled soil (*Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800 (rescission granted)); (5) it is not filled earth, when in fact it was fill and unsuitable to provide a solid foundation (*Worthen v Jackson* (1956) 139 CA2d 615, 293 P2d 797 (rescission granted)); and (6) the lot is solid except for two feet of fill in the back when in fact there was uncompacted fill in varying depth from 6 to 13 feet totaling about 1000 cubic yards, which the plaintiff was forced to excavate before building his foundation (*Ashburn v Miller* (1958) 161 CA2d 71, 74, 326 P2d 229).

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§12.41 c. Warranty of Soil Stability Distinguished

If soil instability is encountered after purchase of the property, the possibility of recovering on a theory of breach of warranty (at least against one other than the developer) is remote. The difficulties of relying on a theory of either express or implied warranty are discussed in more detail in §§12.17-12.19.

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§12.42 2. Negligent Misrepresentation

A plaintiff may recover for a false representation by showing that the party making it knew it to be false or that the party acted recklessly and without reasonable grounds in making the representation. See CC §§1572(1)-(2), 1710(1)-(2). Even when a buyer cannot show that a seller knowingly made a false representation, the facts of a case may still give rise to an action for negligent misrepresentation. In *Ford v Cournale* (1973) 36 CA3d 172, 111 CR 334, a real estate broker represented to the buyer that certain property would yield a monthly income of $700 to $900 a month based only on the seller's unverified statement and without making an independent investigation. The court of appeal reversed a judgment in the broker's favor on finding that the trial court erred in refusing to give a jury instruction on negligent representation in such circumstances. But see *Pacesetter Homes, Inc. v Brodkin* (1970) 5 CA3d 206, 85 CR 39 (mere statements of opinion about potential income from property do not constitute fraud).

The line between negligence and fraud may be difficult to draw because CC §1572(2) defines actual fraud as including "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." Nevertheless, the distinction may be important, especially when the applicable statute of limitations or measure of damages is in issue. See, *e.g.*, *Merchants Fire Assur. Corp. v Retail Credit Co.* (1962) 206 CA2d 55, 23 CR 544, in which the court applied the 3-year statute of limitations of CCP §338(d) to the fraud count, and the 2-year statute of CCP §339(1) to the count alleging negligent performance of an oral contract to provide information in a faulty soils report.

To establish liability under CC §1572(2) it is not necessary that the defendant making the representation knew that it was false; all that is required is a showing of the seller's intent to induce the plaintiff's action. *Gagne v Bertran* (1954) 43 C2d 481, 488, 275 P2d 15. The defendant's good faith belief that the representation is true is no defense. CC §1572(2); *Doran v Milland Dev. Co.* (1958) 159 CA2d 322, 323 P2d 792 (belief that building conformed to local ordinances and statement that foundation was "properly built").

There is dictum in a court of appeal opinion that an implied representation does not appear to be a "positive assertion" within the meaning of CC §1572(2) and thus would not support an action for negligent misrepresentation. *Huber, Hunt & Nichols, Inc. v Moore* (1977) 67 CA3d 278, 303, 136 CR 603.

On the effect of an "as is" clause in a purchase contract on a residential seller's liability for negligent misrepresentation, see *Loughrin v Superior Court* (1993) 15 CA4th 1188, 19 CR2d 161; §12.52. For an analysis of the liability of the seller's broker for negligent misrepresentation (and under other causes of action) when a house is sold "as is" (broker held not liable under facts), see *Wilson v Century 21 Great W. Realty* (1993) 15 CA4th 298, 304, 18 CR2d 779.

A negligent misrepresentation usually precludes exemplary damages (see §12.70) because of a lack of malice. *Worthen v Jackson* (1956) 139 CA2d 615, 618, 293 P2d 797. See §§12.49-12.50 on statute of limitations, and §12.62 on measure of damages for negligent misrepresentation.

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3. Nondisclosure

§12.43 a. One Having Duty to Disclose

Where a seller of real property knows of facts materially affecting the value or desirability of property that are known only to the seller and also knows that such facts are not known to, or within reach of the diligent attention and observation of, the buyer, the seller is under a duty to disclose those facts to the buyer and the seller's failure to do so constitutes actionable fraud. *Lingsch v Savage* (1963) 213 CA2d 729, 29 CR 201. See also CC §§1572(3), 1709, 1710(3). A seller of residential property also has statutory disclosure duties under CC §§1102-1102.18, and 1103-1103.14. See also CC §§1101.4(c), 1102.155 (disclosures required regarding water-conserving plumbing fixtures in residential property, operative January 1, 2017). For further discussion of statutory duties associated with residential sellers, see chap 3. See also Handling Real Property Sales Transactions (Cal CEB Action Guide March 2009).

A real estate agent representing the seller has an affirmative duty to conduct a reasonably competent and diligent inspection of a residential property listed for sale and to disclose to prospective purchasers all material defects that the investigation would reveal; this same obligation to conduct an inspection for defects for the benefit of the buyer, however, may not apply to the sale of commercial real estate. *Easton v Strassburger* (1984) 152 CA3d 90, 199 CR 383.

Because *Easton* failed to provide specific guidelines for determining what constitutes a "reasonably competent and diligent inspection" of residential property (or procedures for disclosure), the legislature enacted CC §§2079-2079.24, imposing on a real estate broker licensed under Bus & P C §§10000-10580 the duty to make a visual inspection of the premises and inform the prospective buyer of all facts materially affecting the value or desirability of the property that such an investigation reveals. The legislature added several other disclosure requirements in the 1990s. For further discussion of these statutes, see chap 3. The standard of care owed by the broker under these statutes is the degree of care that a reasonably prudent real estate licensee would exercise on the basis of the degree of knowledge required to obtain a license under Bus & P C §§10000-10580. CC §2079.2.

Civil Code §§2079.13-2079.24 (former CC §§2373, 2382) are relevant to any buyer or seller who believes that he or she has been defrauded or misled by a real estate agent who acted in a dual capacity or who may have concealed the agency's true nature. The statute provides a detailed procedure for disclosing the nature of the agency and the agent's obligations to the principals, and for obtaining an acknowledgment from the principals that the required disclosure was made. This scheme applies only to residential property of one to four units, any leasehold of such property exceeding one year's duration, and mobilehomes when offered for sale or sold through an agent under Bus & P C §10131.6. CC §2079.13(j). Civil Code §2079.12 defines the duty of care, including the duty of disclosure, of a real estate licensee.

Katz v Department of Real Estate (1979) 96 CA3d 895, 158 CR 766, illustrates the importance of affirmative disclosure. The appellate court upheld the loss of a real estate broker's license for failing to disclose to the buyer that the building on the property sold was under an Order to Comply with four building code violations, even though the property was sold "as is" and with an express disclaimer regarding compliance with applicable city regulations. An attorney who is merely representing the vendor's interests in a transaction and is not acting as a real estate broker, however, does not share a broker's duty of disclosure to the buyer. *Heliotis v Schuman* (1986) 181 CA3d 646, 226 CR 509.

On the effect of an "as is" clause in a purchase contract on a residential seller's disclosure requirements, see §12.52.

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§12.44 b. Nondisclosure of Fill or Other Soil Conditions

A seller who knows of uncompacted or poorly compacted fill must disclose this information when selling property. *Massei v Lettunich* (1967) 248 CA2d 68, 56 CR 232 (duty of disclosure held violated by seller who failed to disclose to buyer or builder existence of fill and engineer's report relating to proper depth of foundations). See also *Buist v C. Dudley DeVelbiss Corp.* (1960) 182 CA2d 325, 6 CR 259 (seller had duty to disclose knowledge of slide area, existence of underground water and improper compaction of fill). See *Rothstein v Janss Inv. Corp.* (1941) 45 CA2d 64, 72, 113 P2d 465 (duty to disclose filled condition "depended not so much upon knowledge of the presence of the fill as upon knowledge of, or belief in, [its] extent," in this case, 19 feet of fill).

The seller's failure to disclose the filled condition of plaintiffs' lot supported the jury's verdict against the seller for fraud in *Oakes v McCarthy Co.* (1968) 267 CA2d 231, 73 CR 127. The court held that an intent to conceal the fill could be inferred from the fact that defendant's salespeople were instructed to tell prospective purchasers about the filled ground if they should ask, but the salespeople need not volunteer the information. 267 CA2d at 242.

A purchaser with special knowledge of soil conditions may be held to a duty to inspect the site or examine reports of soil conditions. Failure by such a purchaser to investigate may relieve the seller of any liability for misrepresentation, concealment, or nondisclosure of material fact. See *Wiechmann Eng'rs v State* (1973) 31 CA3d 741, 107 CR 529 (highway contractor found unduly bouldered subsoil conditions after undertaking project).

If the property is already improved, failure to disclose that the house stands on filled ground may be actionable. *Central Mut. Ins. Co. v Schmidt* (1957) 152 CA2d 671, 313 P2d 132 (improperly compacted fill). A seller knowing of any construction or repair work done in violation of statute or ordinance must disclose it. *Unger v Campau* (1956) 142 CA2d 722, 298 P2d 891 (false representations as well as failure to disclose); *Curran v Heslop* (1953) 115 CA2d 476, 252 P2d 378. See also *Tarrant v Butler* (1960) 180 CA2d 235, 4 CR 230, and *Barder v McClung* (1949) 93 CA2d 692, 209 P2d 808, on the duty to disclose nonconformance with local zoning ordinances.

A housing developer has a duty of full disclosure to buyers regarding fill and other potentially hazardous soil conditions. *Barnhouse v City of Pinole* (1982) 133 CA3d 171, 183 CR 881.

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§12.45 4. Failure to Disclose Fully

Liability for fraud is not restricted to actual misrepresentations and nondisclosure by one having a duty to speak. See §§12.42-12.44. Even persons having no duty to speak may be liable if they begin to speak and then partially conceal or suppress some information and thus fail to make a complete disclosure of what they know on the subject. See CC §1572(5); *Rogers v Warden* (1942) 20 C2d 286, 125 P2d 7; *American Trust Co. v California W. States Life Ins. Co.* (1940) 15 C2d 42, 98 P2d 497.

Those who have no duty to speak but nevertheless make representations can be held to be negligent if they fail to ascertain whether what they have represented is the truth. See *Doran v Milland Dev. Co.* (1958) 159 CA2d 322, 323 P2d 792. Sellers who speak, whether voluntarily or in response to an inquiry, must make full disclosures and may not withhold or conceal any information within their knowledge that materially affects the desirability of the property being sold. *McCue v Bruce Enters., Inc.* (1964) 228 CA2d 21, 27, 39 CR 125.

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§12.46 5. Constructive Fraud

Constructive fraud, defined in CC §1573, generally requires the existence of fiduciary relationships of trust. Thus, constructive fraud is seldom used as a cause of action by a purchaser whose property later suffers landslide damage. Exceptions include actions between a purchaser and its real estate agent (see §12.34) or a purchaser and an engineer, architect, or other expert who may act in a fiduciary capacity in inspecting the property before purchase or repair (see §12.36).

A fiduciary relationship exists between a real estate agent and his or her principal. Whether a realtor was acting as an agent for the buyer, the seller, or both, is an issue of fact for a jury to decide. *Pepper v Underwood* (1975) 48 CA3d 698, 711, 122 CR 343, disapproved on other grounds in *Stout v Turney* (1978) 22 C3d 718, 730, 150 CR 637. For further discussion of a realtor's fiduciary liability, see chap 3; California Real Property Sales Transactions, chap 2 (4th ed Cal CEB 2007); California Real Estate Brokers: Law and Litigation (Cal CEB 2009).

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6. Rescission for Mistake

§12.47 a. Mistake of Fact

Purchasers can rescind contracts for sales of real property if they can show that they gave their consent by mistake. CC §1689(b)(1). Mistake can therefore be an alternative to fraud as a ground for rescission, especially when the buyer expects difficulty in proving that the seller knowingly made false representations. On fraud remedies generally, see chaps 1-3, §§12.60-12.71.

Mistake of fact is defined in CC §1577. Rescission is not granted for a mistake of fact unless it relates to the intrinsic nature of the bargain or vitally affects a fact on the basis of which the parties contracted. *Vickerson v Frey* (1950) 100 CA2d 621, 224 P2d 126. The mistake of fact must be such that the contract would not have been entered into if the mistake had not existed. *Hannah v Steinman* (1911) 159 C 142, 112 P 1094; *Reid v Landon* (1958) 166 CA2d 476, 333 P2d 432.

Although CC §1577 says nothing about mutual mistake, the courts often decide first whether the mistake was mutual or unilateral on the part of the person seeking relief. Rescission is usually granted more readily when the mistake is mutual or when it is induced or contributed to by the other's fraud. *Lawrence v Shutt* (1969) 269 CA2d 749, 75 CR 533. A court, under its equitable power, can grant rescission "for the purely unilateral mistake of one contracting party not induced or contributed to by the other party." 269 CA2d at 764. But, in the interest of the reasonable stability of commercial transactions, the courts will not set aside a contract "merely because one of the parties claims to have been ignorant of or misunderstood the provisions of the contract." 269 CA2d at 765. This is so particularly when the complainant acted without reasonable care.

In *Healy v Brewster* (1967) 251 CA2d 541, 59 CR 752, mutual mistake about the composition of soil, arising from an inaccurate report furnished by the county, was grounds for rescission of a contract. The rationale of *Healy* may applicable to other soil stability cases. See *Salinas v Souza & McCue Constr. Co.* (1967) 66 C2d 217, 57 CR 337. Even a unilateral mistake of fact caused by reliance on a soils report can be grounds for rescission. See *White v Berrenda Mesa Water Dist.* (1970) 7 CA3d 894, 87 CR 338.

A "unilateral mistake" of fact is the equivalent of a "mutual mistake" for purposes of rescission if it was caused by the negligent conduct of the other party or if the other party knew or had reason to know of the mistake. See *M. F. Kemper Constr. Co. v City of Los Angeles* (1951) 37 C2d 696, 235 P2d 7.

For further discussion of rescission based on mistake of fact, see chap 1. On reformation for mistake, see CC §3399, discussed in chap 2.

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§12.48 b. Mistake of Law

Mistake of law is defined in CC §1578. Rescission for mutual mistake of law was permitted in *Hannah v Steinman* (1911) 159 C 142, 112 P 1094 (parties entered into lease, mistakenly believing that it would be possible to construct certain type of building on the property). For further discussion of rescission based on mistake of law, see chap 1.

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C. Defenses

1. Statutes of Limitation; Laches

§12.49 a. Fraud and Mistake

An action for damages based on alleged fraud must be initiated within 3 years. CCP §338(d). This period begins when the aggrieved party discovers the fraud (CCP §338(d); *Herzog v Capital Co.* (1945) 27 C2d 349, 164 P2d 8) or when circumstances should put him or her on inquiry (*Balfour, Guthrie & Co. v Hansen* (1964) 227 CA2d 173, 38 CR 525). When the buyer should become suspicious and begin investigating is question of fact. *Tarrant v Butler* (1960) 180 CA2d 235, 240, 4 CR 230. If a deceitful seller allays the buyer's suspicions, the statute will not begin to run while the buyer's suspicions are lulled. *Kalkruth v Resort Props., Ltd.* (1943) 57 CA2d 146, 134 P2d 513. If an expert opinion is negligently given (*e.g.,* by an engineer or architect), an action based on fraud as well as negligence may lie. See §12.42. In *Merchants Fire Assur. Corp. v Retail Credit Co.* (1962) 206 CA2d 55, 23 CR 544, the plaintiffs alleged that an expert submitted a faulty report on soil condition; the court applied the 3-year statute of CCP §338(d) to the fraud count, and the 2-year statute of CCP §339(1) to the count alleging negligent performance of the oral contract to provide information. See §§12.12-12.14 on negligence of professional personnel.

Rescission for fraud or mistake is subject to the equitable defense of laches (CC §§1691, 1693), which may give the plaintiff less time to initiate an action than the time allowed under the statute of limitations. Therefore, the plaintiff should proceed as soon as the fraud or mistake is discovered. Each case is decided on its own facts, and any finding of prejudice to the defendant because of unreasonable delay can be grounds for barring the suit. See *Wilke v Coinway, Inc.* (1967) 257 CA2d 126, 64 CR 845; *Hil-Mac Corp. v Mendo Wood Prods., Inc.* (1965) 235 CA2d 526, 45 CR 396; *Sogg v Harvey* (1955) 134 CA2d 116, 285 P2d 104. If a notice of rescission has been sent, negotiations between the parties to resolve the dispute will generally excuse any delay in suing while they continue. *Williams v Marshall* (1951) 37 C2d 445, 235 P2d 372. A rescission suit may lie, however, even if a damage action would be barred. See *Wilson v Rigali & Veselich* (1934) 138 CA 760, 33 P2d 455. Conversely, laches alone is no defense to a damage action. See *Hartwigsen v Ditto* (1958) 156 CA2d 811, 320 P2d 114.

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§12.50 b. Claims Against Insolvent Brokers, Salespeople, and Contractors' Bonds

The time limitation for filing a claim against the Real Estate Fund (see §12.35) is 1 year after termination of all proceedings, including reviews and appeals in connection with the judgment. Bus & P C §10471(b)).

A claim against a contractor's bond (see §12.37) must be filed within 2 years after the expiration of the license period for which the bond was provided. Bus & P C §7071.11(c)(1). If the license has been inactivated, cancelled, or revoked, the claim must be filed within 2 years after the license would have expired, had it remained active. Bus & P C §7071.11(c)(2). A contractor's license expires 2 years after the last day of the month in which the license is issued, or 2 years after the date on which the renewed license last expired. Bus & P C §7140. Licenses and bonds can be renewed (Bus & P C §§7071.8, 7140-7141), but renewal does not affect the commencement of the limitation period on the biannual expiration date. For further discussion, see California Construction Contracts, Defects, and Litigation, chap 1 (Cal CEB 2008).

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§12.51 2. Untimely Notice of Rescission

A plaintiff who sues for rescission is required to give notice of rescission to the defendant and to offer to restore everything of value that he received from the defendant. CC §1691.

Although no particular form is required, the required notice normally recites that the plaintiff is rescinding the contract and tendering reconveyance of the property to the defendant. See §§1.32-1.36. The notice is sufficient if it clearly shows the intention of the person rescinding to consider the contract at an end. *Worthen v Jackson* (1956) 139 CA2d 615, 293 P2d 797. Merely serving a pleading in an action for rescission suffices as required notice. CC §1691. A defendant's defense of delay in giving notice will succeed only with a showing of prejudice by the delay. CC §1693.

A similar rule applies to delay in restoring or tendering restoration of benefits under the contract. CC §1693. See *Wilke v Coinway, Inc.* (1967) 257 CA2d 126, 64 CR 845; *Hil-Mac Corp. v Mendo Wood Prods., Inc.* (1965) 235 CA2d 526, 45 CR 396. If a notice of rescission has been sent, negotiations between parties to resolve the dispute will generally excuse a delay in filing suit while they continue. *Williams v Marshall* (1951) 37 C2d 445, 235 P2d 372.

For further discussion, see chap 1.

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§12.52 3. "As Is" and Other Exculpatory Clauses

Sellers often try to obtain some protection against liability for fraud by inserting exculpatory language in the sales contract. Typical clauses indicate that (1) the buyer has inspected the property and as a result of the inspection is satisfied with its condition (*Rothstein v Janss Inv. Corp.* (1941) 45 CA2d 64, 113 P2d 465); (2) the seller is selling the property "as is" (*Loughrin v Superior Court* (1993) 15 CA4th 1188, 19 CR2d 161; *Orlando v Berkeley* (1963) 220 CA2d 224, 33 CR 860; *Lingsch v Savage* (1963) 213 CA2d 729, 29 CR 201); or (3) except for representations expressly stated in the agreement, the buyer has not been induced to purchase the property by a representation of the seller or his broker (*Herzog v Capital Co.* (1945) 27 C2d 349, 164 P2d 8). Such provisions are ineffective if the seller actively misrepresents or fails to disclose material facts about the property's condition not within the buyer's reach and affecting the value or desirability of the property. *Lingsch v Savage, supra*. An "as is" clause is effective, however, to insulate a seller from liability even for latent defects unless the seller, through fraud or misrepresentation, intentionally conceals material defects not otherwise visible or observable to the buyer. *Shapiro v Hu* (1986) 188 CA3d 324, 233 CR 470.

Exculpatory provisions will not protect sellers or their agents from liability if they perpetrate the fraud themselves. See CC §1668; *Manderville v PCG&S Group, Inc.* (2007) 146 CA4th 1486, 55 CR3d 59. When the seller's broker affirmatively misrepresents the condition of the property, the court may find that the seller, although innocent of affirmative misrepresentation (but aware of the broker's misrepresentation), had a duty of disclosure to the buyer. Even when the seller has only constructive knowledge of the facts the agent misrepresented, the exculpatory clause is not necessarily a defense to his failure to disclose. See *Herzog v Capital Co., supra; Crawford v Nastos* (1960) 182 CA2d 659, 6 CR 425.

The seller cannot even rely on an exculpatory clause dealing specifically with a particular condition. In one case, summary judgment for the seller was reversed despite inclusion in the deposit receipt of both an "as is" clause and a clause specifically waiving a termite clearance. *Orlando v Berkeley, supra.*

PRACTICE TIP: It is better for the seller to disclose the specific condition than to attempt to exculpate himself against its nondisclosure. See §§12.43-12.45.

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§12.53 4. Waiver of the Fraud

If the purchaser obtained an extension of time for making payments from the seller after discovering the fraud, there may be a waiver of the fraud. See *Lobdell v Miller* (1952) 114 CA2d 328, 250 P2d 357. Unless the extension of time constituted either an estoppel or the making of a new agreement supported by consideration, however, there is no waiver. See *Bagdasarian v Gragnon* (1948) 31 C2d 744, 751, 192 P2d 935. For further discussion, see chap 3.

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5. Fraud as Purchaser's Defense to Seller's Action

§12.54 a. Land Sales Contract

The seller's fraud is a defense to any action on the contract that the seller brings against the buyer. See CC §§1566-1567. A buyer who discovers fraud before the close of escrow may withdraw and is not liable to the seller for breach of contract.

Buyers in possession under a land sales contract when they discover fraud and stop paying may raise the issue of fraud as a defense or cross-complaint in any suit the seller brings. *Pavlovich v Neidhardt* (1954) 128 CA2d 559, 275 P2d 836.

The buyer's choice of rescission or damages (see §12.60) is not eliminated by the fact that the seller sued first. A cross-complaint for rescission, if granted, gives the buyer the same relief obtainable had the buyer initiated the litigation. *Kent v Clark* (1942) 20 C2d 779, 128 P2d 868. The buyer's previous nonpayment does not operate as an estoppel, because the legal theory is that the contract under which the buyer owed money to the seller is invalid because of fraud. See *Friedberg v Weissbuch* (1955) 135 CA2d 750, 287 P2d 785.

A cross-complaint for damages is not barred by prior nonpayment. But because the buyer seeking damages is affirming the contract, the seller is entitled to an award for the balance of the purchase price then due. See *Duttweiler v Washburn* (1937) 19 CA2d 701, 66 P2d 219. If the award to the seller for the price exceeds the award to the buyer for the fraud, the seller may be permitted to foreclose (*i.e.*, quiet title). *Gluskin v Lehrfeld* (1955) 134 CA2d 804, 286 P2d 457. The seller may be able to enlarge the award if the court permits acceleration of the balance of the debt because of the buyer's default. See *Gluskin v Lehrfeld, supra.*

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§12.55 b. Deed of Trust; Enjoining Foreclosure Sale

If the buyer is in possession under a deed, with the seller holding a note and deed of trust, nonpayment of the note permits the seller to exercise a power of sale. Because the foreclosure by private sale is not a judicial remedy, the trustee may proceed with the sale even though the buyer contends that the seller acted fraudulently. Buyers wanting the sale halted should seek a preliminary injunction against the sale on the ground that the sale would deprive them of an election of remedies. *Stockton v Newman* (1957) 148 CA2d 558, 307 P2d 56. See California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 2, 7 (4th ed Cal CEB 2009).

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§12.56 6. Comparative Negligence; Indemnity

Contributory negligence is not a complete defense to tort actions in California; the California Supreme Court abrogated the defense of contributory negligence and adopted a system of comparative negligence as the standard in *Li v Yellow Cab Co.* (1975) 13 C3d 804, 119 CR 858. The doctrine of comparative negligence adopted by the *Li* court assigns responsibility and liability for damage in direct proportion to the fault of the persons whose negligence brought about the damage. 13 C3d at 828. This case effectively abandoned the common law rule of all-or-nothing indemnity while retaining the doctrine of joint and several liability in its traditional form.

In *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 146 CR 182, however, the California Supreme Court ruled that the doctrine of indemnity should be modified in light of comparative negligence to permit partial indemnity among tortfeasors on a comparative fault basis. A named defendant is thus entitled to seek either total or partial indemnity from joint tortfeasors.

Because comparative indemnity is an equitable doctrine, courts refrain from applying it when its application is unfair. See, *e.g., Weseloh Family Ltd. Partnership v K. L. Wessel Constr. Co*. (2004) 125 CA4th 152, 22 CR3d 660; *Woodward-Gizienski & Assocs. v Geotechnical Exploration, Inc.* (1989) 208 CA3d 64, 255 CR 800.

The Fair Responsibility Act of 1986 (CC §§1431-1431.5) abolished joint liability for noneconomic damages in tort actions. This means that in any action for personal injury, property damage, or wrongful death based on comparative fault, each defendant's liability for noneconomic damages is in direct proportion to the defendant's percentage of fault. CC §1431.2. Noneconomic damages are "subjective, non-monetary losses including, but not limited to, pain, suffering, inconvenience, mental suffering, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation." CC §1431.2(b)(2). The rule of *American Motorcycle* remains in effect except for the limitations of CC §§1431-1431.5. For further discussion, see California Tort Damages (2d ed Cal CEB 2002).

The doctrine of comparative fault was held not to apply to a misrepresentation case in *Carroll v Gava* (1979) 98 CA3d 892, 896, 159 CR 778. The court asserted the policy that business ethics justify reliance on the accuracy of information imparted in buying and selling, and that the risk of falsity is on the one who makes a representation. But see *Baird v Jones* (1993) 21 CA4th 684, 27 CR2d 232, in which the court applied comparative equitable indemnification between concurrent intentional tortfeasors.

For an overview of contributory and comparative negligence, and the development and evolution of both doctrines, see 6 Witkin, Summary of California Law, *Torts* §§1295-1376 (10th ed 2005). See also Schwartz, Comparative Negligence (4th ed 2002).

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§12.57 7. Purchaser's Inspection Performed

If the purchaser makes an inspection, the seller normally argues that the inspection bars a claim of reliance on the seller's representation. The buyer's personal inspection, however, is no defense when conditions are not visible and are known only to the seller and could not be discovered by the buyer's diligent attention and observation. The seller must disclose such facts to the buyer. See *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800; *Burkett v J. A. Thompson & Son* (1957) 150 CA2d 523, 310 P2d 56; *Rothstein v Janss Inv. Corp.* (1941) 45 CA2d 64, 113 P2d 465. When purchasers inspect property about which alleged misrepresentations were made, a presumption exists that the purchasers relied on their own observations, which must be overcome by a showing that they relied on the seller's representations, despite their own inspection of the property, and that they were justified in doing so. *Schonfeld v City of Vallejo* (1975) 50 CA3d 401, 123 CR 669, disapproved on other grounds in *Morehart v County of Santa Barbara* (1994) 7 C4th 725, 737, 29 CR2d 804.

Note that, in any event, a former landowner is not liable for any injury that results from an easily discoverable (*i.e.,* patent) defect created by the owner, even if not disclosed. *Preston v Goldman* (1986) 42 C3d 108, 227 CR 817.

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§12.58 8. Purchaser's Neglect of Legal Duty

When a buyer brings an action to rescind the contract on the basis of mistake, the action will fail if the mistake consisted of the buyer's neglect to perform a legal duty. CC §1577; *M. F. Kemper Constr. Co. v City of Los Angeles* (1951) 37 C2d 696, 235 P2d 7; *Mesmer v White* (1953) 121 CA2d 665, 264 P2d 60; *Roller v California Pac. Title Ins. Co.* (1949) 92 CA2d 149, 206 P2d 694. Ordinary negligence, however, may not amount to neglect of a legal duty under CC §1577, and rescission may be granted. See *M. F. Kemper Constr. Co. v City of Los Angeles, supra; Brunzell Constr. Co. v G. J. Weisbrod, Inc.* (1955) 134 CA2d 278, 286, 285 P2d 989.

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§12.59 9. Approval of Fill by Official Inspectors

Public officials normally inspect land filling operations and determine whether the filled area is sufficiently stable to support a building. This official approval is not a defense to an action for a seller's fraudulent misrepresentation that property is original land, when it is in fact filled land. *Burkett v J. A. Thompson & Son* (1957) 150 CA2d 523, 310 P2d 56 (inspection and approval by contractor, city inspector, and loan inspector).

On liability of lender for negligent inspection, see §12.11.

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D. Remedies Available

§12.60 1. Election of Remedies

A purchaser may seek both damages and rescission in the same complaint and reserve the election between the alternative remedies until completion of the trial. This action compels the defendant to defend on both theories. *Williams v Marshall* (1951) 37 C2d 445, 235 P2d 372. On when election of remedies must be made, see §1.29.

Service of a notice of rescission (see §12.51) constitutes an election only if the seller accepts it. See *Evans v Rancho Royale Hotel Co.* (1952) 114 CA2d 503, 250 P2d 283.

A judgment of rescission completely exhausts the buyer's remedies. *Lozier v Janss Inv. Co.* (1934) 1 C2d 666, 36 P2d 620. This is not true, however, if the rescission suit is unsuccessful. See *Karapetian v Carolan* (1948) 83 CA2d 344, 188 P2d 809. A judgment for damages probably bars a subsequent rescission suit, but if the judgment is unsatisfied, further actions for damages against other defendants are not barred. *Black v Bringhurst* (1935) 7 CA2d 711, 46 P2d 993.

See generally Dresser, *Procedural Control of Damages By Election of Remedies*, 12 Hastings LJ 171 (1960); Yerkes, *Election of Remedies in Cases of Fraudulent Misrepresentation*, 26 S Cal L Rev 157 (1953). See also Comment, *Buyer's Remedies in the Sale of Real Property in California*, 53 Cal L Rev 1062 (1965).

A damages action imposes proof problems on a plaintiff that are absent in a suit for rescission. The buyer has no cause of action in tort without a showing of an out-of-pocket loss. CC §3343; see *Swasey v de L'Etanche* (1936) 17 CA2d 713, 62 P2d 753, disapproved on other grounds in *Gagne v Bertran* (1954) 43 C2d 481, 487, 275 P2d 15. Thus the buyer has the burden of proving both the value of the property purchased and the value of the consideration given. *Nece v Bennett* (1963) 212 CA2d 494, 28 CR 117. The plaintiff in a damages action, but not in a rescission and restitution suit, must usually retain an expert appraiser to present evidence of value.

A successful rescission action exhausts the buyer's remedies only against the seller; the buyer is free to pursue a judgment based on joint and several liability in tort for damages against others not included in the rescission decree. *Whistler v Ondulando Highlands Corp.* (1970) 13 CA3d 108, 91 CR 879. See also *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800. An unsuccessful attempt to rescind does not impair the buyer's right to seek damages on the contract. *Walters v Marler* (1978) 83 CA3d 1, 16, 147 CR 655; *Paularena v Superior Court* (1965) 231 CA2d 906, 915, 42 CR 366. Exemplary damages are available in a rescission action. See §12.70.

The doctrine of election of remedies is based on principles of equitable estoppel. Thus, it is an affirmative defense that must ordinarily be pleaded unless it appears on the face of the complaint. A failure to plead the defense of election of remedies waives the defense. *Roam v Koop* (1974) 41 CA3d 1035, 1044, 116 CR 539.

For a discussion of an award of prejudgment interest in damage and rescission actions, see §12.69.

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2. Actions for Damages

§12.61 a. Damages for Buyers as Victims of Fraud

The buyer of real property has two alternative traditional remedies for the seller's fraud: (1) Affirm the sales contract, retain the property, and sue for tort (out-of-pocket) damages (CC §§1709, 3343; see chap 3); or (2) disaffirm the contract, return the property, and rescind the contract in equity on the ground that the seller obtained the buyer's consent through fraud (CC §§1566-1568, 1689(b)(1); see chap 1). See §§12.65-12.71 on obtaining additional recovery as part of a judgment of rescission. See also *Alliance Mortgage Co. v Rothwell* (1995) 10 C4th 1226, 44 CR2d 352 (suggesting that measure of damages when fiduciary commits intentional fraud is benefit-of-bargain (not out-of-pocket) standard); *Strebel v Brenlar Invs., Inc.* (2006) 135 CA4th 740, 37 CR3d 699 (recognizing that damages may not fit either benefit-of-bargain or out-of-pocket standard).

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§12.62 b. Damages for Negligent Misrepresentation

Fraud by definition includes "the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true." CC §1572(2). In cases based on the seller's negligent misrepresentation, it is unclear whether the appropriate measure of damages is out-of-pocket loss (as used in fraud cases; see §12.61) or the cost of repairing or restoring the property to the condition as represented. For a thorough discussion of the proper measure of damages in cases involving a broker's negligent misrepresentation, see *Overgaard v Johnson* (1977) 68 CA3d 821, 137 CR 412.

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§12.63 3. Rescission Remedies

A suit for rescission, whether based on fraud or mistake, is designed to restore the entire purchase price to the buyer, not just the difference between the purchase price and the fair market value of the property. The buyer, however, must pay the rental value to the seller for the time he or she had possession. See §12.72. Return of the purchase price to the buyer is conditioned on the return of the property to the seller. See *Tampico v Wood* (1963) 222 CA2d 211, 34 CR 885. But see *Buist v C. Dudley DeVelbiss Corp.* (1960) 182 CA2d 325, 6 CR 259, a damages action in which the court allowed recovery of the full purchase price (and sums expended for landscaping, terracing, and gardening) *and* retention of the slide-damaged property.

Rescission also permits the buyer to recover from the seller all payments made to reduce existing encumbrances on the property. *Younis v Hart* (1943) 59 CA2d 99, 138 P2d 323. All notes and deeds of trust executed by the buyer in the seller's favor are canceled (see *Tampico v Wood, supra*), although it may not be possible to cancel the buyer's liability to innocent third party lenders (see *Younis v Hart, supra*). But if such a loan is secured by a purchase money mortgage or deed of trust, the lender's remedy is normally limited to foreclosing on the property. See CCP §580b. This rule may not apply if four or more units are involved. If the elements necessary for rescission are proved, the seller must take back the property even if its value has substantially decreased since the sale date. *Shaffer v Security Trust & Sav. Bank* (1935) 4 CA2d 707, 41 P2d 948.

A restitutionary award is given to a purchaser who proves fraud after the property is already lost by foreclosure, although the award is often mislabeled "damages." See *Garrett v Perry* (1959) 53 C2d 178, 346 P2d 758. The same restitutionary relief may be applied when the buyer has given the seller a deed in lieu of foreclosure. See §§12.65-12.71 on additional relief that may be available.

Rescission does not require proof of a reduced market value. Buyers need only show that the purpose for which they bought the property cannot be fulfilled or that they were prejudiced in some other way by the fraud. *Hefferan v Freebairn* (1950) 34 C2d 715, 214 P2d 386; *Thomas v Krug* (1956) 139 CA2d Supp 941, 294 P2d 785. In fact, the seller cannot resist the rescission on the basis that the misstated fact actually increased rather than decreased the value of the property. *Wood v Jotham Bixby Co.* (1938) 29 CA2d 294, 84 P2d 204.

Both damages and rescission are transitory actions having the same potential venue. *Thielen v Superior Court* (1963) 219 CA2d 217, 33 CR 1. In a suit for rescission, the issue of the amount of restitution can be tried before a jury. *Paularena v Superior Court* (1965) 231 CA2d 906, 42 CR 366. In *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800, however, the court rejected, in an opinion on denial of rehearing, a demand to have a jury determine whether there was a right to rescind even though a large consequential damages award was rendered after the trial court ruled that such a right did exist.

See *Runyan v Pacific Air Indus., Inc.* (1970) 2 C3d 304, 85 CR 138, for a review of the measure and theory of recovery in rescission actions.

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§12.64 4. Additional Recovery

Although the purchaser's general damages for fraud are fixed as of the date of sale (see §12.61), the seller's fraudulent representations may lead to later damages to the buyer for which he may be compensated under CC §3343. *Garrett v Perry* (1959) 53 C2d 178, 346 P2d 758. Similarly, a rescinding buyer is often able to recover more than the purchase price if additional recovery is necessary to restore the parties to the prepurchase status quo. *Lobdell v Miller* (1952) 114 CA2d 328, 250 P2d 357.

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§12.65 a. Value of Improvements Made by Purchaser

If a buyer suing for damages (rather than rescission) erected improvements on the property that have been rendered worthless because of fraud, the buyer may recover the cost of those improvements as additional damages. *Buist v C. Dudley DeVelbiss Corp.* (1960) 182 CA2d 325, 6 CR 259 (fraud regarding soil conditions; buyer's landscaping, terracing, and gardening damaged and destroyed by subsidence). See also *Hardy v Carmichael* (1962) 207 CA2d 218, 24 CR 475.

If the purchaser is able to retain the benefits of the improvements, even though forced to make them because of the seller's fraud, however, the buyer may not recover the value (cost) of the improvements in addition to general damages. See *McNeill v Bredberg* (1961) 192 CA2d 458, 13 CR 580; see §12.61.

In a suit for rescission, the seller will receive the improvements erected by the buyer along with the property. Therefore, the rescinding buyer can recover for the value of these improvements. *Lobdell v Miller* (1952) 114 CA2d 328, 250 P2d 357. But the recovery appears to be measured by the increase in the property's market value caused by the improvements rather than by their cost. *Campbell v Northrop* (1931) 212 C 45, 297 P 541 (suit by lessor); *Tarrant v Butler* (1960) 180 CA2d 235, 4 CR 230 (dictum). See authorities cited in *Runyan v Pacific Air Indus., Inc.* (1970) 2 C3d 304, 315, 85 CR 138. But see chap 1 for authorities holding a contrary view of the measure of recovery.

On the issue of whether the buyer can recover from the seller for higher construction costs resulting from physical conditions concealed by the seller, an analogy can be drawn to the relief available against experts. In *Gagne v Bertran* (1954) 43 C2d 481, 275 P2d 15, the court held that increased costs cannot be recovered against an expert who misrepresented the condition of property, because the increase was caused by physical condition rather than misrepresentation, *i.e.,* property cost the same whether the report was true or false. The court, however, did state that if on retrial the buyers could show that the property was worth less than what they paid for it because of its condition, the expert would be liable for that difference. 43 C2d at 490 n6. See also *Roberts v Karr* (1960) 178 CA2d 535, 3 CR 98.

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§12.66 b. Architect's Fees; Sales Program Expenses; Closing Costs; Other Expenses

In a suit for damages, the purchaser cannot recover the cost of repairs that benefit the property even if they would not have been needed had the property been as represented. See *McNeill v Bredberg* (1961) 192 CA2d 458, 13 CR 580; *Crawford v Nastos* (1960) 182 CA2d 659, 6 CR 425. The buyer can recover expenses for preparing the property for its intended purpose.

EXAMPLE: If the purchaser bought raw land intending to subdivide, the amount spent on architect's fees and setting up a selling program before discovery of the fraud is recoverable in addition to general damages. *Perkins v Ketchum* (1962) 211 CA2d 245, 27 CR 278. These expenses are also recoverable in a suit for rescission, even if they do little to increase the value of the property returned. *Younis v Hart* (1943) 59 CA2d 99, 138 P2d 323.

Closing costs are not recoverable in an action for damages, because they do not result from the fraud. See *Isaacs v Frank Meline Co.* (1934) 2 CA2d 341, 37 P2d 1045. Closing costs are sometimes awarded to the buyer in a rescission action. See *Curran v Heslop* (1953) 115 CA2d 476, 252 P2d 378; *Younis v Hart, supra.*

Because market value of income property is determined by the property's income, a buyer suing for damages cannot recover lost (*i.e.,* anticipated) revenue as additional damages. *Oliver v Benton* (1949) 92 CA2d 853, 208 P2d 375. But see CC §3343(a)(4) on recovery for lost profits for use of property. The rescinding buyer may recoup whatever operating loss he or she suffered while maintaining the property. *Williams v Marshall* (1951) 37 C2d 445, 235 P2d 372; *Lobdell v Miller* (1952) 114 CA2d 328, 250 P2d 357.

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§12.67 c. Conversion Cost

If the purchaser intends a particular use of the property that becomes impossible because of the fraud, an award of the cost of converting the property for the buyer's purpose will not be allowed in addition to general damages, because the conversion cost should already be reflected in a depreciated market value. See *Nece v Bennett* (1963) 212 CA2d 494, 28 CR 117; *Sanfran Co. v Rees Blow Pipe Mfg. Co.* (1959) 168 CA2d 191, 335 P2d 995. See also *Perkins v Ketchum* (1962) 211 CA2d 245, 27 CR 278. If the limitation on the use of the property does not reduce the market value below the purchase price, a damage action will fail, but the buyer can still rescind. See *Gulke v Brock* (1963) 222 CA2d 459, 35 CR 200.

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§12.68 d. Personal Injury; Mental Anguish

The law on recovery for mental anguish (*i.e.*, emotional distress) resulting from fraud is not clear. Such recovery has been disallowed (see *Newman v Smith* (1888) 77 C 22, 18 P 791; *Ruby v Debovsky* (1954) 126 CA2d 21, 24, 271 P2d 983) but the current validity of this view is doubtful (see *Greitzer v United States Nat'l Bank* (SD Cal 1971) 326 F Supp 762, 764). Recovery for mental anguish is allowed in nuisance cases (see §12.86), and there appears to be no reasonable basis for not allowing it in fraud cases while allowing it in nuisance cases. If deceit is the proximate cause of personal physical injuries, the injured should be able to recover damages. A landlord is liable to a tenant for personal injuries caused by concealed defects. *Merrill v Buck* (1962) 58 C2d 552, 25 CR 456; *Burks v Blackman* (1959) 52 C2d 715, 344 P2d 301. Because both landlords and sellers have a duty of disclosure incident to conveying an estate in land, there should be no reason that the rule permitting a tenant to recover for physical injuries should not apply to a buyer.

Damages for mental distress resulting from the fraudulent sale of property were not allowed in *O'Neil v Spillane* (1975) 45 CA3d 147, 119 CR 245 (seller's action for undue influence). The court held that such damages were not allowed under CC §3343 (general fraud damages) or CC §1692 (allowing consequential damages under rescission of contract). Compare the *O'Neil* reasoning with that in *Crisci v Security Ins. Co.* (1967) 66 C2d 425, 432, 58 CR 13, and *Fletcher v Western Nat'l Life Ins. Co.* (1970) 10 CA3d 376, 89 CR 78. Both cases permitted damages for emotional distress resulting from the insurer's unreasonable refusal to settle claims.

Damages for mental anguish caused by a breach of a noninsurance contract have been awarded when a breach was sure to cause mental anguish. *Wynn v Monterey Club* (1980) 111 CA3d 789, 168 CR 878 (gambling casino's failure, in violation of contract, to bar plaintiff's wife from check-cashing privileges and access to card games); *Allen v Jones* (1980) 104 CA3d 207, 163 CR 445 (cremated remains lost in transit by mortuary).

The California trend is to disallow the award of damages for mental anguish in breach of contract cases outside the insurance context. See, *e.g.*, *Foley v Interactive Data Corp.* (1988) 47 C3d 654, 254 CR 211 (no tort remedy for breach of implied covenant of good faith and fair dealing outside insurance contract context).

For discussion of mental distress damages based on negligence, see §12.86. For a general discussion of mental distress damages, see California Tort Damages, chap 6 (2d ed Cal CEB 2002).

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§12.69 e. Prejudgment Interest

Prejudgment interest is recoverable when damages are "certain, or capable of being made certain by calculation" and the right to recover is vested on a particular day. CC §3287(a). This section has been applied to tort as well as contract claims. *Black v Vermont Marble Co.* (1902) 137 C 683, 70 P 776 (conversion); *Schmidt v Nunan* (1883) 63 C 371 (wrongful attachment). See also Comment, *Interest as Damages in California*, 5 UCLA L Rev 262, 270 (1958). But see *Salinas v Souza & McCue Constr. Co.* (1967) 66 C2d 217, 57 CR 337, in which a sewer contractor was denied prejudgment interest because the amount due could not be calculated with certainty by the terms of the contract. The court reasoned that, when the amount can be determined only by resolving conflicting evidence, there can be no recovery of prejudgment interest under CC §3287. Civil Code §3288 provides that "in every case of oppression, fraud or malice, interest may be given, in the discretion of the jury." Civil Code §§3287 and 3288 are not mutually exclusive. See 5 UCLA L Rev at 270. Because CC §3288 interest is discretionary, the plaintiff cannot complain if the court fails to include interest in the judgment without a showing of abuse of discretion. See *Nathanson v Murphy* (1955) 132 CA2d 363, 282 P2d 174; *Conger v White* (1945) 69 CA2d 28, 158 P2d 415.

When awarded, prejudgment interest runs from the date of the sale. *Pavlovich v Neidhardt* (1954) 128 CA2d 559, 275 P2d 836. However, if the buyer has recovered additional damages, interest starts from the dates the buyer paid for those items. *Sixta v Ochsner* (1960) 187 CA2d 485, 9 CR 617. The rescinding buyer is also eligible for interest on an award. *Smith v Rickards* (1957) 149 CA2d 648, 308 P2d 758 (relying on CC §1709, which provides that "one who willfully deceives another … is liable for any damage which he thereby suffers." But see *Younis v Hart* (1943) 59 CA2d 99, 138 P2d 323.

In a suit for rescission, interest runs from the date of notice of rescission. See *Wilson v Rigali & Veselich* (1934) 138 CA 760, 33 P2d 455. Postrescission payments accrue interest from the date of such payments. *Leaf v Phil Rauch, Inc.* (1975) 47 CA3d 371, 120 CR 749 (automobile conditional sales contract).

Arguably, because rescission is contractual in nature and its aim is to restore the status quo ante, a rescinding plaintiff may be entitled to interest as a matter of right under CC §3302 (relating to breaches of obligations to pay money) or to discretionary interest under CC §3287(b) (relating to unliquidated contract claims).

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§12.70 f. Exemplary Damages

Exemplary damages may be awarded in a fraud action, but the facts supporting the award must be proved by clear and convincing evidence. CC §3294. Although CC §3343 provides the exclusive measure of damages in fraud actions in the purchase, sale, or exchange of real property, punitive (or exemplary) damages qualify as one of the "legal or equitable" remedies to which reference is made in that statute. CC §3343(b)(2). See *Sierra Nat'l Bank v Brown* (1971) 18 CA3d 98, 95 CR 742. See chap 3 for discussion of CC §3343. The purchaser must first show entitlement to compensatory damages before he or she can recover punitive damages. See *Brewer v Second Baptist Church* (1948) 32 C2d 791, 197 P2d 713.

Although the amount of exemplary damages should bear a reasonable relationship to the actual damages, there is no fixed ratio by which to determine the proper proportion between compensatory and exemplary damages. *Austin v Duggan* (1958) 162 CA2d 580, 584, 328 P2d 224. The amount of the punitive award may, in appropriate cases, exceed the compensatory award. *Oakes v McCarthy Co.* (1968) 267 CA2d 231, 263, 73 CR 127. The award, however, can be reduced or vacated if it violates the due process clause of the constitution or if it is excessive or grossly disproportionate to the compensatory damage award. See §12.87.

Exemplary damages are also recoverable in rescission actions. *Horn v Guaranty Chevrolet Motors* (1969) 270 CA2d 477, 75 CR 871; *Mahon v Berg* (1968) 267 CA2d 588, 73 CR 356; *Millar v James* (1967) 254 CA2d 530, 62 CR 335. See chap 1.

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§12.71 g. Attorney Fees

Except as expressly provided by statute, the "measure and mode" of compensating attorneys are left to agreement between the parties. CCP §1021. A few statutes allow or require the court to award attorney fees to the prevailing party on a particular cause of action. For a complete list of statutes authorizing attorney fees, see California Attorney Fee Awards, chaps 2, 9-10 (3d ed Cal CEB 2010).

Attorney fees are awarded to the party who prevails on a contract cause of action if the contract authorizes the recovery of such fees. See CC §1717. If the attorney fee provision is phrased broadly enough, it may support a fee award "in an action alleging both contract and tort claims." See *Santisas v Goodin* (1998) 17 C4th 599, 608, 71 CR2d 830 (contract allowing award of attorney fees in any litigation "arising out of" execution of agreement or sale of real property covered tort actions related to sale). The language of the fee clause is crucial, and many reported cases interpret attorney fee clauses. See, *e.g.*, *Lerner v Ward* (1993) 13 CA4th 155, 160, 16 CR2d 486 (clause granting attorney fees to prevailing party in any action or proceeding "arising out of the agreement" included action for fraud). Attorney fees authorized by contract may be specified as a general item of recovery in the judgment, but the amount of fees is usually set by the court in a motion made by the prevailing party after entry of judgment. See Cal Rules of Ct 3.1702(a). For additional cases interpreting fee clauses and procedures for recovery of attorney fees provided by contract, see Attorney Fee Awards, chaps 2, 4.

Under the "tort of another" or "third party tort" exception to the general rule that attorney fees cannot be recovered in tort, a plaintiff can recover attorney fees as an element of damages if he or she retained counsel to prosecute or defend an action against a third party because of the defendant's tort. In *Gray v Don Miller & Assocs., Inc.* (1984) 35 C3d 498, 198 CR 551, the supreme court applied this exception to allow the plaintiff to recover the costs of suit (including attorney fees) from his real estate agent after the plaintiff sued the sellers of real property for specific performance as a result of the agent's wrongdoing. The court, however, rejected the contention, based on *Walters v Marler* (1978) 83 CA3d 1, 147 CR 655, that a plaintiff is entitled to recover attorney fees merely because the plaintiff was defrauded by a fiduciary. If attorney fees are sought as damages, they must be proved during trial, not in a posttrial motion. On recovering attorney fees as damages, see Attorney Fee Awards, chap 7.

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§12.72 5. Seller's Setoffs; Rental Value

Because a rescinding buyer must pay the seller reasonable rent for the time he or she had possession of the property, the seller has a setoff for this charge. *Kent v Clark* (1942) 20 C2d 779, 128 P2d 868. When the rescinding buyer recovers for improvements made to the property, the improvements may be depreciated to compensate for their use. If the buyer can show that he or she was forced to remain in possession to protect the property because the seller refused to take it back, the court may relieve the buyer of the rental charge. See *Smith v Rickards* (1957) 149 CA2d 648, 308 P2d 758.

In a damage action, the buyer does not owe rent, because the buyer remains the owner of the property. Even when the buyer recovers as damages the entire price paid, there is still no setoff for rent. *Sixta v Ochsner* (1960) 187 CA2d 485, 9 CR 617. However, because a damage action is an affirmance of the contract, the buyer does remain liable for any balance of the purchase price owed to the seller. Thus the seller may assert a setoff for any arrearages in payment due from the buyer. *Bagdasarian v Gragnon* (1948) 31 C2d 744, 192 P2d 935. There is no setoff for payments not yet matured. 31 C2d at 764; *Haines v Fisher* (1957) 147 CA2d 415, 305 P2d 124. The purchaser may set off the amount of the judgment against the balance owed to the seller, including the part of it not yet matured. See *Bagdasarian v Gragnon, supra*.

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IV. LIABILITY OF ADJOINING PROPERTY OWNERS

A. Theories of Liability

§12.73 1. Nuisance

Landslide, subsidence, and erosion cases litigated on a nuisance theory include *Spaulding v Cameron* (1952) 38 C2d 265, 239 P2d 625 (poorly compacted fill, resting on slope that upper property owner failed to prepare properly, causing mud to flow onto plaintiff's lower property during rains held to be nuisance); *Kafka v Bozio* (1923) 191 C 746, 218 P 753 (subsidence on land that caused building to sink and tip over into neighbor's air space, warping and distorting neighbor's building, held to be basis for nuisance action); *Buchanan v Los Angeles County Flood Control Dist.* (1976) 56 CA3d 757, 767, 128 CR 770 (negligent release of water at an unprecedented rate, causing erosion by excessive water flow, and negligent maintenance of fence revetments held to be nuisance); and *Sturges v Charles L. Harney, Inc.* (1958) 165 CA2d 306, 331 P2d 1072 (maintenance of slope condition created by defendant's cut-and-fill operations prohibited by local ordinance, which caused water, mud, silt, rock, and boulders to move onto plaintiff's property during rainy season, held to be nuisance).

Landslide damage caused by an earthquake can constitute a nuisance (*e.g.,* slippage that threatens to or damages adjoining property) and the owner of the offending land can be liable for nuisance for failing to remedy an earthquake-caused condition. See *People v Greene* (1968) 264 CA2d 774, 70 CR 818.

For further discussion of nuisance remedies, see chap 11.

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§12.74 2. Trespass

Landslides or other land failures may also be considered a trespass on adjoining land. For discussion of remedies for trespass, see chap 11.

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§12.75 3. Negligence

An adjoining landowner may be liable for negligence for many of the same acts or conditions that constitute trespass (see §12.74) or ultrahazardous activity (see §12.77) and may also be liable for the negligence of employees, experts, and independent contractors for their activities on his or her land. See §§12.6-12.9. One court has blurred the distinction between negligence and nuisance; see *Lussier v San Lorenzo Valley Water Dist.* (1988) 206 CA3d 92, 104, 253 CR 470 ("under certain circumstances, the worlds of nuisance and negligence overlap and the two become merely alternative legal theories for redressing what is really the invasion of a single primary right: the right to the undisturbed enjoyment of one's property and land").

A possessor of land is no longer immunized, under the traditional rule, from liability for harm caused by the natural condition of the land to others and there is no longer any distinction between natural and artificial conditions on the land; the possessor's exposure for liability is determined by ordinary principles of negligence. *Sprecher v Adamson Cos.* (1981) 30 C3d 358, 178 CR 783.

See *Newhall Land & Farming Co. v Superior Court* (1993) 19 CA4th 334, 347, 23 CR2d 377, for an analysis of the elements of pleading negligence and of negligence per se.

On the liability of an engineer not in privity with the injured property owner, but retained by the adjacent property owner, see *Shurpin v Elmhirst* (1983) 148 CA3d 94, 195 CR 737.

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§12.76 4. Lateral and Subjacent Support

Support is lateral if the supported and supporting lands are divided by a vertical plane. Support is subjacent if the supported land is above and the supporting land is beneath. See 5 Powell, The Law of Real Property §698 (1971). Lateral support can be from adjacent, submerged land. *SLPR, LLC v The San Diego Unified Port District* (SD Cal, June 30, 2008, No. 06-CV-1327 W) 2008 US Dist Lexis 51624 (seeking damages for dredging).

At common law, excavators who denied neighbors lateral or subjacent support for their property were subject to strict liability. *Puckett v Sullivan* (1961) 190 CA2d 489, 12 CR 55. This rule was modified in California by CC §832. See *Daniels v McPhail* (1949) 93 CA2d 479, 209 P2d 19. But see *Marin Mun. Water Dist. v Northwestern Pac. R.R. Co.* (1967) 253 CA2d 83, 61 CR 520.

If the excavator complies with CC §832, the common law rule of strict liability does not apply. *Wharam v Investment Underwriters, Inc.* (1943) 58 CA2d 346, 136 P2d 363. Compliance with CC §832, however, does not grant a license to excavate negligently. See *Holtz v Superior Court* (1970) 3 C3d 296, 90 CR 345; *Conlin v Coyne* (1937) 19 CA2d 78, 64 P2d 1123.

Under CC §832(1), the excavator must give notice informing neighbors on adjoining land the time and depth of the anticipated excavation. Under CC §832, the excavator's liability is determined by the depth of the excavation and the size of the adjoining foundations that may be threatened by it.

When an excavation is intended to be deeper than the foundations of an adjoining owner's building, and when it will be close enough to possibly endanger the building, the adjoining owner must be given 30 days to take precautionary measures to protect his or her property, including obtaining a reasonable license to enter the excavator's property. CC §832(3).

An excavator who fails to give the notice required by CC §832 is liable for all damage resulting from a denial of support to the adjoining property. *The Charles F. Harper Co. v DeWitt Mortgage & Realty Co.* (1931) 115 CA 15, 300 P 839. See also Comment, *Adjoining Landowners*: *California Civil Code Section 832*: *Lateral Support*, 20 Cal L Rev 62 (1931).

Under CC §832 a lateral support action may be brought against an adjoining landowner or his or her lessee. Actions against noncontiguous property owners must be founded on negligence or some theory other than lateral support. See *Puckett v Sullivan* (1961) 190 CA2d 489, 12 CR 55; *Cassell v McGuire & Hester* (1960) 187 CA2d 579, 10 CR 33; but see *SLPR, LLC v The San Diego Unified Port District* (SD Cal, June 30, 2008, No. 06-CV-1327 W) 2008 US Dist Lexis 51624, allowing a claim under CC §832, because the district failed to establish the boundaries of its property. Moreover, CC §832 may not apply if there was no one to whom the excavator could at the time give notice. *Daniels v McPhail* (1949) 93 CA2d 479, 209 P2d 19 (defendants excavated their own land, which they subsequently conveyed to plaintiffs).

That the negligent excavation was performed before the plaintiff acquired title to the property is irrelevant. The cause of action does not accrue until the land actually subsides, which may be long after the negligent act occurred. *Conlin v Coyne* (1937) 19 CA2d 78, 89, 64 P2d 1123 (lateral support). See also Restatement (Second) of Torts §820(1), Comment (1979) (subjacent support); *Marin Mun. Water Dist. v Northwestern Pac. R.R. Co.* (1967) 253 CA2d 83, 61 CR 520 (subjacent support). Civil Code §832 has been held to apply only to surface owners' mutual obligation to provide lateral support. The statute does not apply to obligations of subjacent support and does not change the common law duty of subjacent support owed by a subsurface owner to the surface owner. *Marin Mun. Water Dist. v Northwestern Pac. R.R. Co., supra*.

A successor in interest to a landowner who wrongfully removes lateral support from an adjacent landowner is not liable for that action unless the successor in interest is actively negligent, either by contributing to the initial act of negligence or by some later act of negligence. The original owner who withdrew lateral support remains liable to the adjacent owner. *Lee v Takao Bldg. Dev. Co.* (1985) 175 CA3d 565, 220 CR 782. A party who removes subjacent support is strictly liable for damages caused by subsidence and is not relieved from liability on transfer of ownership rights. *Platts v Sacramento N. Ry.* (1988) 205 CA3d 1025, 253 CR 269.

For further discussion of lateral support, see California Easements and Boundaries: Law and Litigation, chaps 4, 8 (Cal CEB 2008); *Lateral Support*, 6 Stan L Rev 104 (1953) (conflict between local codes relating to excavations and CC §832). Both lateral and subjacent support are discussed in 12 Witkin, Summary of California Law, *Real Property* §§377-381 (10th ed 2005).

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§12.77 5. Ultrahazardous Activities

Certain activities are so inherently dangerous to the public and occur so infrequently that the courts consider them to be ultrahazardous and impose strict liability for resulting property damage or personal injury. The person responsible for an ultrahazardous activity is liable regardless of the degree of care exercised. See *Luthringer v Moore* (1948) 31 C2d 489, 190 P2d 1; *Green v General Petroleum Corp.* (1928) 205 C 328, 334, 270 P 952. But see *Guy F. Atkinson Co. v Merritt, Chapman & Scott Corp.* (ND Cal 1954) 123 F Supp 720, 722.

Neither a public duty nor a public contract can relieve a party from strict liability for damages resulting from an ultrahazardous activity. In *Chavez v Southern Pac. Transp. Co.* (ED Cal 1976) 413 F Supp 1203.

Blasting in populated areas has been held to be an ultrahazardous activity. *Alonso v Hills* (1950) 95 CA2d 778, 214 P2d 50. However, blasting in an isolated area requires a showing of negligence. *Houghton v Loma Prieta Lumber Co.* (1907) 152 C 500, 93 P 82. But see *Snyder v Southern Cal. Edison Co.* (1955) 44 C2d 793, 803, 285 P2d 912.

The use of dynamite has been held to be an ultrahazardous activity. *McGrath v Basich Bros. Constr. Co.* (1935) 7 CA2d 573, 46 P2d 981. Creating vibrations is also considered ultrahazardous in some situations. *Smith v Lockheed Propulsion Co.* (1967) 247 CA2d 774, 56 CR 128 (rocket testing). See also *Gallin v Poulou* (1956) 140 CA2d 638, 295 P2d 958 (vibrations, in some circumstances, can constitute trespass).

Drilling for oil may be considered an ultrahazardous activity if a blowout occurs during the drilling operation. *Green v General Petroleum Corp.* (1928) 205 C 328, 270 P 952.

Ground-moving operations are not usually considered ultrahazardous activities subject to strict liability rules. See *Beck v Bel Air Props., Inc.* (1955) 134 CA2d 834, 286 P2d 503 (earth-moving operations incident to subdividing and grading hills and slopes into building sites were not so plainly ultrahazardous as to impose liability regardless of the care used). See also *Cassell v McGuire & Hester* (1960) 187 CA2d 579, 10 CR 33 (removing streetcar tracks and pavement and digging sewer trench held not ultrahazardous activity). See Restatement (Second) of Torts §520(d) (1977) on activities of "common usage" not constituting ultrahazardous activities.

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§12.78 6. Tortious Diversion of Surface Water

Fletcher v Rylands (1868) LR 3 E & I App 330, a venerable English case, imposed strict liability on a theory of ultrahazardous activity for injury to real property caused by water escaping from adjoining lands. The doctrine was applied both to a defendant who, after bringing water onto his land, let it escape by seepage or percolation and to a defendant whose improvements interfered with the natural flow of surface waters, raising the water level on the plaintiff's property.

Some courts expressly state that the *Fletcher* doctrine is not followed in California. *Guy F. Atkinson Co. v Merritt, Chapman & Scott Corp.* (ND Cal 1954) 123 F Supp 720, 722; *Smith v East Bay Mun. Util. Dist.* (1954) 122 CA2d 613, 265 P2d 610. At least one earlier opinion, however, holds that the *Fletcher* doctrine does apply in California. *Kall v Carruthers* (1922) 59 CA 555, 211 P 43. Other courts, without mentioning *Fletcher,* nevertheless follow a rule of strict liability. See *Nola v Orlando* (1932) 119 CA 518, 6 P2d 984. But see discussion of *Keys v Romley* (1966) 64 C2d 396, 50 CR 273, below.

The California Supreme Court in *Rozewski v Simpson* (1937) 9 C2d 515, 71 P2d 72, stated that it was an open question whether escaping waters constitute an ultrahazardous activity in California. Other courts also rely on nuisance in this area. See *Shields v Wondries* (1957) 154 CA2d 249, 316 P2d 9.

The owner of an upper or dominant estate is entitled to discharge surface water as the water naturally flows; the upper owner, however, is liable for damage caused to an adjacent property by the discharge of water in an unnatural manner. *Keys v Romley* (1966) 64 C2d 396, 50 CR 273. Known as the "rule of reasonableness," *Keys* held that when the actions of both the upper and lower landowners are reasonable, necessary, and in accord with reasonable care, the injury must be borne by the upper landowner who changes a natural system of drainage. 64 C2d at 409. The issue of reasonableness is a question of fact to be determined in each case on a consideration of all relevant circumstances, including such factors as the amount of harm caused, the foreseeability of the harm that results, the purpose or motive with which the possessor acted, and all other relevant matters. 64 C2d at 410. *Locklin v City of Lafayette* (1994) 7 C4th 327, 27 CR2d 613, explicitly extended the *Keys* rule of reasonableness to public entity landowners.

The reasonable use doctrine of *Keys v Romley* also applies to the loss of land along a stream when neighbors install measures to protect their bank from being washed away. *Weaver v Bishop* (1988) 206 CA3d 1351, 254 CR 425.

The concept of negligence in *Keys* is not precisely the same as the concept of negligence in a personal injury context. In determining reasonableness of conduct, the factfinder must consider "such factors as the amount of harm caused, the foreseeability of such harm, the purpose or motive of the diverter and a comparative weighing of the utility of the diversion against the gravity of the harm caused by it." *Marment v Castlewood Country Club* (1973) 30 CA3d 483, 485, 105 CR 853.

The intentional change in a natural water course may be "reasonable" when the owner has no other alternative. *Pagliotti v Acquistapace* (1966) 64 C2d 873, 50 CR 282.

In *Western Salt Co. v City of Newport Beach* (1969) 271 CA2d 397, 76 CR 322, negligence concepts were applied when it was charged that the upper owner was negligent in diverting the natural flow of surface waters. The lower owner was held to have no duty to protect his land from flooding because of the upper owner's negligence.

Measures taken by upstream landowners to protect their property from flooding are governed by general principles of negligence. There is no exception to this rule for artificial conditions created and maintained for floodwater diversion. See *Linvill v Perello* (1987) 189 CA3d 195, 234 CR 392.

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B. Defenses

§12.79 1. Statutes of Limitations; Laches; Accrual

The statute of limitations for private nuisance (see §12.73), trespass (see §12.74), or denial of lateral support (see §12.76) is 3 years. CCP §338(b); *Bellman v County of Contra Costa* (1960) 54 C2d 363, 5 CR 692 (lateral support); *Polin v Chung Cho* (1970) 8 CA3d 673, 87 CR 591 (lateral support); *Castelletto v Bendon* (1961) 193 CA2d 64, 13 CR 907 (trespass and nuisance); *Tracy v Ferrera* (1956) 144 CA2d 827, 301 P2d 905 (trespass); *Veterans' Welfare Bd. v Oakland* (1946) 74 CA2d 818, 169 P2d 1000 (lateral support). The 5-year period for the recovery of real property is not applicable. *Kafka v Bozio* (1923) 191 C 746, 218 P 753 (encroaching building a nuisance).

If the action is one for personal injuries caused by land failure, the 2-year period (CCP §335.1) probably applies, but if the defendant's tortious conduct is continuing in nature, every repetition of such conduct may be separately actionable. Therefore, the statute of limitations may bar recovery of some, but not all, of the plaintiff's personal injury damages. See *Nestle v City of Santa Monica* (1972) 6 C3d 920, 101 CR 568.

A trespass cause of action generally accrues when the land is entered, even though damage is not done, or noticed immediately. *Castelletto v Bendon, supra.* However, the statute of limitations for nuisance begins to run only when actual damage is done to the property (*Collins v Sargent* (1928) 89 CA 107, 116, 264 P 776); the same is true in lateral support cases (*Bellman v County of Contra Costa, supra*). For further discussion, see §11.39.

In ascertaining when the statute of limitations begins to run in a nuisance action, a "permanent" nuisance must be distinguished from a "continuing" nuisance. *Phillips v City of Pasadena* (1945) 27 C2d 104, 162 P2d 625. The statute of limitations for a permanent nuisance runs on creation of the nuisance, while a continuing nuisance gives rise to separate causes of action for every continuance of the nuisance. *Mangini v Aerojet-General Corp. (Mangini II)* (1996) 12 C4th 1087, 1093, 51 CR2d 272. For further discussion, see §§11.13-11.16, 11.38-11.41.

A public nuisance is considered to be "permanent" if it will presumably continue indefinitely. The nuisance is "continuing" if it can be discontinued at any time. *Mangini v Aerojet-General Corp. (Mangini I)* (1991) 230 CA3d 1125, 1143, 281 CR 827. If the nuisance is considered "continuing," every repetition of the nuisance is a separate wrong for which the injured person may bring successive actions for damages and injunctive relief until it is abated, even though an action based on the original wrong may be barred. *Phillips v City of Pasadena* (1945) 27 C2d 104, 107, 162 P2d 625; *Wade v Campbell* (1962) 200 CA2d 54, 61, 19 CR 173.

This rule of continuing nuisance is important to landslide cases. Although the defendants may have created conditions causing or threatening slides to the plaintiff's property long before the limitation period, the action is not barred if the plaintiff can prove that these conditions constitute a continuing nuisance. And in doubtful cases, the plaintiff can elect to treat the nuisance as permanent or not. *Spaulding v Cameron* (1952) 38 C2d 265, 268, 239 P2d 625.

Whether the action is brought by a public authority or by a private person who has suffered special damage, there is no defense of statute of limitations or laches for public nuisance. CC §3490; *Tucker v Watkins* (1967) 251 CA2d 327, 59 CR 453; *Wade v Campbell, supra*. See §§11.37-11.40 on public nuisance.

As a rule, a defendant can be estopped from raising the statute of limitations as a defense (under the doctrine of equitable estoppel) if the plaintiff is lulled into believing that the action need not be commenced within the statutory period (*Mercer v Elliott* (1962) 208 CA2d 275, 25 CR 217) or if the defendant conceals facts on which the cause of action is based (*Lagomarsino v San Jose Abstract & Title Ins. Co.* (1960) 178 CA2d 455, 3 CR 80). Compare *Union Oil Co. v Greka Energy Corp.* (2008) 165 CA4th 129, 138, 80 CR3d 738 (applied equitable estoppel when defendant repeatedly engaged in settlement talks and asked plaintiff to withhold litigation until they resolved dispute) with *Lobrovich v Georgison* (1956) 144 CA2d 567, 573, 301 P2d 460 (held settlement negotiations alone do not entitle party to equitable estoppel). Some defendant parties may be required by law to inform plaintiff parties of an impending statute of limitations; if they fail to disclose it, equitable estoppel may apply. See, *e.g.*, *Superior Dispatch, Inc. v Insurance Corp.* (2010) 181 CA4th 175, 188, 104 CR3d 508 (every insurer must disclose to first party insured all benefits,

coverage, time limits, or other provisions of any insurance policy issued by insurer that may apply to claim).

See §12.80 on prescription as a defense. See also §12.23 on statute of limitations in negligence cases; §12.27 on the 10-year statute for latent defects; and §12.26 on the 4-year statute for patent defects.

For discussion of statutes of limitations and accrual of actions in soil contamination situations, see *Wilshire Westwood Assocs. v Atlantic Richfield Co.* (1993) 20 CA4th 732, 24 CR2d 562 (negligence, ultrahazardous activity, nuisance), and *Beck Dev. Co. v Southern Pac. Transp. Co.* (1996) 44 CA4th 1160, 52 CR2d 518 (nuisance). See also *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 218 CR 293.

For discussion of the statute of limitations and continuing nuisances, see *Starrh & Starrh Cotton Growers v Aera Energy* (2007) 153 CA4th 583, 63 CR3d 165 (continuous dumping of polluted water into unlined ponds adjacent to plaintiff's farm constitutes continuing trespass even though ponds are permanent); *Nestle v City of Santa Monica* (1972) 6 C3d 920, 101 CR 568 (repeated wrong may create further liability; statute does not run merely from original intrusion). See also *Spar v Pacific Bell* (1991) 235 CA3d 1480, 1 CR2d 480 (underground public utility wires treated as permanent nuisance/trespass despite relative ease of removal); *Amador Valley Investors v City of Livermore* (1974) 43 CA3d 483, 117 CR 749; *Aaron v City of Los Angeles* (1974) 40 CA3d 471, 492, 115 CR 162; *Mosesian v County of Fresno* (1972) 28 CA3d 493, 501, 104 CR 655. In *Amador,* the court followed *Bellman v County of Contra Costa* and upheld the award of damages occurring within 1 year before the claim was filed but disallowed damages occurring before that time.

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§12.80 2. Prescription

Prescription is not a defense to public nuisance under CC §3490, which provides that a lapse of time cannot legalize a public nuisance. *Wade v Campbell* (1962) 200 CA2d 54, 19 CR 173. See §12.79 for discussion of statutes of limitation in public nuisance cases.

A time limitation based on adverse possession may defeat a claim based on private nuisance (see *Wright v Best* (1942) 19 C2d 368, 121 P2d 702) or trespass (see *Castelletto v Bendon* (1961) 193 CA2d 64, 13 CR 907).

Prescriptive rights may arise after 5 years of use that is "continuous, uninterrupted, peaceable, adverse and under a claim of right" when the owner of the property has constructive or actual notice of the user's claim. *O'Banion v Borba* (1948) 32 C2d 145, 150, 195 P2d 10. The issue is one of fact. See *Grant v Ratcliff* (2008) 164 CA4th 1304, 79 CR3d 902. If it finds that the defendant did not assert a claim of right, however, a court may deny the defense by holding that the plaintiff had no more than a revocable license. *Los Angeles Brick & Clay Prods. Co. v City of Los Angeles* (1943) 60 CA2d 478, 141 P2d 46 (discharge of water onto plaintiff's property).

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§12.81 3. Act Authorized by Statute

Nothing done or maintained under the express authority of a statute can be deemed a nuisance. CC §3482. Thus, conditions that might otherwise constitute a nuisance might have to be endured without redress if they are specifically authorized by statute (*Lombardy v Peter Kiewit Sons' Co.* (1968) 266 CA2d 599, 72 CR 240, disapproved on other grounds in *Southern Cal. Edison Co. v Bourgerie* (1973) 9 C3d 169, 175, 107 CR 76 (noise and fumes resulting from construction and operation of freeway not a nuisance)) or by an ordinance (*Katcher v Home Sav. & Loan Ass'n* (1966) 245 CA2d 425, 53 CR 923 (construction of homes, complying with local ordinance, which blocked plaintiffs' panoramic view, not a nuisance)).

Justification of a nuisance, however, cannot be based on the mere fact that no statute prohibits the activity. *Varjabedian v City of Madera* (1977) 20 C3d 285, 291, 142 CR 429 (release of noxious fumes from sewage treatment plant not expressly authorized by statute); *Hassell v City & County of San Francisco* (1938) 11 C2d 168, 78 P2d 1021 (construction of comfort station in public park was not expressly included in general powers given to park commissioner under charter). Also, even though the activity may be expressly authorized by a statute, such power does not permit the activity to be performed in such a manner as to create a nuisance. *Bright v East Side Mosquito Abatement Dist.* (1959) 168 CA2d 7, 335 P2d 527 (mosquito abatement activity created thick blanket of chemical fog over highway).

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§12.82 4. Consent; "Coming to the Nuisance"

A plaintiff who consents to, or participates in, creation of a private nuisance (*Sutro Heights Land Co. v Merced Irrig. Dist.* (1931) 211 C 670, 296 P 1088), a trespass (*Robinson v Crescent City Mill & Transp.* Co. (1892) 93 C 316, 28 P 950), or an ultrahazardous activity (Restatement (Second) of Torts §523 (1977)) cannot recover on claims based on these activities. See also §§11.43-11.44.

To be a defense, the consent or acquiescence must be by the plaintiff; it is no defense that a grantor consented. *Learned v Castle* (1889) 78 C 454, 21 P 11 (nuisance). Furthermore, mere knowledge of the condition is not sufficient to create an estoppel. *Friedman v Pacific Outdoor Advertising Co.* (1946) 74 CA2d 946, 170 P2d 67 (nuisance).

The defense of "coming to the nuisance," *i.e.,* of moving to an area where a nuisance is already in existence and assuming the risk of its continuance is not recognized in California. *Williams v Blue Bird Laundry Co.* (1927) 85 CA 388, 392, 259 P 484. The court, however, may take notice of the plaintiff's choice of "coming to the nuisance" in determining whether the defendant's activity is so "unreasonable" as to constitute a nuisance. See *McIntosh v Brimmer* (1924) 68 CA 770, 230 P 203. See Note, *Torts; Nuisance: Defenses "Coming to the Nuisance" As a Defense*, 41 Cal L Rev 148 (1953).

Equitable estoppel is not available as a defense in actions for public nuisance. See *Tucker v Watkins* (1967) 251 CA2d 327, 59 CR 453.

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§12.83 5. Comparative Negligence

Comparative negligence principles apply to nuisance actions alleging injury to property but only when the nuisance in controversy arose from negligent conduct. *Tint v Sanborn* (1989) 211 CA3d 1225, 259 CR 902. The court in *Tint* ruled that a defendant can raise the defense of comparative negligence even when the plaintiff's complaint does not allege negligence. Nonetheless, to use the defense, the defendant must show that the complained-of nuisance arose from negligence.

For discussion of comparative negligence, see California Tort Guide §§1.38-1.42 (3d ed Cal CEB 1996); Schwartz, Comparative Negligence (4th ed 2002).

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C. Relief Available

1. Compensatory Damages

§12.84 a. Trespass; Ultrahazardous Activity; Private Nuisance

The plaintiff in a trespass, ultrahazardous activity, or private nuisance case is entitled to be made whole in damages for the detriment caused, whether or not the defendant could have anticipated the detriment. CC §3333. If the damage is permanent (*e.g.,* permanent encroachment) the plaintiff sues for all past and prospective damage in a single action with a single statutory period of limitations beginning with the original entry (see §12.79). The judgment is res judicata, thus barring any attempt to recover for injury that may occur later. In such situations, the plaintiff is considered to waive the invasions and consent to the continued occupancy at the price of the past and prospective damages he or she recovers. *Slater v Shell Oil Co.* (1943) 58 CA2d 864, 137 P2d 713 (trespass). The measure of damages in this single action has been described as the reduction in the market value of the land. See *Kornoff v Kingsburg Cotton Oil Co.* (1955) 45 C2d 265, 288 P2d 507. It has also been described as "permanent depreciation in the value of [the plaintiff's] property." *Herzog v Grosso* (1953) 41 C2d 219, 226, 259 P2d 429 (both damages and injunction granted because market value would be depressed even after corrective work completed). The owner of damaged timber land may recover the value of trees either as timber or for their aesthetic qualities. See *U.S. v Union Pac. R.R. Co*. (ED Cal, April 30, 2008, No. Civ S-06-1740) 2008 US Dist Lexis 35338. Damage awards for wrongful injuries to timber may be trebled or, where the trespass is casual or involuntary, the damages may be doubled. CC §3346. See also *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442, 102 CR3d 32 (spread of negligently set fire resulting in trespass by destruction of timber warranted doubling of damages).

Although CCP §731 on its face appears to permit remedies of both damages and injunction, the courts have questioned whether compensatory damages may be awarded after a permanent injunction has issued. *Farmy v College Hous., Inc.* (1975) 48 CA3d 166, 121 CR 658; *Polin v Chung Cho* (1970) 8 CA3d 673, 678, 87 CR 591.

In certain situations, a court will permit a victim of seasonal or recurring trespasses or nuisances to elect to sue in a single action for past and prospective damages. See, *e.g., Spaulding v Cameron* (1952) 38 C2d 265, 239 P2d 625. If this election is allowed, the plaintiff is subject to the defense of res judicata in future actions and is bound by the statute of limitations applicable to the original entry. See *Kornoff v Kingsburg Cotton Oil Co., supra.*

The usual rule, however, is that if the trespass or nuisance is not a single occurrence but is seasonal or of a recurring nature (*e.g.,* periodic flooding), the landowner can bring successive actions as the injuries occur and the damages accrue; each invasion gives rise to a separate cause of action with its own statute of limitations (see §12.79). For further discussion of the effects of classifying a nuisance as continuing or permanent, see §§11.13-11.16, 11.24-11.28, 11.38-11.41.

The measure of damages for temporary trespass or nuisance (*e.g.,* dumping removable debris) is based on the reasonable rental value of the premises occupied. CC §3334; *Lindberg v Linder* (1933) 133 CA 213, 23 P2d 842 (trespass). Civil Code §3334(a) specifies the damages available for wrongful occupation of real property in cases not covered by CC §3335 (willful holding over), the Eminent Domain Law (CCP §§1230.010-1273.050), or CCP §1174 (unlawful detainer). The measure of damages under CC §3334 is based on the reasonable rental value of the premises occupied, not exceeding the 5 years before commencement of the action or proceeding to enforce the right to damages, and the cost, if any, of recovering possession. Section 3334 was amended in 1993 to include damages for the reasonable cost of repair or restoration of the property to its original condition. In addition, CC §3334(b)(1) provides that the value of the use of the property is the greater of the reasonable rental value of the property or the benefits obtained by the trespasser by reason of the trespass. If the wrongful occupation, however, is the result of the wrongful occupier's mistake of fact, the value of the property's use is its reasonable rental value. CC §3334(b)(2).

For an unusual case involving a permanent trespass in which the court declined to follow the measure of damages under CC §3334, see *Cassinos v Union Oil Co.* (1993) 14 CA4th 1770, 18 CR2d 574.

It is not significant that plaintiff owners or possessors actually never intended to rent the property. *Don v Trojan*

Constr. Co. (1960) 178 CA2d 135, 138, 2 CR 626 (trespass and ejectment). See also *Spaulding v Cameron* (1954) 127 CA2d 698, 274 P2d 177, in which the plaintiffs were allowed recovery of diminution in rental value caused by the nuisance (rocks, mud, and debris washing down from adjacent property) even though they lived on the premises.

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§12.85 b. Lateral Support

The measure of damages in lateral support cases is the lesser of the value of the plaintiff's property before injury or the cost of repairing the injury by removing the debris and otherwise restoring the premises to their original condition. *Sager v O'Connell* (1944) 67 CA2d 27, 31, 153 P2d 569. In *Wharam v Investment Underwriters, Inc.* (1943) 58 CA2d 346, 136 P2d 363, the court upheld damages based solely on the cost of replacing the plaintiff's retaining wall because the appellant failed to object to this measure of damages during the trial but noted that the proper measure of damage would be the cost of replacing the damaged or destroyed structure. 58 CA2d at 350.

If the plaintiff's possessory interest is something less than a full freehold interest, his or her recovery of compensatory damages is limited to his or her proportionate interest. *Razzano v Kent* (1947) 78 CA2d 254, 177 P2d 612.

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§12.86 c. Lost Profits; Discomfort; Mental Distress

The trespasser may be liable for any actual injury to the land (*Smpardos v Piombo Constr. Co.* (1952) 111 CA2d 415, 244 P2d 435) including the cost of removing dumped dirt, rocks, and debris (see *Connor v Grosso* (1953) 41 C2d 229, 259 P2d 435), loss of prospective profits (*Razzano v Kent* (1947) 78 CA2d 254, 177 P2d 612), and the cost of replacing damaged personal property (*McCormick v Appleton* (1964) 225 CA2d 591, 37 CR 544).

Damages may also be recovered by a resident property owner for personal discomfort and annoyance. See *Acadia, Cal., Ltd. v Herbert* (1960) 54 C2d 328, 337, 5 CR 686; *Herzog v Grosso* (1953) 41 C2d 219, 259 P2d 429; *Kelly v CB&I Constructors, Inc.* (2009) 179 CA4th 442, 459, 102 CR3d 32; *Sturges v Charles L. Harney, Inc.* (1958) 165 CA2d 306, 331 P2d 1072 (action for nuisance and negligence). See also Restatement (Second) of Torts §929 (1979).

In a private nuisance action for injuries to real property, the plaintiff may recover damages for diminution in market value and damages for annoyance, inconvenience, and discomfort, actual injuries to the land, and costs of minimizing future damages. *City of San Jose v Superior Court* (1974) 12 C3d 447, 115 CR 797 (airport noise and air pollution).

The ability of homeowners to recover emotional distress damages for the negligent destruction of property was restricted and clarified in *Cooper v Superior Court* (1984) 153 CA3d 1008, 200 CR 746, which held that such damages can be recovered when a duty of care exists by virtue of a preexisting relationship between the parties or when the damage arose from an intentional tort. But see *Erlich v Menezes* (1999) 21 C4th 543, 87 CR2d 886 (no recovery for emotional distress based on breach of contract to build house if contractor's negligence caused only economic injury and property damage, and contractor breached no duty independent of contract).

In a recovery action for damage to the plaintiff's property caused by loose dirt, mud, and debris washing down from adjacent property, damages for discomfort, annoyance, and mental distress are recoverable. *Spaulding v Cameron* (1954) 127 CA2d 698, 274 P2d 177. See also *Greater Westchester Homeowners Ass'n* v *City of Los Angeles* (1979) 26 C3d 86, 160 CR 733, recognizing the recovery of personal injury damages for emotional distress (from airport noise) as well as diminution in the fair market value of property.

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§12.87 2. Punitive Damages

A plaintiff can be awarded punitive damages by proving with clear and convincing evidence that the defendant is guilty of express or implied oppression, fraud, or malice. CC §3294(a). However, the plaintiff must first establish entitlement to compensatory damages for the trespass, nuisance, or other tortious activity. *Contractor's Safety Ass'n v California Compensation Ins. Co.* (1957) 48 C2d 71, 307 P2d 626. The rule cannot be satisfied if a jury makes an express verdict not to award compensatory damages. *Cheung v Daley* (1995) 35 CA4th 1673, 42 CR2d 164; *State of California v Altus Finance S.A.* (9th Cir 2008) 540 F3d 992. See also Comment to BAJI 14.72.1; *City of Hope Nat'l Med. Ctr. v Genentech, Inc.* (2008) 43 C4th 375, 75 CR3d 333 (because no fiduciary relationship existed between parties, tort remedies did not apply; court set aside jury award of $200 million in punitive damages). For further discussion on necessity of compensatory damages for award of punitive damages, see §3.55.

The California Supreme Court ruled that the economic loss rule will not bar a claim for punitive damages in a fraud action if the claim for fraud exists independently of the claim for breach of contract. See *Robinson Helicopter Co. v Dana Corp.* (2004) 34 C4th 979, 22 CR3d 352. See also Imre, *Is* Seaman's *Rising from the Ashes? The Ever-Changing Line Between Contract and Tort Remedies*, 27 CEB Civ LR 96 (June 2005); Comment, 28 CEB Real Prop L Rep 24 (Jan. 2005).

Exemplary damages may be awarded for trespass committed with malicious intent. *Haun v Hyman* (1963) 223 CA2d 615, 36 CR 84; *Griffin v Northridge* (1944) 67 CA2d 69, 153 P2d 800. See also *Roberts v Permanente Corp.* (1961) 188 CA2d 526, 10 CR 519. Punitive damages have been upheld in nuisance cases in which there was evidence of willful violation of local grading ordinances. *Sturges v Charles L. Harney, Inc.* (1958) 165 CA2d 306, 331 P2d 1072. Punitive damages were also awarded when there was evidence of intentional interference with repair work on an easement. *Herzog v Grosso* (1953) 41 C2d 219, 259 P2d 429.

Malice is defined as conduct "intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." CC §3294(c)(1). Similarly, oppression means "despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights." CC §3294(c)(2). Like "malice" and "oppression," "despicable" is subject to court interpretation but is undefined in the statute. See, *e.g., Shade Foods, Inc. v Innovative Prods. Sales & Mktg., Inc.* (2000) 78 CA4th 847, 891, 93 CR2d 364; *Mock v Michigan Millers Mut. Ins. Co.* (1992) 4 CA4th 306, 331, 5 CR2d 594 (cited with approval definition of "despicable" in BAJI 14.72.1). Official jury instructions state "despicable conduct is conduct that is so vile, base or contemptible that it would be looked down on and despised by reasonable people." CACI 3940.

In cases of nondeliberate injury, there must be a "conscious disregard of safety," not just reckless conduct, to justify punitive damages. *G. D. Searle & Co. v Superior Court* (1975) 49 CA3d 22, 122 CR 218.

In California, punitive damages can be imposed on a corporation only in limited circumstances. See CC §3294(b); *White v Ultramar, Inc.* (1999) 21 C4th 563, 88 CR2d 19; *College Hosp., Inc. v Superior Court (Crowell)* (1994) 8 C4th 704, 34 CR2d 898. In evaluating a large corporation's liability for punitive damages arising from the actions of a manager, the court may evaluate whether the offending manger had "broad authority" over corporate policy, affecting many employees, so that the manger's actions were likely to come to the attention of corporate leadership. *Roby v McKesson Corp.* (2009) 47 C4th 686, 715, 101 CR3d 773. See CACI 3945 for jury instructions that apply to an entity defendant.

Under California law, appellate courts review the amount of a trial court's award (or a jury's verdict) of punitive damages in the light of the reprehensibility of the defendant's misconduct, the amount of compensatory damages awarded, and the defendant's financial condition. See *Adams v Murakami* (1991) 54 C3d 105, 109, 284 CR 318; *Neal v Farmers Ins. Exchange* (1978) 21 C3d 910, 148 CR 389. Civil Code §3295(d) allows the court, on the application of any defendant, to preclude evidence of the defendant's profits or financial condition until a verdict is returned for the plaintiff and a finding is made that the defendant is guilty of malice, oppression, or fraud under CC §3294. Civil Code §3295(e) prohibits stating dollar amounts in pleading claims for punitive damages. Although decided in relationship to a

Utah statute regulating punitive damages, the decision in *State Farm Mut. Auto. Ins. Co. v Campbell* (2003) 538 US 408, 155 L Ed 2d 585, 123 S Ct 1513 arguably prohibits a trier of fact in California from considering the defendant's profits or financial condition in calculating the amount of punitive damages, despite the ruling in *Neal v Farmers Ins. Exchange, supra,* which has been the standard for decades. However, California courts of appeal continue to consider the defendant's financial condition as long as the ultimate verdict is not excessive under the constitutional tests established in *State Farm Mut. Auto. Ins. Co. v Campbell, supra*. See, *e.g., Roby*, 47 C4th at 719; *Century Surety Co. v Polisso* (2006) 139 CA4th 922, 967, 43 CR3d 468; *Boeken v Philip Morris, Inc.* (2005) 127 CA4th 1640, 1697, 26 CR3d 638.

An award of punitive damages must ordinarily be upheld if the trial record "contains substantial evidence to support a determination by clear and convincing evidence." *Shade Foods, Inc. v Innovative Prods. Sales & Mktg., Inc., supra*. Constitutional challenges to the amount of (*e.g.,* excessively high) punitive damages, however, require a different standard and are reviewed de novo. *Cooper Indus., Inc. v Leatherman Tool Group, Inc.* (2001) 532 US 424, 149 L Ed 2d 674, 121 S Ct 1678. The amount awarded does not violate federal constitutional due process standards if adequate procedural safeguards exist at the state level. *Sierra Club Found. v Graham* (1999) 72 CA4th 1135, 85 CR2d 726; *Las Palmas Assocs. v Las Palmas Ctr. Assocs.* (1991) 235 CA3d 1220, 1256, 1 CR2d 301.

An appellate court may reverse or reduce an award of punitive damages that is excessive or grossly disproportionate to the actual damages. See *State Farm Mut. Auto. Ins. Co. v Campbell, supra* (when computing punitive damage award, jury may not consider defendant's net worth or its business practices in other states); *BMW of N. Am., Inc. v Gore* (1996) 517 US 559, 134 L Ed 2d 809, 116 S Ct 1589 (award of 500 times value of actual harm held excessive). See also *Exxon Shipping Corp. v Baker* (2008) 554 US__, 171 L Ed 2d 570, 128 S Ct 2605 (remanding with directions to reduce punitive-to-compensatory ratio to 1:1 in maritime case). To satisfy due process, "single-digit multipliers" are more likely to be upheld when reviewing the ratio of punitive damages to compensatory damages. *State Farm Mut. Auto. Ins. Co. v Campbell, supra*.

A California court of appeal applied the *Campbell* single-digit standard in reducing a $5.5 million award to $1 million and similarly ruled that the trier of fact may not consider the defendant's wrongful conduct with persons other than the plaintiff. See *Diamond Woodworks, Inc. v Argonaut Ins. Co.* (2003) 109 CA4th 1020, 135 CR2d 736. Despite *Campbell,* another court of appeal affirmed a jury verdict of $1.7 million (ratio of 340:1 of punitive to compensatory damages) in a fraud action arising from an unsuccessful real property purchase, but the supreme court reversed, concluding that the maximum award constitutionally permissible for that plaintiff, who was awarded only $5000 in economic compensatory damages, was $50,000 in punitive damages. See *Simon v San Paolo U.S. Holding Co.* (2005) 35 C4th 1159, 29 CR3d 379.

After the *Simon* decision, the California Supreme Court ordered a court of appeal that had upheld a 33:1 ratio of punitive to compensatory damages to reconsider its decision in light of *Philip Morris USA v Williams* (2007) 549 US 346, 166 L Ed 2d 940, 127 S Ct 1057 (addressed below). See *Bullock v Philip Morris USA* (2008) 159 CA4th 655, 695, 71 CR3d 775, in which the court of appeal remanded for a new trial on the amount of punitive damages requiring a jury instruction that "punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff." In 2009, the California Supreme Court also used the *Campbell* single-digit standard to reduce a punitive damage award from $15 million awarded by the jury to $1.9 million, which was roughly a 1:1 ratio with the compensatory damages. *Roby v McKesson Corp.* (2009) 47 C4th 686, 101 CR3d 773. The *Roby* case offers a good step-by-step analysis of the factors by which the Court weighs the reprehensibility of conduct, leaving the door open for higher punitive damage ratios where the conduct is exceedingly reprehensible. See also *Amerigraphics, Inc. v Mercury Cas. Co.* (2010) 182 CA4th 1538, 107 CR3d 307 (court reduced punitive damages from $1.7 million to $500,000; jury awarded $130,000 in compensatory damages).

A punitive damages award was upheld in an insurance bad faith case, in which the court cited the defendant's net worth as justification for the proportionately large punitive damages award. See *Century Surety Co. v Polisso* (2006) 139 CA4th 922, 43 CR3d 468. For additional discussion on the effect of the *Campbell* and *Simon* decisions on California review standards, see 27 CEB Civ Litigation Rep 139 (Aug. 2005), 26 CEB Civ Litigation Rep 100 (June 2004), and 25 CEB Civ Litigation Rep 110 (June 2003).

Although punitive damages awards may not be used to punish defendants for harm inflicted on nonparties, such harm can be used to show that the defendant's conduct was reprehensible. In *Philip Morris USA v Williams* (2007) 549 US 346 166 L Ed 2d 940, 127 S Ct 1057, a case brought by a smoker's widow, the Court held that a $79.5 million

punitive damages award amounted to a taking of property from the defendant without due process, because it sought to punish the defendant for injury that it inflicted on nonparties. The Court did not reach issues of reprehensibility, or whether the punitive damages were reasonably related to the plaintiff's harm. See Nelson, *Instructing the Jury on Punitive Damages After* Philip Morris USA v Williams, 29 CEB Civ Litigation Rep 47 (April 2007). See also 29 CEB Civ Litigation Rep 63 (April 2007).

For comprehensive discussion of punitive damages, see California Tort Damages, chap 14 (2d ed Cal CEB 2002).

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§12.88 3. Injunction

An injured landowner can obtain injunctive relief to force an offending party to correct an existing or threatened nuisance or trespass on his property. Equity treats each tract of land as unique and protects a landowner who is threatened with losing property by prescription. See CC §3422; *Union Oil Co. v Domengeaux* (1939) 30 CA2d 266, 86 P2d 127 (subsurface trespass in oil-and-gas producing area held to be within CC §3422(2) because damages difficult to ascertain). Injunctions are granted even before any actual physical damage occurs when the threat of damage exists. See *Rhodes v San Mateo Inv. Co.* (1955) 130 CA2d 116, 278 P2d 447 (nuisance action in which excavation caused slide to creep toward plaintiff's property, which had not yet been damaged).

When the nuisance is not permanent and may be abated, the general rule is that a landowner cannot secure both an injunction requiring the defendant to stabilize the land and damages for a permanent nuisance or trespass based on decrease in market value (see §12.84). This rule avoids double recovery. *Spaulding v Cameron* (1952) 38 C2d 265, 239 P2d 625; *Rhodes v San Mateo Inv. Co., supra.* In *Herzog v Grosso* (1953) 41 C2d 219, 259 P2d 429, prospective damages and injunctive relief were permitted because market value of the property was depressed even after corrective work had been done.

If the offending land condition can be stabilized, the nuisance is not ordinarily considered permanent and the plaintiff's damages are not based on diminution of market value. See §12.84. A defendant who fails to obey an injunction issued to stabilize the soil is liable for future damages. *Rhodes v San Mateo Inv. Co., supra.*

Code of Civil Procedure §731a prohibits an injunction when the activity or operation complained of is permitted by local zoning. See §12.81. There can, however, be a suit for damages. *Roberts v Permanente Corp.* (1961) 188 CA2d 526, 10 CR 519.

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4. Nuisance Remedies

§12.89 a. Abatement by Government

A public nuisance, as defined in CC §§3479-3480 and Pen C §§370-371, may be abated by any public body. CC §3494. The district or city attorney of any county, town, or city, where the nuisance exists may be given authority by the local legislative body to obtain an injunction. CCP §731; Govt C §26528. The State Department of Health Services is vested with virtually all jurisdiction and powers that relate to public health (Health & S C §100150), including the power to maintain actions to enjoin or force abatement of nuisances that are dangerous to health (Health & S C §100170) and to take its own action to abate (Health & S C §100175).

A city may specify what constitutes a nuisance and may provide for summary abatement at the expense of the person who creates, causes, commits, or maintains it and may make the expense a lien against the property as well as a personal obligation of the offending property owner. Govt C §§38771-38773. A county board of supervisors may also establish abatement procedures and apply the cost as a special assessment against the offending parcel. Govt C §25845.

Cities and counties, by ordinance, can authorize courts to order the property owner to pay three times the costs of abating a public nuisance on entry of a subsequent civil or criminal judgment within a 2-year period finding that the property owner has been responsible for a public nuisance. Conditions abated under Health & S C §17980 are exempt. Govt C §§25845.5, 38773.7.

Government Code §25845 provides that a board of supervisors may, by ordinance, delegate to a hearing officer the powers and duties to establish a procedure for abatement of a nuisance, to conduct a hearing, and to assess the abatement costs against the property. The county may also provide for recovery of attorney fees by the prevailing party and may limit the opportunity for recovery to only those actions in which the county elects at the initiation of the action to seek recovery of its own fees. A fee award may not exceed the amount of fees incurred by the county. Govt C §25845(c).

See §12.81 on limits of abatement when an activity is permitted by express statutory authority (*e.g.,* zoning ordinances). For further discussion of public nuisance abatement, see §§11.7-11.8, 11.20.

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§12.90 b. Criminal Proceedings

A person who creates or maintains a public nuisance or who willfully omits to perform a legal duty to remove a public nuisance is guilty of a misdemeanor. Pen C §372. See also CC §§3491-3492. Refusal to abate a public nuisance can result in prosecution for the same offenses more than once and, even if the defendant is convicted, a subsequent prosecution does not constitute double jeopardy. Pen C §373a; *Dapper v Municipal Court* (1969) 276 CA2d 816, 81 CR 340.

A local ordinance may permit a local agency to take affirmative action to eliminate a condition that is a menace to life or limb, endangers public or private property, or affects the safety, usability, or stability of a public right of way. In *People v Greene* (1968) 264 CA2d 774, 776, 70 CR 818, *e.g.*, a misdemeanor conviction for failing to obey such a local ordinance was affirmed.

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§12.91 c. Abatement by Private Person

A private person may sue for injunctive relief for abatement of a public nuisance only if it is specially injurious to him or her, but not otherwise. CC §3493; see §12.88. An action to abate a public nuisance is equitable, and does not include a right to a jury trial. *People v Bhakta* (2008) 162 CA4th 973, 76 CR3d 421. Anyone may also use self-help and abate a public nuisance specially injurious to him or her by removing or, if necessary, destroying the nuisance, as long as he or she does not commit a breach of the peace or cause unnecessary injury. CC §3495. Self-help is ordinarily not advisable except in clear emergency situations because of the possible liability to the owner whose land is entered.

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13

Lis Pendens

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I. INTRODUCTION

§13.1 A. Overview of Procedure; Scope of Chapter

A party to an action that asserts a real property claim may record a "notice of pendency of action" (often referred to as a "lis pendens") with the recorder in each county in which all or part of the real property is located. See CCP §405.20; *Hunting World, Inc. v Superior Court* (1994) 22 CA4th 67, 26 CR2d 923. Lis pendens is a provisional remedy that is narrowly applied. *BGJ Assocs.*, *LLC v Superior Court* (1999) 75 CA4th 952, 967, 89 CR2d 693.

Throughout this chapter, "lis pendens," "notice of pendency of action," and the shorthand "notice" are used interchangeably. The Latin term "lis pendens," with roots in the common law tradition, means that an action has been commenced and is pending. *Malcolm v Superior Court* (1981) 29 C3d 518, 174 CR 694. Although the term does not appear in the current version of the notice statutes (CCP §§405-405.61), the legislature continues to recognize "lis pendens" as a legal term, having used it in amending CC §47(b)(4). See §13.5.

The nature and effect of a lis pendens and when notice is authorized are discussed in §§13.8-13.16 and 13.17-13.22, respectively. For a checklist on preparing, mailing, and filing the notice, see §13.23. On drafting, serving, and recording and filing a notice of pendency of action, see §§13.24-13.33 (drafting), 13.34-13.35 (service), and 13.36-13.40 (recording and filing). For discussion of the motion to require claimant's undertaking as a condition to maintaining the notice (CCP §405.34), see §§13.41-13.43.

Because the notice is a potent prejudgment method of rendering property unmarketable, this chapter discusses the procedure available to a property owner for removing ("expunging") a notice while litigation is still pending. Tactical and procedural considerations are discussed in §§13.44-13.55, grounds in §§13.56-13.91, the order in §§13.92-13.95, and expungement conditioned on the owner's furnishing of an undertaking in §§13.96-13.105. Remedies on denial of the expungement motion or the motion for an undertaking are set forth in §§13.106-13.107. Termination of a lis pendens is discussed in §§13.108-13.115. Forms for lis pendens practice are in §§13.116-13.120.

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§13.2 B. History of Current Statutes

At common law, the interest of a purchaser or an encumbrancer of real property was acquired subject to the outcome of any pending litigation affecting title to the property even if the purchaser or encumbrancer had no notice of the litigation. *Richardson v White* (1861) 18 C 102, 106. This harsh rule had the effect, however, of creating a hardship for purchasers or encumbrancers who failed to discover a pending action despite a reasonable search. See *Sampson v Ohleyer* (1863) 22 C 200, 210; Comment, *Abuses of the California Lis Pendens*: *An Appeal for Legislative Remedy*, 39 S Cal L Rev 108 (1966).

In 1851, California adopted a statutory lis pendens procedure. See Stats 1851, ch 5, Code of Practice §27. The legislature sought to alleviate hardships that arose under the common law doctrine by providing that a plaintiff could record a lis pendens with the recorder of the county in which the property was located, and that a purchaser or an encumbrancer would then be charged with constructive notice of the action from the time of recording (see §13.8). See *Sampson v Ohleyer, supra; Allied E. Fin. v Goheen Enters.* (1968) 265 CA2d 131, 71 CR 126. In 1968, the legislature amended California's lis pendens statutes by establishing a procedure under which a property owner could remove ("expunge") a lis pendens under certain circumstances. See Stats 1968, ch 815. Later amendments were added by Stats 1976, ch 27.

In 1992, as a result of the efforts of a special committee of the Real Property Section of the California State Bar, the legislature enacted comprehensive revisions to the lis pendens statutes. See Stats 1992, ch 883, which repealed the older version and added CCP §§405-405.61. The committee wrote interpretive comments to the proposed statutes, which are preserved in the Assembly Journal as an expression of the legislature's intent in enacting §§405-405.61. They are cited throughout the text as "Comment to CCP §____."

CAUTION: Because many of the cases cited in this chapter rely on the former versions, discussion of the former versions may be necessary to understand the current provisions.

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§13.3 C. Constitutionality of Statutes

Legal commentators suggested that the former lis pendens statutes (former CCP §§409-409.9) may have unconstitutionally deprived a property owner of due process rights. Although the 1992 statutes (CCP §§405-405.61) may have cured that constitutional infirmity, other constitutional arguments may exist. Some commentators suggested that the former California lis pendens statutes may have been unconstitutional, but no reported California case reached that conclusion. See Comment, *Does California's Statutory Lis Pendens Violate Procedural Due Process?* 6 Pac LJ 62 (1975). See also Howard, Borenstein & Ceran, *Lis Pendens*: *A Provisional Remedy*, 6 LA Law 11, 27 (Mar. 1983). In fact, the only reported California case to consider the issue upheld the constitutionality of California's former lis pendens statutes. See *Empfield v Superior Court* (1973) 33 CA3d 105, 108 CR 375.

A due process analysis of the current lis pendens statute requires that a property owner who is deprived of a significant property interest be afforded either a predeprivation hearing on the merits of the claim or a prompt postdeprivation hearing. The rule that the merits of the underlying action could not be considered in a pretrial expungement motion, based on the court's holding in *Malcolm v Superior Court* (1981) 29 C3d 518, 174 CR 694, was thought to be the most serious due process weakness in the former statutory scheme. See *After* Malcolm v Superior Court *and* Peery v Superior Court: *A Due Process Analysis of California Lis Pendens*, 70 Cal L Rev 909 (1982).

The current statutory scheme attempts to remedy this potential defect by giving property owners the right to a hearing on the merits of the underlying claim after the lis pendens has been recorded; the lis pendens must be expunged unless the claimant can establish the probable validity of the real property claim by a preponderance of the evidence. CCP §405.32. See Comment to CCP §405.32; and see §13.87. Expungement motions follow the usual pretrial motion and hearing procedure schedule, unless the court orders that time shortened (see §13.52). If expungement is ordered, the order is not effective for an additional 20 days (CCP §405.39; see §13.94), and the plaintiff can seek review of the expungement order and further delay its effectiveness (see §13.106). Thus, if a property owner is under time pressure to sell or encumber the property, even these expungement procedures are arguably inadequate.

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D. Deciding Whether to Record Notice

§13.4 1. Advantages

A plaintiff (claimant) in an action that asserts a "real property claim" obtains substantial tactical advantages by recording a lis pendens. Because it gives constructive notice that an action involving the real property claim is pending (CCP §405.24; see §§13.8-13.16), a lis pendens prevents anyone who subsequently acquires an interest in the property from being a bona fide purchaser or encumbrancer (*i.e.,* a person who "in good faith and for a valuable consideration acquires a title or lien by an instrument that is first duly recorded" (CC §1107)). A lis pendens enables the claimant to retain the priority of his or her real property claim over other interests in the property that are acquired while the action is pending. Otherwise, third parties without actual or constructive notice who take interests in the affected property while an action is pending would not be bound by a judgment entered in the action. See *Page v W. W. Chase Co.* (1904) 145 C 578, 79 P 278; *Kendall-Brief Co. v Superior Court* (1976) 60 CA3d 462, 131 CR 515.

A lis pendens filed in an action by a buyer for specific performance, however, does not impart notice to subsequent transferees or lienholders of a potential attorney fee award, and if the buyer succeeds on the action, any fee award the buyer obtains in the judgment may not be deducted from the purchase price as an offset. *Behniwal v Mix* (2007) 147 CA4th 621, 54 CR3d 427. See §§5.21, 5.30, 5.45.

A lis pendens affords a claimant a good deal of leverage to force an expeditious and advantageous resolution of the litigation, or even total capitulation, if:

- The owner cannot await the outcome of possible motions for expungement (*e.g.,* a sale or loan closing is imminent, permit deadlines are about to expire, or a delayed transfer will have adverse tax consequences);
- The owner cannot obtain expungement (*e.g.,* because the claimant's claim has "probable validity" (see CCP §405.32; and see §§13.45, 13.85)); or
- The claimant can afford to meet a bonding requirement imposed by the court (see CCP §405.34; and see §§13.41-13.43).

PRACTICE TIP: Because a pending court action involving a real property claim is necessary to support recordation of a lis pendens (see §§13.17-13.22), plaintiff's counsel must protect plaintiff's right, if any, to invoke arbitration under a contractual provision. If a party to an agreement with either a mandatory or voluntary arbitration clause wants to obtain the benefit of recording a lis pendens and also arbitrate the claim, it must file along with the complaint an application to stay the action pending the arbitration. See CCP §1298.5, discussed in chap 14. See also *Manhattan Loft, LLC v Mercury Liquors, Inc.* (2009) 173 CA4th 1040, 93 CR3d 457.

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§13.5 2. Disadvantages and Liabilities

When considering whether to record a notice of pendency of action, the plaintiff (claimant) and the plaintiff's attorney must weigh the advantages offered by a lis pendens (see §13.4) against the following risks:

Risk of expungement. A properly recorded lis pendens ensures constructive notice to the world of the real property claim. Without an expungement, a purchaser or an encumbrancer with actual or constructive knowledge of the pending litigation could not be a bona fide purchaser or encumbrancer. See §13.8. If the court were to conclude, however, that the notice should be expunged, the claimant might be worse off than if no notice had been recorded. After a lis pendens is expunged or withdrawn, no one but a named party to the action is considered to have knowledge of the action or any of the matters contained, claimed, or alleged in the action, regardless of whether he or she has actual knowledge of the action (CCP §405.61; see §13.15), and neither the notice nor any information derived from it constitutes constructive notice (CCP §405.60). See §§13.94, 13.114. If a claimant does *not* record a lis pendens, there is no recorded notice to be expunged and therefore no means available to the owner for negating any actual notice after it is given or acquired.

PRACTICE TIP: A potential claimant should consider the alternative of giving actual notice of the claim to specific potential purchasers or encumbrancers, if known, rather than recording a lis pendens. Because actual notice to specified persons does not constitute actual notice to others or constructive notice to anyone, however, this is not a viable alternative to recording a notice, unless there is virtually no risk of an unknown person acquiring an interest. Therefore, the attorney must document a full explanation to the client of the risks inherent in failing to record a notice. Also consider the alternative procedure in §13.6A.

WARNING: Unlike the recording of a lis pendens, the giving of actual notice is not privileged under CC §47. The publication of actual notice may therefore provoke an independent action for slander of title. See "Risk of liability for slander of title," below.

Risk of exposing weaknesses in claimant's case. In opposing a motion to expunge brought under CCP §405.32, the claimant has the burden of demonstrating that the claim has "probable validity." See §13.89. Thus, the weaknesses in the claimant's case may be exposed prematurely (*i.e.,* before the case can be developed through discovery or a factual investigation) if the claimant is required to oppose a motion to expunge that tests the merits of the claim.

Risk of liability for owner's attorney fees and costs. If a lis pendens is recorded, the claimant risks liability for the owner's attorney fees and costs on a motion to expunge. CCP §405.38. See §13.55. Under §405.38, the court is required to order that the prevailing party on a motion to expunge a lis pendens be awarded costs and attorney fees, unless the court finds that the other party acted with substantial justification or that other circumstances make an award unjust. See also ethical considerations in §13.7.

Potential liability for undertaking. On an appropriate motion (CCP §405.34; see §13.41), the court may require the claimant to file an undertaking as a condition of allowing the lis pendens to remain in effect. If the potential claimant has limited funds, recording a lis pendens may not be advisable, especially if the claimant's case is marginal, if the owner has greater resources, or if the notice may have a detrimental impact on the property's value. If the claimant cannot post the required undertaking and the notice is thus expunged, the claimant's legal position in the lawsuit might be impaired. See *Earp v Nobmann* (1981) 122 CA3d 270, 175 CR 767, disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 212, 266 CR 638. Even if the lis pendens is expunged, and the court requires an undertaking of the owner as a condition to expungement under CCP §405.33 (see §13.96), the premium cost of the undertaking may be taxed against the nonprevailing party at the end of the litigation. See CCP §§995.210, 995.250, 1033.5(a)(6).

Risk that recording lis pendens will be considered "action" for purposes of "one-action" rule. A lis pendens recorded by the creditor/beneficiary of a note and deed of trust against property other than the property securing the note (but to satisfy the debt secured by the deed of trust) might be considered an "action or proceeding" for the recovery of the debt or enforcement of any right secured by the deed of trust. The simple bringing of an action by the beneficiary seeking a personal money judgment against the borrower will not ordinarily raise the bar of the one-action rule of CCP §726 if the case has not proceeded to judgment. If the beneficiary records a lis pendens against other property, however, that act might be held to constitute an "action or proceeding" under §726 if the court considers the lis pendens to be a provisional remedy asserting dominion over the property rather than simply constructive notice of an action. See *Shin v Superior Court* (1994) 26 CA4th 542, 552, 31 CR2d 587 (prejudgment attachment triggered §726

defense), discussed in California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 4 (4th ed Cal CEB 2009).

Effect of lis pendens on owner's damages. Courts may consider the effect of a lis pendens on the value of the property when assessing damages for breach of contract in the underlying action. If a defendant seller who prevailed in the action can establish that he or she had diligently attempted to resell the property but that the lis pendens rendered the property unmarketable, the seller may be entitled to consequential damages by way of a cross-complaint or an independent action for damages. See *Askari v R & R Land Co.* (1986) 179 CA3d 1101, 225 CR 285.

Risk of liability for slander of title. A lis pendens is not absolutely privileged as a publication made in the course of judicial proceedings, unless (1) the notice identifies an action previously filed in a court of competent jurisdiction, and (2) the action affects title to or possession of real property. See CC §47(b)(4). Therefore, if the complaint does not allege a real property claim, the lis pendens is not "privileged" under CC §47 and is not only subject to expungement under CCP §405.31, but may also be the basis of a subsequent action for slander of title. See, *e.g., Palmer v Zaklama* (2003) 109 CA4th 1367, 1 CR3d 116. See also *Park 100 Inv. Group II v Ryan* (2009) 180 CA4th 795, 812, 103 CR3d 218 (rejecting slander of title theory regarding recordation of lis pendens by owner of servient estate against dominant estate in prior action to quiet title and eliminate prescriptive easement). On slander of title actions, see chap 9.

Risk of liability under deed of trust. A lis pendens (arising from a prior court action to cancel a deed of trust) that has not been withdrawn or expunged extends the time period for enforcing the power of sale in the deed of trust under CC §882.020. *Slintak v Buckeye Retirement Co.* (2006) 139 CA4th 575, 43 CR3d 131.

Effect of lis pendens on damages based on malicious prosecution. Recording a lis pendens could also be a basis for an owner's establishing increased damages if the owner prevails on the underlying action and later brings an action for malicious prosecution. If completion of a sale or an encumbrance is prevented by the lis pendens, the property owner could presumably establish resulting damages, such as lost anticipated profits and increased holding costs. See *Palmer v Zaklama, supra; Sheldon Appel Co. v Albert & Oliker* (1989) 47 C3d 863, 254 CR 336; *Askari v R & R Land Co., supra*. But see *Park 100 Inv. Group II v Ryan* (2009) 180 CA4th 795, 812, 103 CR3d 218 (servient owner's recordation of lis pendens against dominant estate in quiet title action to eliminate easement was not actionable in tort as intentional interference with prospective economic advantage).

PRACTICE TIP: A lis pendens, however, cannot be the basis for an abuse of process action, because recording a lis pendens does not constitute "process." *Palmer v Zaklama, supra; Woodcourt II Ltd. v McDonald Co.* (1981) 119 CA3d 245, 251, 173 CR 836.

Violation of automatic stay in bankruptcy. A lis pendens recorded after the automatic stay in bankruptcy goes into effect is void because it violates the stay. A postpetition recordation of the notice not only violates the stay, but it can also result in the bankruptcy court's imposing a sanction against a party recording the notice and against his or her attorney for willful violation of the stay. *Barnett v Edwards (In re Edwards)* (BAP 9th Cir 1997) 214 BR 613.

Liability for civil penalty if recorded with intent to harass public officer or employee. Any lien or encumbrance claimant who records or files, or directs another to record or file, a lien or other encumbrance including a lis pendens in violation of Govt C §6223 (prohibiting harassing lawsuit, lien, or encumbrance against public officer or employee) is liable to the property owner for a civil penalty of a specified sum. See CCP §765.040.

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3. Other Provisional Remedies

§13.6 a. Used in Addition to Lis Pendens

The lis pendens procedure is not a claimant's exclusive provisional remedy. It does not legally prevent the owner from conveying the property, although that may be the practical effect. See §13.11. It also does not prevent the owner from encumbering the property during the litigation. See, *e.g.*, *Behniwal v Mix* (2007) 147 CA4th 621, 54 CR3d 427 (lis pendens filed in action by buyer for specific performance does not impart notice to subsequent lienholders of potential attorney fee award to buyer), cited in §§5.21, 5.30, 5.45.

Under CCP §405.8, a party is not precluded from seeking an attachment, preliminary injunction, or other relief in connection with a pending real property claim even after the expungement of a lis pendens. On other provisional remedies, see CCP §§481.010-493.060 (attachment), 525-534 (injunctive relief); California Civil Procedure Before Trial, chaps 32-33 (4th ed Cal CEB 2004).

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§13.6A b. Used Alternatively to Lis Pendens

Because of the unsettled state of the law on whether certain causes of action qualify as a real property claim under CCP §405.4 (see §§13.17-13.22, 13.58-13.78), the recordation of a lis pendens can be very risky (see §13.5). In those situations, requesting relief in the form of a temporary restraining order and preliminary injunction under CCP §§525-534 at the beginning of the action is the safer alternative, particularly when the equities of the case favor the plaintiff. The chief disadvantage is that the plaintiff must always post an undertaking when the court grants a preliminary injunction. See CCP §529. The advantages of early injunctive relief are the following:

- The court orders the relief after a full law and motion hearing in which the plaintiff is the moving party, in contrast to a lis pendens expungement motion in which the plaintiff is in a defensive posture; and
- An injunction is not vulnerable to a later expungement motion, but under CCP §533, the issuing court may review the continuing need or the merits of the preliminary injunction before trial of the underlying action.

PRACTICE TIP: Code of Civil Procedure §405.20 does not authorize a party who has a pending action in another state court to record a lis pendens in a California county recorder's office. *The Formula, Inc. v Superior Court* (2008) 168 CA4th 1455, 86 CR3d 341. An out-of-state preliminary injunction is a poor substitute for a properly recorded notice of pending action. If avoiding a bona fide purchaser is key, or if the obtaining injunctive relief to purchase the property itself, rather than its value, is the goal, then the action should be filed in California.

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§13.7 4. Ethical Considerations

The attorney for a claimant who is considering recording a lis pendens must be alert to his or her ethical obligations. The same rules of professional conduct that govern an attorney's conduct in commencing and prosecuting actions generally apply to lis pendens proceedings. Attorneys must avoid vexatious or harassing conduct. Cal Rules of Prof Cond 3-200(A). The substantial leverage afforded by lis pendens procedures and the potential for their abuse require that an attorney carefully consider whether legally justifiable grounds exist for recording a notice of pendency of action. An attorney may not accept employment to present a claim or defense that is not warranted under existing law or supported by a good faith argument that the law should be extended or altered. Cal Rules of Prof Cond 3-200(B).

Although a creative attorney, tempted by the potential leverage afforded by a lis pendens, may be able to allege a cause of action that arguably states a real property claim, it is probably unethical for an attorney to record a lis pendens knowing that the action does not state a real property claim or is without merit. Moreover, recording a lis pendens frivolously or in bad faith could subject an attorney to sanctions under CCP §§128.6-128.7 or Fed R Civ P 11. Failure to pursue with diligence an action in which a lis pendens has been recorded could be grounds for discipline under Cal Rules of Prof Cond 3-110(B).

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II. NATURE AND EFFECT OF LIS PENDENS

A. Constructive Notice of Pending Action

§13.8 1. Notice Binds Subsequent Purchasers and Encumbrancers

The purpose of the lis pendens statute is to enable a litigant, by recording a lis pendens, to give *constructive notice* of the action to anyone who subsequently acquires an interest in the property, regardless of whether that person has actual knowledge of the action. See CCP §405.24; *Bishop Creek Lodge v Scira* (1996) 46 CA4th 1721, 1733, 54 CR2d 745. The effect of a properly recorded lis pendens is that subsequent interests will take the property subject to any judgment entered in the action (*Knapp Dev. & Design v Pal-Mal Props.* (1987) 195 CA3d 786, 240 CR 920), and the lis pendens claimant's rights and interests in the property, as ultimately adjudicated in the action, relate back to the date on which the lis pendens was recorded (CCP §405.24). Because of the protection and potentially powerful leverage it affords, a notice of pendency of action is essential to certain remedies affecting real property. See, *e.g.,* §§1.43, 2.18, 5.33, 6.28, 7.26, 8.53, 9.9, 10.21, 13.17-13.22.

A purchaser or an encumbrancer of real property who has *actual knowledge* of a pending action affecting title to or possession of the property takes whatever interest he or she acquires subject to any judgment that may be entered in the action regardless of whether a lis pendens has been recorded. CCP §1908(a)(2); *Albertson v Raboff* (1956) 46 C2d 375, 379, 295 P2d 405. But see CCP §405.61 (discussed in §13.15).

Once recorded, a lis pendens imparts constructive notice not only of its contents but also of all facts concerning the action that could be discovered by reasonable inquiry. *Albertson v Raboff, supra; Milton E. Giles & Co. v Bank of America* (1941) 47 CA2d 315, 324, 117 P2d 943; *In re The Brickyard* (9th Cir 1984) 735 F2d 1154 (applying California law). Moreover, a lis pendens constitutes constructive notice of what may be established by the judgment and is effective with respect to what is established. *Ahmanson Bank & Trust Co. v Tepper* (1969) 269 CA2d 333, 342, 74 CR 774.

PRACTICE TIP: There is no penalty under the statutes for "over-noticing" a properly recorded lis pendens. Thus, if it is unclear whether a third party might have an interest in the property, counsel should serve the third party with a copy of the notice under CCP §405.22.

A purchaser or an encumbrancer is considered to have constructive notice of the action only from the date on which the notice is recorded and indexed and only of the pendency of the action against parties designated in the notice. CCP §405.24. See *Dyer v Martinez* (2007) 147 CA4th 1240, 54 CR3d 907 (bona fide purchaser who closed escrow 4 days after lis pendens recorded but 1 day before indexed did not have constructive notice). On the duration of the lis pendens, see §13.14. On the effect of the lis pendens on prior purchasers, see §§13.12-13.13.

A person who acquires property subject to a lis pendens is not a necessary party to the pending action, but one purpose of the notice is to advise a purchaser or an encumbrancer of the option to become a party. *Hibernia Sav. & Loan Soc'y v Cochran* (1904) 141 C 653, 75 P 315. Whether the purchaser or encumbrancer simply permits the action to proceed in the grantor's name or appears in the action, he or she will be bound by the judgment. *Hibernia Sav. & Loan Soc'y v Cochran, supra*.

PRACTICE TIP: If the plaintiff becomes aware of a subsequent purchaser, counsel should consider joining the purchaser to the pending action to avoid multiple actions on the property.

A recorded lis pendens gives constructive notice of the pending action to a "purchaser, encumbrancer, or other transferee" of the real property. See CCP §405.24. It is unclear whether this language was intended merely to adopt existing law concerning the scope of constructive notice given by a lis pendens or to broaden it. Courts have held "purchaser or encumbrancer" to include one acquiring a homestead interest in property (*Roach v Riverside Water Co.* (1887) 74 C 263, 15 P 776), a person claiming an interest under a lease (*Drinkhouse v Spring Valley Water Works* (1890) 87 C 253, 25 P 420), a purchaser at an execution sale (*Koch v Wilcoxen* (1916) 30 CA 517, 158 P 1048), and a purchaser at a foreclosure sale (*Randall v Duff* (1889) 79 C 115, 21 P 610). In some instances, persons with prior unperfected rights in the property are not treated as purchasers and thus are not bound by the judgment. See §13.12.

The rule of constructive notice of an action from the time a lis pendens is recorded is applied strictly. Purchasers can be bound by the judgment even though they acquired the property one day after the lis pendens is recorded without

actual knowledge of the lis pendens because the title company failed to report it. *Stagen v Stewart-West Coast Title Co.* (1983) 149 CA3d 114, 196 CR 732.

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§13.9 a. Recording Date of Notice Establishes Priority

A judgment favorable to a party who recorded a lis pendens relates back to and receives priority from the date on which the notice was recorded and is senior to any interest in the property acquired after that date (subject to a few exceptions, such as a declaration of homestead; see §§13.8, 13.10). CCP §405.24; CC §1213; *Moore v Schneider* (1925) 196 C 380, 394, 238 P 81; *Stagen v Stewart-West Coast Title Co.* (1983) 149 CA3d 114, 196 CR 732; *D-K Inv. Corp. v Sutter* (1971) 19 CA3d 537, 546, 96 CR 830.

WARNING: The indexing practices of the county recorder's office are essential to the success of the recordation. See *Dyer v Martinez* (2007) 147 CA4th 1240, 54 CR3d 907 (bona fide purchaser who closed escrow 4 days after lis pendens recorded but 1 day before indexed did not have constructive notice).

Because the judgment relates back to the date on which the notice was recorded, the notice has priority over an interest or encumbrance that was acquired after the effective date of the lis pendens even if that interest was recorded before the judgment was entered. *Dobbins v Economic Gas Co.* (1920) 182 C 616, 189 P 1073; *Ahmanson Bank & Trust Co. v Tepper* (1969) 269 CA2d 333, 74 CR 774. Thus, the lis pendens statutes create an exception to the usual rule that a judgment is subject to a prior unrecorded conveyance. *Whitney v Sherman* (1918) 178 C 435, 173 P 931; *Bank of Ukiah v Petaluma Sav. Bank* (1893) 100 C 590, 35 P 170; *Holman v Toten* (1942) 54 CA2d 309, 128 P2d 808. On unrecorded interests acquired before recordation of the lis pendens, see §13.12.

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§13.10 b. Notice Does Not Create Priority Otherwise Lacking

A lis pendens preserves whatever priority the recording party has by giving constructive notice of the claim (see §13.8), but it does not create a priority that is otherwise lacking. For example, a notice will not give priority to a judgment that is entered after recordation of a declaration of homestead (CCP §§704.910-704.995), even if the homestead declaration was recorded after the lis pendens was recorded. Only a final judgment obtained before recordation of the declaration, by recordation of an abstract or certified copy of the judgment, can defeat a homestead (CCP §704.950), and recording a lis pendens does not change that result (*Putnam Sand & Gravel Co. v Albers* (1971) 14 CA3d 722, 92 CR 636).

The fact that a purchaser or an encumbrancer is charged with constructive notice as of the date on which the notice is recorded does not in every instance establish the relative priorities of the parties' respective interests in the property.

EXAMPLE: A purchaser at a foreclosure sale under a preexisting deed of trust usually has priority over a claimant who filed an action against the trustor and recorded a lis pendens before the sale but after the recordation of the deed of trust. See, *e.g., Hohn v Riverside County Flood Control & Water Conserv. Dist.* (1964) 228 CA2d 605, 39 CR 647; California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 2-3 (4th ed Cal CEB 2009). The priority result may be different if the claimant recording the lis pendens is the trustor seeking to enjoin or set aside the foreclosure sale. See Mortgage Deed of Trust Foreclosure, chap 7.

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§13.11 c. Notice Does Not Prohibit Subsequent Conveyances

A lis pendens does not, by itself, legally prevent a subsequent conveyance of an interest in the affected property; it merely provides constructive notice of the pending litigation and thus prevents a subsequent purchaser or encumbrancer from being a bona fide purchaser. See *Stagen v Stewart-West Coast Title Co.* (1983) 149 CA3d 114, 196 CR 732. See also Warning about indexing practices of recording office in §13.9. To be sure of precluding a transfer of the property while the action is pending, the claimant may use other provisional remedies, such as injunctive relief. See §13.6. Despite the lis pendens, a prospective purchaser or encumbrancer may nevertheless decide to complete the transaction, taking an interest in the property subject to the lis pendens. For example, if the real property claim could be satisfied monetarily, the subsequent purchaser or encumbrancer could complete the transaction and:

- Provide for a holdback or segregation of proceeds to cover the claim if the claimant were to prevail as a condition of closing;
- In rare instances, convince a title company to issue a clean policy of title insurance (necessary for, *e.g.,* loans or resales);
- Obtain indemnity from the seller before closing; or
- Simply take the risk of an adverse ruling.

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2. Effect on Prior Purchasers and Encumbrancers

§13.12 a. Recorded and Unrecorded Prior Interests

A purchaser or an encumbrancer for value who records the acquired interest is unaffected by the later recording of a lis pendens and subsequent judgment. *Lee v Silva* (1925) 197 C 364, 240 P 1015. Conversely, if a claimant records a lis pendens without knowledge of a prior unrecorded interest, the judgment will take priority over the prior but unknown and unrecorded interest. CC §1214; *Moore v Schneider* (1925) 196 C 380, 390, 238 P 81; *Evarts v Jones* (1954) 127 CA2d 623, 625, 274 P2d 185; *Taylor v Chapman* (1936) 17 CA2d 31, 33, 61 P2d 476.

Less clear is the effect of a judgment obtained by a claimant who had knowledge of a prior unrecorded interest at the time the lis pendens was recorded. The general rule is that a grantee who receives title with knowledge of a prior unrecorded deed takes his or her interest subject to the prior estate. CC §§1217, 3395; *Ocean Shore R.R. v Spring Valley Water Co.* (1933) 218 C 86, 21 P2d 588; *Noble v Blanchard* (1932) 120 CA 664, 8 P2d 523. If the wording of CC §1214 were given a strict interpretation, however, a court might hold that the second grantee could change this result and prevail over the known prior interest simply by filing a quiet title action and recording a lis pendens. Two courts indicated in dicta that the judgment in such a case would terminate an unrecorded interest known to the plaintiff, but in each case the issue was left undecided. See *Moore v Schneider* (1925) 196 C 380, 238 P 81; *Evarts v Jones* (1954) 127 CA2d 623, 274 P2d 185. Two other cases, however, suggest that a known, prior, unrecorded interest should prevail over the interest supported by the lis pendens. See *Taylor v Chapman* (1936) 17 CA2d 31, 61 P2d 476; *Torrez v Gough* (1955) 137 CA2d 62, 71, 289 P2d 840.

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§13.13 b. Priority Over Unrecorded Executory Contract of Sale

If a lis pendens is recorded by a third party claimant in litigation affecting real property after the owner has signed an executory, unrecorded contract of sale, the prospective purchaser does not take priority of title over a judgment that is subsequently entered in the litigation. Under CC §1214, a conveyance of real property is void, as against any judgment affecting title, unless the conveyance was properly recorded before a lis pendens was recorded. An executory contract of sale arguably falls within the definition of "conveyance" in CC §1215. Thus, persons who acquire an interest in real property before an action affecting title to the property is filed, but who do not record the conveyance before a lis pendens is recorded, take their interest subject to a subsequent judgment affecting title that is covered by the lis pendens. If the executory sale is consummated, regardless of whether the contract was recorded, and the purchasers record the deed before an action affecting title is filed (and a lis pendens recorded), they are protected against any subsequent adverse judgment under CC §§1213-1220. For discussion of the seller's duty to disclose the existence of a pending action to the buyer, see §13.16.

A purchaser under a contract of sale that was recorded before an action affecting title is filed against the purchaser's seller (the owner of "legal" title), and thus before a lis pendens is recorded, is protected as long as the purchaser fully performs the contract, even if actual conveyance of title under the contract does not occur until after the lis pendens is recorded. See CC §1215; *Lee v Silva* (1925) 197 C 364, 373, 240 P 1015. There is authority, however, for the proposition that, to be protected against a grantee under a prior unrecorded deed, a purchaser under an executory contract must be without actual or constructive notice "prior to and down to" the time of payment of the purchase money. *Lindley v Blumberg* (1907) 7 CA 140, 147, 93 P 894. See *Kenniff v Caulfield* (1903) 140 C 34, 45, 73 P 803; *Ocean Shore R.R. v Spring Valley Water Co.* (1927) 87 CA 188, 192, 262 P 53; *Pond v Goldstein* (9th Cir 1930) 41 F2d 76, 78.

There is also persuasive authority, however, for the proposition that the priority of one who records an executory contract of sale before a lis pendens is recorded is protected, even if he or she does not pay the full purchase price until later and has actual knowledge of the litigation. The bona fide purchaser test applies only to protect subsequent purchasers or encumbrancers. See, *e.g., Plew v Colorado Lumber Prods.* (Colo Ct App 1970) 481 P2d 127, 130; *Mays v Miller* (Ark 1968) 431 SW2d 750; *Petring v Kuhs* (Mo 1943) 171 SW2d 635; *Dalander v Howell* (Colo Ct App 1912) 124 P 744. Arguably, to require an innocent purchaser to remain at risk of acquiring notice of a claim of prior title until full payment is tendered would subvert the purpose of the recording statutes, *i.e.,* to protect those who honestly believe that they are acquiring good title and invest a sum of money in reliance on that belief. *Horton v Kyburz* (1959) 53 C2d 59, 66, 346 P2d 399, quoting *Beach v Faust* (1935) 2 C2d 290, 292, 40 P2d 822. See 12 Witkin, Summary of California Law, Real Property §333 (10th ed 2005).

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§13.14 B. Duration of Lis Pendens

Unless expunged (see §§13.44-13.105), withdrawn, or terminated (see §§13.108-13.115), a recorded lis pendens is incidental to the action and is effective to give constructive notice from the date on which it is recorded until final decision on appeal, passage of the time for appeal, or satisfaction of judgment. See §13.108. Thus, a lis pendens may be recorded late in the action, and may be effective to give constructive notice to subsequently acquired interests, after judgment has been entered but before it becomes final. CCP §§405.24, 1049; *Kartheiser v Superior Court* (1959) 174 CA2d 617, 619, 345 P2d 135. On effect when judgment becomes final, see §13.110. A lis pendens (arising from a prior action to cancel a deed of trust) that has not been expunged, withdrawn, or terminated extends the time period under CC §882.020 for enforcing the power of sale in the deed of trust. *Slintak v Buckeye Retirement Co.* (2006) 139 CA4th 575, 43 CR3d 131.

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§13.15 C. Actual or Inquiry Notice of Pending Action

A person who acquires an interest in real property with actual notice of a pending action concerning the property takes it subject to any judgment that might be entered in the action, whether or not a lis pendens has been recorded (except as set forth in CCP §405.61, discussed below). CCP §1908(a)(2); *Albertson v Raboff* (1956) 46 C2d 375, 379, 295 P2d 405. Similarly bound by the judgment is one who acquires an interest in real property with "inquiry notice" (*i.e.,* notice of facts sufficient to put a reasonable person on inquiry that would have led to knowledge of a pending action concerning the property). *Sharp v Lumley* (1868) 34 C 611 (bankruptcy petition's statement re commencement of action to foreclose on bankrupt's real property was sufficient to impart notice of foreclosure action to assignee of bankrupt's interest in real property).

After a lis pendens has been expunged or withdrawn, however, no person other than a named, nonfictitious party to the action is deemed to have actual knowledge of the action, regardless of whether the person possesses actual knowledge of the action and regardless of when (*i.e.,* whether before or after expungement) and how the knowledge was obtained. CCP §405.61. Thus, §405.61 creates a fiction that actual knowledge is obliterated when a lis pendens has been withdrawn or expunged, and the legislature stated this point in the last sentence of §405.61. *Lewis v Superior Court* (1994) 30 CA4th 1850, 1871, 37 CR2d 63. In an action for fraudulent conveyance, however, withdrawal of a lis pendens does not obliterate actual knowledge of the lis pendens or underlying action. *Bishop Creek Lodge v Scira* (1996) 46 CA4th 1721, 54 CR2d 745.

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§13.16 D. Seller's Duty to Disclose Pending Action

Even if a lis pendens has not been recorded, a seller of residential real property is obligated under CC §1102.6 to disclose to the purchaser, among other things, the existence of a known pending action affecting the property. This duty only applies to (1) any transfer of real property improved with one to four dwelling units by means of sale, exchange, installment sale contract, lease with option to purchase, or any other option to purchase, or (2) any resale of residential mobile or manufactured homes after January 1, 2000. CC §1102. Any waiver of this disclosure requirement is void as against public policy. CC §1102(c). Transfers between co-owners, transfers in connection with marital dissolutions, and certain other transfers are excluded. CC §1102.2. Real estate brokers and sales agents may owe their own clients a fiduciary duty to disclose knowledge of a pending action under *Field v Century 21 Klowden-Forness Realty* (1998) 63 CA4th 18, 73 CR2d 784. See chap 3.

Apart from CC §1102.6, a seller of real property is under a duty to disclose to a prospective purchaser facts that materially affect the value or desirability of the property, at least if those facts are known or accessible only to the seller and if the seller knows that those facts are not known to or within the observation of the purchaser. Failure to fulfill this duty of disclosure constitutes actionable fraud. See CC §1572; *Easton v Strassburger* (1984) 152 CA3d 90, 199 CR 383; *Snelson v Ondulando Highlands Corp.* (1970) 5 CA3d 243, 84 CR 800; *Central Mut. Ins. Co. v Schmidt* (1957) 152 CA2d 671, 313 P2d 132; *Clauser v Taylor* (1941) 44 CA2d 453, 112 P2d 661. But see *Bishop Creek Lodge v Scira* (1996) 46 CA4th 1721, 54 CR2d 745 (in fraudulent conveyance action, purchaser is charged with any actual knowledge of lis pendens and underlying action, even if lis pendens is withdrawn). Thus, the duty to disclose in this situation may depend on whether the existence of the litigation is a material fact. For further discussion, see chap 3.

PRACTICE TIP: The safest course for a seller is to fully disclose to the purchaser the pendency of an action affecting the property whether or not a lis pendens was or could have been recorded. On purchaser's rights, see §13.13.

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III. WHEN NOTICE IS AUTHORIZED OR REQUIRED

A. Authorized in Action Asserting "Real Property Claim"

§13.17 1. Statutory Requirements

Under CCP §405.20, any party who asserts a "real property claim" in an action may record a lis pendens in that action. The party recording the lis pendens need not be a plaintiff or a cross-complainant. A "real property claim" is defined in CCP §405.4 as a cause of action in a pleading that would, *if meritorious,* affect:

- Title to, or the right to possession of, specific real property; or
- The use of an easement identified in the pleading other than an easement obtained under a statute by any regulated public utility.

The term "specific real property" is strictly construed. See, *e.g., Gale v Superior Court* (2004) 122 CA4th 1388, 19 CR3d 554.

Unless specifically required by statute (even then, the requirement is usually not jurisdictional; see §13.20), recording a notice is not a prerequisite to maintenance of an action involving a real property claim. A party who is a potential claimant ordinarily may decline the statutory right to record a notice. The effects of a failure to record a notice would be the following:

- Subsequent purchasers or encumbrancers who received their interests without actual knowledge of the pending action will not be bound by a judgment adverse to their interests entered in the action (see, *e.g., Alpha Stores, Ltd. v Nobel* (1943) 57 CA2d 867, 870, 135 P2d 625); and
- Persons with an interest in the property would be able to convey their interests to third parties who, if they take such interest in good faith, for consideration, and without notice, become bona fide purchasers or encumbrancers. See CC §1107.

PRACTICE TIP: An interesting and open issue is whether a contractual waiver of the right to record a lis pendens is enforceable. The authors believe that a waiver of the right to record a lis pendens in a commercial context should be enforceable in the absence of elements that would prevent enforcement of any contractual provision, such as fraud, coercion, or duress. Such a waiver may be unenforceable as contrary to public policy, even if made knowingly, in a consumer contract, such as one for the purchase of a single-family dwelling that the claimant intends to occupy or home remodeling contract, or in a contract that a court declares to be adhesionary.

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§13.18 2. Actions That Constitute Real Property Claims

Code of Civil Procedure §405.4 does not enumerate the types of causes of action that constitute real property claims. The definition of "real property claim" in §405.4, *i.e.*, a cause of action that would affect "title to, or the right of possession of, specific real property," replicates former CCP §409(a)'s authorization of a lis pendens in an action "affecting the title or the right of possession of real property." Accordingly, California courts are likely to consider cases decided under former CCP §409(a) as authority for ruling on what causes of action fall within the definition of a "real property claim." Particular actions analyzed by the courts for their effect on title to or possession of real property (and whether that effect is sufficient to support recording a lis pendens) are summarized in §§13.64-13.85.

If the real property claim is subject to a mandatory or voluntary arbitration clause, and if the plaintiff wants to obtain the benefit of recording a lis pendens and also arbitrate the claim, it must first file a court complaint accompanied by an application to stay the action pending the arbitration. See CCP §1298.5, discussed in chap 14. Not following this procedure risks an action for slander of title. See *Manhattan Loft, LLC v Mercury Liquors, Inc.* (2009) 173 CA4th 1040, 93 CR3d 457.

In an action pending in a sister state and affecting title to or the right of possession of real property in California, CCP §405.20 does not on its face either sanction or proscribe recording a lis pendens in the county where the property is located. See CCP §405.5. But at least one court of appeal interpreted the lis pendens statutes to require a California court action. See *The Formula, Inc. v Superior Court* (2008) 168 CA4th 1455, 86 CR3d 341, cited in §13.22A. See also Note, *The Protection of Land Decrees*: *The Use of Lis Pendens in Interstate Litigation Affecting California Real Property*, 36 Hastings LJ 255 (1984).

PRACTICE TIP: A party to out-of-state litigation affecting title to or possession of California real property should consider seeking an injunction from the sister-state court in which the action is pending, preventing the transfer of any interest in the California property, rather than relying on a lis pendens. It is not certain that a California county recorder would accept for recording a lis pendens that gives notice of a foreign action or that a foreign court would accept the notice for filing as required by CCP §405.22. Moreover, even if the claimant manages to record a lis pendens in California and to file it in the foreign action, the lis pendens may be held to be void by a California court (see §13.22A), or the foreign court in which the action is pending might lack jurisdiction to decide the issue. In either event, the notice might be held to be ineffective to give constructive notice of the claimant's interest.

If the action does not properly plead a real property claim, the lis pendens is subject to expungement under CCP §405.31 (see §§13.58-13.86). If a real property claim is alleged but the claim lacks probable validity, the lis pendens is subject to expungement under CCP §405.32 (see §§13.87-13.91). See *Kirkeby v Superior Court* (2004) 33 C4th 642, 651, 15 CR3d 805; Comments 1-2 to CCP §405.4.

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§13.19 B. Authorized by Statute in Certain Actions

Besides the general authorization in CCP §405.20 (see §13.17), numerous California statutes authorize recordation of a lis pendens in specific actions:

- To foreclose a mechanics' lien. CC §3146. The procedure is the same as that for recording a notice of pendency of action under CCP §§405-405.61.
- By a public agency to enforce zoning regulations. The notice may be filed at the commencement of the action, in the county in which the real property is located. Govt C §65908.
- To claim a right to real property owned or possessed by a decedent at the time of death. Prob C §1004. The notice may be filed under the procedures set forth in CCP §§405-405.61.

As with CCP §405.20, these statutory authorizations are not jurisdictional, *i.e.,* failure to record a notice of pendency of action under them will not bar entry of a judgment in the plaintiff's favor.

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§13.20 C. Required by Statute in Specified Actions

Some California statutes require recordation of a lis pendens in connection with certain types of actions. Under most of these provisions, failure to record a notice is not a jurisdictional defect that will preclude the court from entering a valid judgment. See, *e.g., Rutledge v Rutledge* (1953) 119 CA2d 114, 259 P2d 79. A notice must be recorded when the complaint is filed, or as otherwise specified, in the following types of actions:

- To enforce the right to remove fixtures erroneously affixed to the land of another by a good faith improver. CC §1013.5(b). The lis pendens must be recorded before trial. Compare §1013.5(b) with CCP §871.3, which authorizes but does not require recordation of a notice in an action for relief by a good faith improver of real property owned by another. See *Okuda v Superior Court* (1983) 144 CA3d 135, 192 CR 388.
- To declare a building uninhabitable by a public agency. CCP §405.7. The procedures for recording a notice are set forth in CCP §405.20.
- To establish destroyed land records. Under the Destroyed Land Records Relief Law, also known as the McEnerney Act (CCP §§751.01-751.28), an action may be filed to establish title if public records in the recorder's office are destroyed. CCP §751.13.
- To quiet title to real property. CCP §761.010. The basic quiet title statute (CCP §§760.010-764.080) applies to actions to establish title against all known and unknown adverse claims and also to actions to establish title by adverse possession. A notice of pendency of action must be recorded for either form of action. CCP §761.010(b). On actions to quiet title generally, see chap 7.
- To adjudicate adverse interests in or liens or clouds on title to real property arising from public improvement assessments. CCP §801.5. For statutes governing such actions, see CCP §§801.1-801.15. This notice must be filed within 10 days after the complaint is filed. CCP §801.5.
- To partition real property. CCP §872.250. If other real property is later added to the complaint, a supplemental notice must be recorded. CCP §872.250(b). On partition, see chap 8.
- To acquire property under the Eminent Domain Law (CCP §§405.6, 1230.010-1273.050). Code of Civil Procedure §1250.150 governs the issuance, recording, and service of the notice in eminent domain cases. CCP §405.6. Recording a notice in an eminent domain action is a prerequisite to obtaining service by publication of the summons and complaint (CCP §1250.130), but it is not jurisdictional. *Housing Auth. v Forbes* (1942) 51 CA2d 1, 10, 124 P2d 194. On eminent domain actions generally, see Condemnation Practice in California (3d ed Cal CEB 2005).
- To claim a right to real property escheated to the state under statutes governing unclaimed property (CCP §§1300-1615). CCP §1355.
- To initiate escheat proceedings against unclaimed real property by the California Attorney General. CCP §1410.
- To abate a public nuisance under state statutes regulating the habitability of buildings (Health & S C §§17910-17995) by an enforcement agency (*e.g.,* a local building or health department or city attorney's office). Health & S C §17985.
- To enforce a claim rejected by the executor or administrator of an estate. Prob C §§9353, 9354(b).
- To preserve real property in control of a person alleged to have committed two or more felonies and a charge of aggravated white collar crime enhancement. Pen C §186.11(e)(4) (action by prosecuting agency).
- To quiet title to tax-deeded property under Rev & T C §§3950-3970 by a purchaser of tax-deeded property, or his or her successor. The notice must be recorded within 10 days after the complaint is filed. Rev & T C §3956.
- To foreclose the lien of an improvement bond under the Improvement Act of 1911 (Str & H C §§5000-6794). The notice must be filed with the applicable city or county treasurer. Str & H C §6619.

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§13.21 D. Actions for Which Notice Held Ineffective

A notice of pendency of action recorded in an action that does not come within the terms of CCP §405.20 or one of the other authorizing statutes does not impart constructive notice of the pending action (*Brownlee v Vang* (1962) 206 CA2d 814, 24 CR 158) and may be expunged under CCP §405.31. See §13.58. In the following actions the lis pendens was held ineffective to give notice:

- Action involving personal property or an interest in a partnership owning real property (see §13.78).
- Trustee sale for foreclosure under the power of sale in a deed of trust (see §13.84).
- Action to foreclose a chattel mortgage (see §13.70).
- Action to recover attorney fees (see §13.64).
- Action to adjudicate the validity of assessments levied for reclamation purposes (see §13.85).
- Certain actions seeking to impose a constructive trust (see §§13.67, 13.69, 13.71).
- Action to recover only money damages (see §§13.67, 13.77).
- Arbitration proceeding without a companion court case (see *Manhattan Loft, LLC v Mercury Liquors, Inc.* (2009) 173 CA4th 1040, 93 CR3d 457, interpreting CCP §405.20; Practice Tip in §13.4).

PRACTICE TIP: In most of these situations, requesting injunctive relief from the court under CCP §§525-534 at the beginning of the action is a safer alternative than using a lis pendens. See §13.6A.

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§13.22 E. Use in Federal Actions

A notice of pendency of action may be recorded and filed in any federal district court action alleging a real property claim concerning California real property to the same extent and in the same manner as in an action in a California court. CCP §405.5. A litigant in federal court may record a lis pendens in an action concerning real property if authorized to do so under applicable state law. See, *e.g., U.S. v Real Prop. at 2659 Roundhill Dr.* (9th Cir 1999) 194 F3d 1020, aff'd (9th Cir 2001) 283 F3d 1146; *Nintendo of Am., Inc. v Dragon Pac. Int'l* (9th Cir 1994) 40 F3d 1007. For the special situation of forfeitures under the Civil Asset Forfeiture Reform Act (18 USC §§981-987), the persons protected and burdens of proof are different. *U.S. v One Residential Prop. at 8110 E. Mojave Rd.* (SD Cal 2002) 229 F Supp 2d 1046. The state statutes for recording a notice must be complied with for notice of the federal action to be effective. 28 USC §1964.

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§13.22A F. Use in Sister-State Courts

California lis pendens statutes do not authorize a party who has a pending action in another state court to record a lis pendens in a California county recorder's office. *The Formula, Inc. v Superior Court* (2008) 168 CA4th 1455, 86 CR3d 341. The court in *Formula, Inc.* ruled that under CCP §405.20, only actions filed in California courts may support the recordation of a lis pendens, even though CCP §405.5 (see §13.22) allows recordation of a lis pendens in connection with a federal district court action alleging a real property claim concerning California real property. For commentary on *The Formula*, see Geiger, Formula v Superior Court: *Out-of-State Claims Involving California Real Property Cannot Use California's Lis Pendens Statute*, 32 CEB Real Prop L Rep 42 (March 2009).

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Source: Real Property/California Real Property Remedies and Damages/13 Lis Pendens/§13.23 IV. CHECKLIST: PREPARING, MAILING, RECORDING, AND FILING NOTICE

§13.23 IV. CHECKLIST: PREPARING, MAILING, RECORDING, AND FILING NOTICE

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1. Factual Research and Foundation

___ a. Obtain litigation guaranty naming attorney and claimant as insureds and listing every person who has recorded interest in affected real property and all owners shown in most recent county assessor's records. Attorney could also order preliminary report, which does not guarantee but may disclose all parties with recorded interest in property and all owners shown in assessor's records. See §13.33.

b. If no guaranty or preliminary report is obtained:

___ (1) Review county recorder's title indexes to obtain names and addresses of all persons with recorded interest in property (see §13.39); and

___ (2) Contact assessor's office in the county where property is situated to obtain names and addresses of owners of record of property on assessment rolls. See CCP §405.22; §13.34.

Note: It is risky to proceed without a litigation guaranty because the loss from not serving all persons with interests in the property may be much greater than the cost of the guaranty. See §13.33.

2. Documents to Prepare

___ a. Complaint, including at least one cause of action that would, if meritorious, affect title to or possession of specific real property, *e.g.,* allege "real property claim" (see §13.17), and naming all known adverse parties to property claim by their real names, in addition to "Doe" defendants if presently unknown adverse claimants are discovered (see §13.25). On complaints generally, see California Civil Procedure Before Trial, chap 15 (4th ed Cal CEB 2004).

___ b. Summons. On preparation and service of summons, see Civ Proc Before Trial, chap 17.

___ c. Notice of pendency of action. For form notice, see §13.116. Duplicate originals must be prepared if notice will be recorded in more than one county.

___ d. If appropriate, ex parte application for court approval. If party acting in propria persona will sign and record notice, ex parte application for court approval of notice is needed. CCP §405.21. Not needed if attorney of record for claimant signs notice. CCP §405.21. See §13.32.

___ e. Declaration of service of notice by registered or certified mail, return receipt requested, on each adverse party and each owner of property as shown in assessor's records. CCP §§405.22, 1013a. See §§13.34-13.35. On service requirements generally, see Civ Proc Before Trial, chap 17. Declaration should not be signed until after complaint is filed and notice is actually mailed; sign before recording with notice.

___ f. Declaration of unknown address if address of any adverse party or of owner is unknown. CCP §405.22. Declaration must be recorded and filed with notice along with declaration of mailing to adverse parties and owners (see e., above). See §13.34.

___ g. Envelopes addressed to all known addresses of each adverse party and each owner of record for mailing of notice, with return receipts.

3. Filing at Applicable Court Clerk's Office

___ a. File complaint. Have case number stamped on copies for service.

___ b. Have summons issued. Have case number stamped on copies for service, or photocopy original summons for service copies.

___ c. Have case number stamped on original notice to be recorded, but do not file notice with complaint (it is filed later). Have case number stamped on copies of notice for service and filing, or photocopy original notice. (Case number, essential to valid notice, is missing in surprising number of instances.) If time is not

of the essence, notice may be prepared after complaint is filed, with attorney's office inserting case number.

4. Mailing Notice

___ a. Insert copies of notice with case number (check for accuracy) in prepared envelopes (see 2.g., above). Copies of summons and complaint can be sent for service by notice and acknowledgment, if desired.

___ b. Mail copies of notice by registered or certified mail, return receipt requested, to all adverse parties and owners of record whose addresses are known. CCP §405.22. See §13.34.

___ c. Sign declaration of service. CCP §§405.23, 1013a. See §13.35.

5. Recording Notice

___ Take original notice, along with signed declaration of service and declaration of unknown address (CCP §405.22), to the county recorder's office(s) and present for recordation. See §13.37.

6. Filing Notice

___ File copies of notice and proof of service and/or declaration of unknown address (CCP §§405.22-405.23) with recording data on it with court clerk where action is pending. See §13.37.

7. Updating Litigation Guaranty

___ a. Obtain updated litigation guaranty through time of recordation of notice (or, if a preliminary report was obtained, obtain litigation guaranty as of time of recordation of notice). See §13.33.

___ b. Confirm proper recording and indexing of notice.

___ c. Identify interests shown to be intervening between effective date of original litigation guaranty and update as of time of recording, and if holders of interests are not already named as adverse parties, add them as defendants to property claim in complaint by amendment and prepare, mail, record, and file amended notice and proof of service or declaration (see 2.e.-2.f., above). CCP §§405.22, 405.24. See §13.29.

8. Review Return Receipts

___ Review return receipts to confirm that copies of notice were actually received and to check on names and addresses of adverse parties and owners to whom notice was mailed out but for whom no return receipt was received. If a receipt was returned with notation such as "addressee unknown" or "moved/no forwarding address," claimant presumably should rerecord and then refile notice with new or revised declaration of unknown address under CCP §405.22 (see 6., above).

Note: The lis pendens statutes do not address how the claimant should respond if a mailed notice is returned marked "addressee unknown" or the like. Because the claimant believed that he or she had the adverse party's or owner's known address, that party or owner would not have been listed in a declaration of unknown addresses under CCP §405.22. The authors believe that the legislature should address this issue by amendment, perhaps by authorizing a later declaration of unknown addresses in such cases. In the meantime, proceed as suggested in Checklist Item No. 8.

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V. PREPARATION OF NOTICE

§13.24 A. Drafting Considerations

Drafting a proper notice of pendency of action is a relatively straightforward process in most cases. To be valid, a notice must contain:

(1) The names of all the parties named in the action (CCP §405.20; see §§13.25-13.27);

(2) A description of the real property affected by the action (CCP §405.20; see §13.30); and

(3) The signature of an attorney of record in the action, or, in the case of an in propria persona litigant, the approval of a judge of the court in which the action is pending (CCP §405.21; see §13.32).

A fourth important element, not expressly required by the lis pendens statutes, is the identity of the pending action. Recordation of a lis pendens is not a privileged publication unless the notice contains such an identification. CC §47(b)(4); see §13.5.

For a form notice of pendency of action, see §13.116. The brevity and simplicity of the wording of a notice should not lull the practitioner into thinking that it can be prepared perfunctorily. A notice that does not comply with the statutory requirements (see §13.25-13.32) is likely to be ineffective to give constructive notice of the litigation (see §§13.8-13.16). Also, in cases in which significant title activity on the property has occurred, it is advisable to obtain a litigation guaranty to make sure all necessary parties are named and served. See §13.33.

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B. Names of Parties

§13.25 1. Designation by Real Names

The claimant's attorney must ascertain the real names of all defendants and name them as parties in both the complaint and the notice. See §13.33. A purchaser, encumbrancer, or other transferee of the property is considered to have constructive notice of the action against only parties not fictitiously named, *i.e.,* parties designated by their real names. CCP §405.24. In many cases, failure to properly designate all parties will result in a judgment that does not bind those who were not properly designated. See, *e.g.*, *Sax v Clark* (1919) 180 C 287, 180 P 821; *Ross v Title Guar. & Trust Co.* (1934) 136 CA 393, 29 P2d 236. See also *Orr v Byers* (1988) 198 CA3d 666, 244 CR 13. Accordingly, a lis pendens will not be effective against a "Doe" defendant or his or her successors in many instances.

This rule may be altered by statute in cases in which the judgment is intended to bind unknown claimants to the property, *i.e.,* to have an in rem effect. For example, the judgment in an action brought under the basic quiet title statute (CCP §§760.010-764.080) binds all persons known or unknown who were made parties to the action (CCP §764.030(a)) and all persons not parties to the action whose claims were not recorded when the lis pendens was filed (CCP §764.030(b)). See chap 7. The same basic rule applies to partition actions brought under CCP §§872.010-874.250. See CCP §874.210; chap 8. Therefore, despite CCP §405.24, it is customary, as well as good practice, to include unknown persons in the caption of the complaint in quiet title and partition actions and to do so in the lis pendens as well.

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§13.26 2. Fictitious Defendants

It is generally advisable to include several fictitious or "Doe" defendants when drafting the complaint. On fictitious defendants generally, see California Civil Procedure Before Trial §§14.13-14.17 (4th ed Cal CEB 2004). When the true names of fictitiously named persons with interests in the property are ascertained, the complaint should be amended to substitute the real names for the "Does." CCP §474. See §13.29. An amended notice of pendency of action must be prepared, served, and recorded in order to give constructive notice of the pendency of the action against the parties added by the amendment. CCP §405.24. New parties added to the action under CCP §472 or §473, either as a matter of right or on motion, must be served with a copy of the notice by registered or certified mail, return receipt requested. See CCP §§405.23, 1013a; §13.34. If an amended notice is not recorded, the existing lis pendens is ineffective against the added parties although it is still effective to give constructive notice to the originally named defendants.

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§13.27 3. Names in Body of Notice

The real names of the parties to the action should be set forth in the body of the notice of pendency of action as well as in the caption. Although practice may vary, in some counties the recorder's office looks to the body rather than the caption of the notice to obtain the names of the parties to the action for indexing purposes. Recorders of other counties may accept a notice if the caption designates the parties but the body of the notice does not. Perhaps a reference to the captioned names in the body of the notice will suffice, but the better practice is to list the parties' names in both the caption (*i.e.,* a full caption) and the body of the notice. Rejection of a notice for recordation would create an extra burden at best and could have disastrous consequences if the delay in presenting a proper notice for recordation causes the notice to lose priority to a bona fide purchaser, encumbrancer, or other transferee of the property (see §13.8). The form notice of pendency of action in §13.116 provides for insertion of the parties' names in both the caption and the body.

PRACTICE TIP: Proper identification of the parties is essential under California's indexing systems. See §13.40. An improperly indexed notice will likely fail to appear in the chain of title and could render the lis pendens ineffective to impart constructive notice. See California Title Insurance Practice §§4.2, 4.7-4.8, 4.23-4.24 (2d ed Cal CEB 1997).

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§13.28 C. Separate Notice Required for Cross-Action

If a cross-action is of the same nature as the complaint, a lis pendens recorded by the plaintiff in the main action may also constitute notice of the claims raised in the cross-action. For example, if the action is one to quiet title to real property, it is clear from the nature of the action itself that the defendants are asserting adverse claims to the property. See, *e.g., Welton v Cook* (1882) 61 C 481; *Olson v Cornwell* (1933) 134 CA 419, 25 P2d 879; *Imperial Farming Co. v Van Horn* (1930) 107 CA 717, 290 P 1077.

If the cross-complaint raises a different "real property claim," however, as usually occurs, the plaintiff's notice will not protect the real property claims raised in the cross-action, and the cross-complainant should therefore record a separate notice. *Fremont Indem. Co. v Du Alba* (1986) 187 CA3d 474, 478, 231 CR 683; *Orekar v Lager* (1932) 122 CA 370, 10 P2d 178.

PRACTICE TIP: The lesson of the *Fremont* and *Orekar* decisions is clear. If there is any doubt about whether a cross-action asserts a new real property claim, a separate notice should be recorded. A cross-action typically asserts a new claim, except in quiet title actions in which the parties merely assert competing claims to the property.

Moreover, a plaintiff's notice might be invalid for some parties because service or recording was defective in some respect unknown to the cross-complainant. In addition, the plaintiff could later withdraw the lis pendens or dismiss the real property claim, circumstances over which the cross-complainant would have no control. Accordingly, a cross-complainant should generally record a separate notice instead of relying on the notice recorded by the plaintiff.

Because the plaintiff has already appeared in the action through counsel, there is a question whether a cross-complainant may simply serve plaintiff's counsel of record with a copy of the lis pendens. Code of Civil Procedure §405.22 states merely that a copy of the notice shall be mailed to all "known addresses" of the parties to whom the real property claim is adverse. Because CCP §405.23 states that a lis pendens shall be void and invalid if the requirements of §405.22 are not met for that party or owner, and because §405.22 does not expressly authorize "substituted service" on plaintiff's counsel of record, the prudent course is to mail a copy of the notice to the plaintiff's known addresses and a "courtesy copy" to plaintiff's counsel of record.

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§13.29 D. Amendment of Pleading

After the true names of additional persons with an interest in the property (who have been named in the complaint as "Doe" defendants) are discovered, the complaint should be amended to substitute their real names. See CCP §474. An amended lis pendens should then be prepared, mailed to the newly named parties by registered or certified mail, return receipt requested, recorded, and filed in the action. The amended notice should also be mailed to all of the previously named parties. The amended notice must be recorded with a declaration of mailing and then filed with the court. See CCP §§405.23, 474. When new parties are added to the action under CCP §472 or §473, they must also be named in an amended notice of pendency of action. A copy of the new notice must immediately be mailed to the new parties by registered or certified mail, return receipt requested, then recorded and filed in the same manner as the original notice. See CCP §405.22. A copy of the new notice, along with the amended complaint, should also be served on the original parties. Prudence dictates mailing a copy to all known addresses of the adverse party and the owner of record and copies to their counsel of record. See §13.34; CCP §405.22.

After a notice of pendency of action has been recorded, an amendment to the underlying pleading—the complaint or the cross-complaint—that alleges new facts but does not add new parties should not ordinarily affect the viability of the notice. On addition of parties, see §13.26. The amended pleading relates back to the date when the original pleading was filed, and the notice filed on that pleading constitutes valid notice of the action. *Brock v Pearson* (1891) 87 C 581, 25 P 963. Under case law decided under the former statutes, if an amendment alleged a new real property claim, the original notice would not give notice of the new claim. *Dobbins v Economic Gas Co.* (1920) 182 C 616, 189 P 1073. Under current lis pendens statutes, however, a lis pendens need not set forth the object of the action or cross-action. CCP §405.20. Requiring a new lis pendens if an amended pleading alleges a new real property claim would make little sense; the new lis pendens would be exactly the same as the previous one.

A purchaser, encumbrancer, or other transferee whose interest was acquired after the original notice was recorded but before the new notice is recorded presents an additional problem. Presumably, the original notice will have priority over the intervening interests only for real property claims that were pending at the time those interests were acquired. Unless the new purchaser or encumbrancer is added to the action as a named party, he or she will not be bound by a judgment based on the new real property claim. *Dobbins v Economic Gas Co., supra*. To obtain a binding decree on whether the newly acquired interest has priority over the interest sought to be established by the new real property claim, the claimant should add the purchaser or encumbrancer as a new party to the action by an amended or supplemental pleading and in a new notice that is recorded, mailed, and filed in accordance with CCP §405.22. See CCP §405.30.

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§13.30 E. Description of Property

The notice must contain a description of the real property affected by the real property claim in the action. CCP §405.20; *Mitchell v Amador Canal & Mining Co.* (1888) 75 C 464, 17 P 246. A legal description of the property in the notice is not technically required by §405.20, although it is the most accurate description. The authors believe that many county recorders may refuse to record a lis pendens unless a legal description of the affected property is set forth in the notice.

PRACTICE TIP: The best practice is to state in the notice the property's common designation (*i.e.,* street address), the legal description, and the assessor's parcel number. If only the street address or assessor's parcel number is known, the other descriptions can usually be obtained from a title company, free or at a negligible cost.

When seeking to confirm alternative descriptions (as well as when obtaining preliminary reports and title insurance policies), explicit instructions must be given to the title company. A street address may convert to one parcel on the assessor's roll even though multiple parcels are under the same ownership but separately assessed. The attorney should obtain a plat map showing the requested parcel and adjacent parcels, specifically delineated, to avoid "under-describing" the affected property.

In older case law, any description that on reasonable inquiry would lead a person to the correct identity of the property was held sufficient. See, *e.g*., *Broome v Broome* (1919) 179 C 638, 178 P 525 (description of land as "the Broome Estate Ranch" with general description of its extent, location, and county in which it was situated held sufficient); *McLean v Baldwin* (1902) 136 C 565, 69 P 259 (erroneous statement that property located in northwest corner of ranch did not render lis pendens ineffective, because property was otherwise accurately described by reference to three visible boundary lines and one surveyed line); *Stearns v Los Angeles City Sch. Dist.* (1966) 244 CA2d 696, 53 CR 482 (reference to "Landier Capistran Ranch," with metes and bounds description, held sufficient to describe entire ranch, although integral part of ranch was not included in metes and bounds description).

PRACTICE TIP: A litigation guaranty (see §13.33) will contain a complete legal description of the property. Unless the description is very short, the practice of incorporating an actual photocopy of that description in the lis pendens, rather than retyping it, is highly recommended. This practice will avoid any possibility of transcription errors and help to ensure policy coverage for any claimed defect in the legal description of the affected property.

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F. Other Formal Requirements

§13.31 1. Form and Format of Court Papers

A notice of pendency of action should be in the form and format of a court paper (under Cal Rules of Ct 2.100-2.119) because CCP §405.22 requires that, immediately following recordation, a copy of the notice must be filed in the court in which the action is pending. Thus, the notice should be prepared in the same form as any other pleading, with the caption and case number of the action. See Comment 3 to CCP §405.20. The caption should be the full caption for the case, *i.e.,* the same as that used for the complaint or amended complaint, including the names of all parties (see §§13.25-13.27). On rules of form and format for court papers generally, see California Civil Procedure Before Trial, chap 11 (4th ed Cal CEB 2004). For a form notice of pendency of action, see §13.116.

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§13.32 2. Signature

The attorney of record for the claimant may sign a notice of pendency of action. The form notice set forth in §13.116 provides for the attorney's signature. Alternatively, a judge of the court in which the action is pending may, on a party's request, approve the notice. A lis pendens may not be recorded unless it has been signed by an attorney or, if signed by a party in propria persona, approved by a judge. CCP §405.21. Notices recorded in eminent domain proceedings are not governed by the recordation, service, and filing requirements of the lis pendens statutes. CCP §§405.20-405.24. Issuance, service, and recordation of lis pendens in eminent domain actions are subject to CCP §1250.150. CCP §405.6.

PRACTICE TIP: Recorders occasionally accept notices for recording that have been approved by a court clerk rather than by a judge. This practice seems to violate CCP §405.21, which requires either an attorney's signature or approval by a judge. Code of Civil Procedure §405.23 expressly applies to void and invalidate a lis pendens for failure to comply with the requirements of CCP §405.22 governing service, recording, and filing a lis pendens, but it is silent on failure to comply with §405.21. The authors believe that, although a county recorder may refuse to record a lis pendens signed only by a clerk, if a county recorder does record such a lis pendens, it should be effective to provide notice. This issue must await judicial resolution.

Neither CCP §405.20 nor §405.21 require that a notice of pendency of action be verified or acknowledged as a prerequisite for recording. This omission was apparently deliberate, reflecting the view of the State Bar Committee that drafted the 1992 legislation that an acknowledgment should not be required, because the statutes require a review of the lis pendens by an attorney or a judge (CCP §405.21).

PRACTICE TIP: Although acknowledgment of a notice is not required under the lis pendens statutes, Govt C §27287 could be interpreted to require acknowledgment of the notice in connection with recordation. Given the purpose of §27287 (see *Osterberg v Osterberg* (1945) 68 CA2d 254, 156 P2d 46), the authors believe that a recorded notice would be valid without an acknowledgment. If, however, the recorder were to refuse recordation for lack of an acknowledgment, the delay in recording could result in a loss of priority to a bona fide purchaser, encumbrancer, or other transferee of the property. See §13.8. Thus, a cautious attorney may want to include an acknowledgment.

In contrast, it should be noted that CCP §405.50 does require that a notice of withdrawal of a lis pendens be acknowledged. See §13.113.

PRACTICE TIP: It is unclear from the second sentence of CCP §405.21 whether an attorney representing a party may, instead of signing the notice, use the alternative of having the judge of the court in which the action is pending approve the notice. This alternative might be considered if the attorney or the client fears possible liability for a slander of title claim if it were later established that the action did not in fact involve a real property claim and, therefore, that the statutory protection for recording the notice afforded by CC §47 was not available to the claimant or his or her attorney (see §13.5). If this alternative is available, approval of the notice by the court, presumably requiring a finding that the underlying action involves a real property claim, should insulate the claimant and the attorney from potential liability on a slander of title claim. The third sentence of CCP §405.21 indicates, however, that the alternative of judicial approval of a notice is available only to a party in propria persona; otherwise, it must be signed by the attorney of record, and court approval does not appear to be contemplated. Comment to CCP §405.21 does not address this apparent ambiguity. The authors believe that the legislature should consider clarification of this point.

If a lis pendens is signed by a party appearing in propria persona, approval of the judge of the court in which the action is pending is required before the notice may be recorded. CCP §405.21. The statute does not address the procedure for obtaining a judge's approval of the notice or the means of memorializing such approval. Presumably, the request for approval should be made in the same manner as any other ex parte application. See, *e.g.,* Cal Rules of Ct 3.1200-3.1207. If a claimant appearing in propria persona requests court approval for a proposed notice, the court *may* approve the notice. CCP §405.21. Comment 2 to CCP §405.21 states that, in the event of such a request by a pro per litigant, it is the court's duty to confirm that an action containing a real property claim is pending and, if so, to approve a notice submitted in proper form.

The Comment further provides that the procedures for hearing and ruling on requests and for establishing a record are left to the courts, but then adds: "However, it is expected that an approval will be endorsed upon or appended to

the lis pendens document for the information of the recorder and persons referring to land title records." Comment 2 to CCP §405.21.

PRACTICE TIP: Code of Civil Procedure §405.21 does not specify what action, if any, a pro per litigant may take if the court refuses to approve the lis pendens. Presumably, the claimant could initiate mandamus proceedings in a higher court. See §13.106. The claimant could also retain counsel and have the attorney sign the lis pendens, but counsel should probably be cautious about signing a lis pendens that the court has already disapproved. If the basis for the court's disapproval is the action's failure to state a real property claim, it can reasonably be expected that a lis pendens signed by an attorney in this situation will face a motion to expunge under CCP §405.31 as well as on other possible grounds. The attorney should also be aware that the litigation privilege under CC §47 does not apply if the action does not affect title to or possession of real property (see §13.5).

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§13.33 G. Title Insurance; Litigation Guaranty

To ensure that the lawsuit and the lis pendens include all the appropriate parties, the claimant's attorney should order a litigation guaranty from a title company, naming the attorney or both the attorney and the claimant as the insured. Under a litigation guaranty, the title insurer guarantees the accuracy of the information provided on the vesting of title, the property's legal description, any clouds on the title, and the names and service addresses of all necessary parties to an action alleging a real property claim. The nature of the contemplated action will appear on the face page of the guaranty along with the amount of liability declared by the insurer.

A litigation guaranty usually covers only recorded information because title companies use their own title plant data, which comes from the county recorder, not the county assessor's roll, and these sources may differ. A lis pendens, however, must be served by mail on all owners of record as shown by the latest county assessment roll. CCP §405.22; see §13.34. When ordering a litigation guaranty, therefore, the attorney should also specify that the title company provide information (*i.e.*, furnish the latest "tax read-out") from the county assessor's records. Many title companies have computer linkage by which they can obtain this information.

In lieu of a litigation guaranty, the claimant's attorney may order a preliminary report (formerly called a preliminary title report) immediately before filing the action. This report will identify parties to be named in the action.

WARNING: A preliminary report is not an abstract of title, does not constitute a representation as to the condition of title, and does not provide coverage. See Ins C §12340.11. See also California Title Insurance Practice, chap 5 (2d ed Cal CEB 1997). Thus, the claimant's attorney should not simply rely on a preliminary report.

The safest course is for the attorney to order a litigation guaranty before the complaint is prepared and filed and then to request a "date-down" endorsement (CTLA Guarantee Form No. 2) to be effective as of the date the lis pendens is recorded. The attorney should request the litigation guaranty in writing and:

- Describe the purpose of the litigation guaranty, because the contents of a guaranty will be different for different types of claims. For example, the guaranty for an easement claim on neighboring property would be very different from a guaranty for a judicial foreclosure action.
- Specify the information needed from the county assessor's records (*i.e.*, the latest "tax read-out") in addition to the data furnished from the recorder's office.
- Include a request for the "date-down" endorsement, which should reflect recording information for the notice of pendency of action and assurance that the notice has been properly indexed.

The litigation guaranty should be at least for the minimum coverage. Beyond that, the attorney should consider the potential loss the client would suffer if the litigation guaranty is erroneous. The desired liability amount on the guaranty must be weighed against the increasing cost of the guaranty as the amount of liability increases.

On litigation guaranties, see Title Ins, chap 9.

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VI. SERVICE OF NOTICE

§13.34 A. By Registered or Certified Mail

Under CCP §405.22, before a notice of pendency of action is recorded, a copy must be mailed, by registered or certified mail, return receipt requested, to:

- All parties to whom the real property claim is adverse at all of their known addresses, and
- All owners of record of the property affected as shown by the latest county assessment roll.

PRACTICE TIP: A record search at the county recorder's office to identify adverse parties is not required. Although it might appear that the intent in CCP §405.22 is that the claimant use the most current addresses for record owners, in fact the statute requires resort to the assessor's roll to establish the identity as well as the addresses of record owners. Accordingly, title information obtained in connection with preparation of a lis pendens (see §13.33) must include a search of the assessor's roll to ensure compliance with §405.22, as well as a search of the records of the county recorder. There is no prejudice for "over-noticing" (*i.e.*, giving notice to a party whose interest in the property is unclear). Thus, an attorney should be as thorough as possible in giving notice.

A copy of the notice must be served immediately on each adverse party who is later joined in the action under CCP §472 or §473. CCP §405.22. On amending the complaint to add parties, see §13.29. If there is an adverse party or owner of record for whom there is no known address, a declaration under penalty of perjury that there is no known address for that party or owner of record must be recorded with the notice, instead of a declaration of service on that particular party or owner. CCP §405.22.

Failure to comply with the mailing, recording, and filing requirements of CCP §405.22, and failure to record a proof of service (in conformity with the proof of service by mail requirements of CCP §1013a) or a declaration of unknown address for any adverse party or owner with the notice, renders the notice "void and invalid" for any party or owner of record for whom the requirements were not met. CCP §405.23. See *Biddle v Superior Court* (1985) 170 CA3d 135, 215 CR 848; *McKnight v Superior Court* (1985) 170 CA3d 291, 215 CR 909. See also §§13.35, 13.57.

The service requirements are intended to ensure that adverse parties and property owners receive prompt notice of the recording of a notice, as well as of the action itself. This invalidating provision will ensure prompt notice and thus will enable adverse parties or owners of property to seek immediate expungement of the notice, if appropriate. To enforce such requirements, CCP §405.23 provides for expungement for failure to comply with service requirements. Attorneys should assume that service and filing requirements are mandatory and that failure to comply will invalidate a lis pendens. See §13.57. On service generally, see California Civil Procedure Before Trial, chaps 17-18 (4th ed Cal CEB 2004).

If the action comes under a specific statute authorizing or requiring that a lis pendens be recorded, counsel should check the service requirements of the applicable statute. (On specific statutes, see §§13.17-13.20.) For example, in eminent domain proceedings under CCP §§1230.010-1273.050, the notice must be served with the summons and complaint. CCP §1250.150.

PRACTICE TIP: Under former CCP §409.9(a), any party who contracted to transfer an interest in real property and who received a notice of the pendency of an action concerning that property had a duty to notify all prospective transferees. That requirement was *not* enacted into CCP §§405-405.61. However, to avoid claims of misrepresentation or concealment, a prudent transferor will notify prospective transferees of the notice of pendency of action by sending them a copy of it (certified mail, return receipt requested). If the transferor is successful in a motion to expunge the notice, the prospective transferees would, of course, have the benefit of the expungement order. See §13.94.

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§13.35 B. Proof of Service

When a notice of pendency of action is recorded (see §13.36), it must be accompanied by proof of service by registered or certified mail, return receipt requested (see §13.34), in conformity with the form and content requirements of CCP §1013a (proof of service by mail). CCP §§405.22-405.23.

PRACTICE TIP: Failure to record a proof of service along with the notice, showing prerecordation service on any adverse party or owner of record, renders the notice void and invalid for an adverse party or owner of record not listed on the proof of service. CCP §405.23. It may also justify expungement. *McKnight v Superior Court* (1985) 170 CA3d 291, 215 CR 909; see §13.57. But see *Biddle v Superior Court* (1985) 170 CA3d 135, 215 CR 848, discussed in §13.34.

If there is no known address for an adverse party or owner, a declaration under penalty of perjury to that effect must be recorded with the declaration of mailing of the notice to the other parties and owners. CCP §405.22. On requirements for service, see §13.34

PRACTICE TIP: There is no express requirement in CCP §§405.22-405.23 that a proof of service accompany the copy of the notice filed in the pending court action (see §13.38), but it is the better practice to do so because court rules typically require that a proof of service accompany many pleadings or papers that are filed. See, *e.g.,* Cal Rules of Ct 3.1300(c).

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VII. RECORDING AND FILING NOTICE

§13.36 A. Time for Recording

Ordinarily, a plaintiff may record a lis pendens immediately after filing a complaint alleging a real property claim, and the defendant may record a notice immediately after filing a cross-complaint alleging a real property claim. See CCP §405.20. If the lis pendens comes under any statutory authorization other than §405.20, counsel should review that statute because provisions concerning the time of recording may vary. For example, some statutes require that the notice be recorded immediately on filing the complaint, others specify that the notice must be filed within 10 days after the complaint is filed, and still others are silent on the timing of recordation. See statutes discussed in §§13.17-13.22.

Under CCP §405.20, a notice may be recorded at any time while the action is pending, including after judgment has been entered but before it becomes final. See *Kartheiser v Superior Court* (1959) 174 CA2d 617, 619, 345 P2d 135 (discussing former CCP §409). The judgment will have priority only from the date the notice was recorded. CCP §405.24. Thus, counsel should have the notice recorded immediately after the pleading on which it is based is filed to obtain immediate protection against subsequent purchasers, encumbrancers, and other transferees of interests in the property.

The recorded notice must be accompanied by a proper proof of service. See §13.35.

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§13.37 B. Place for Recording

A notice of pendency of action must be recorded in the office of the recorder of each county in which all or part of the real property affected by the action is situated. CCP §405.20. Thus, if the property is situated in more than one county, the notice must be recorded in each county in which the property is located. See also CCP §§761.010(b) (quieting title), 872.250(a) (partition of property); CC §3146 (mechanics' liens). To accomplish this, a duplicate original of the lis pendens should be recorded in each additional county in which the property is situated. CC §1218. A copy of each recorded notice should then be filed in the court in which the action is pending. CCP §405.22.

Although California lis pendens statutes do not authorize a party who has a pending action in another state court affecting California real property to record a lis pendens in a California county recorder's office (*The Formula, Inc. v Superior Court* (2008) 168 CA4th 1455, 86 CR3d 341), recordation of a lis pendens is allowed in California on a federal court action (see §13.22).

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§13.38 C. Filing With Court

Immediately after a notice of pendency of action has been recorded, a copy of it must be filed in the court in which the action is pending. CCP §405.22. If a notice must be recorded in more than one county because portions of the property are located in different counties (CCP §405.20; see §13.37), a copy of each recorded notice should be filed. Failure to file a copy of the notice may render the notice void and invalid. CCP §405.23. See §13.57. If properly filed as provided in CCP §405.22, a lis pendens is effective from the time it was recorded. CCP §405.24. See §13.9.

If a lis pendens is authorized or required under a specific statute (see §§13.17-13.22), counsel should always check whether the specific statute provides for filing a copy of notice in a location other than, or in addition to, the court in which the action is pending. For example, in an action to enforce a claim rejected by the executor or administrator of an estate, Prob C §§9353 and 9354(a)-(c) provide that the notice must be filed with the clerk of the applicable probate court.

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§13.39 D. When Recording Takes Effect

A purchaser, encumbrancer, or other transferee is charged with constructive notice of litigation affecting the real property from the time the notice is properly recorded. CCP §405.24. See Comment 1 to CCP §405.24. See also §§13.8-13.11. The party who sought to record its interest has the responsibility to confirm that its interest is properly recorded and indexed; no other party is in a better position to detect and correct errors in recording. *T & O Mobile Homes, Inc. v United Cal. Bank* (1985) 40 C3d 441, 220 CR 627.

PRACTICE TIP: The attorney for a party recording a lis pendens should be sure that the notice, endorsed with the usual recording data, is returned by the recorder within a reasonable period of time, and should make inquiries if it is not. Hand-delivering the notice for recording (see §§13.36-13.37) will ensure prompt recording so that priority is maintained. See Warning about indexing practices of recording office in §13.9.

For discussion of the uses of a litigation guaranty to ensure the propriety of the recording of the notice, see §13.34.

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§13.40 E. Checking Index and Updating Litigation Guaranty

Each county recorder is required to maintain an index of all recorded documents (Govt C §§27257, 27324-27325), but an improperly indexed instrument or a delayed indexing does not give constructive notice to a subsequent purchaser, encumbrancer, or other transferee of the real property. *Dyer v Martinez* (2007) 147 CA4th 1240, 54 CR3d 907; *Lewis v Superior Court* (1994) 30 CA4th 1850, 1866, 37 CR2d 63; see §§13.8-13.16; California Title Insurance Practice §§4.2, 4.7-4.8, 4.23-4.24 (2d ed Cal CEB 1997).

PRACTICE TIP: An attorney can ascertain whether the notice has been properly indexed by reviewing both the grantor and grantee indexes at the recorder's office. The notice may, however, be properly recorded but not yet indexed. Certified copies of the recorded notice should be available if the attorney has the recording number assigned to the notice. The recorded notice should be evident within 24 hours, by reviewing the "grey film" or "blotter film" pending entry of a digital image into the recorder's indexed database. See *Ricketts v McCormack* (2009) 177 CA4th 1324, 1333 n9, 99 CR3d 817. The better practice is for counsel to obtain an update of the litigation guaranty (see §13.33) specifying that the notice has been properly indexed.

After recording the notice, and perhaps once again just before trial, the attorney should update the guaranty by obtaining a "date-down" endorsement (CTLA Guarantee Form No. 2) that shows further exceptions to coverage and any changes in the condition of title that have occurred since the original date of the guaranty. This endorsement will confirm that the notice was properly recorded and should be reviewed by the claimant's attorney to ensure that the action includes all necessary parties. Even this endorsement will not ensure, however, that the notice has been properly indexed unless the attorney specifically requests that the title company provide this service and the title company agrees to do so.

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VIII. MOTION FOR UNDERTAKING BY CLAIMANT AS CONDITION OF MAINTAINING NOTICE (CCP §405.34)

§13.41 A. Procedure for Obtaining Undertaking

At any time after recordation of a lis pendens, on motion of "any person with an interest in the property," the court may require the claimant to give the moving party an undertaking as a condition of maintaining the notice "in the record title," *i.e.*, on record with the county recorder. A nonparty to the action must obtain leave to intervene from the court at or before the time of moving to require an undertaking. CCP §405.34. Attorneys representing interests adverse to the claimant should therefore consider whether it would be advantageous to file a motion for an undertaking together with an expungement motion (see §§13.44-13.46) based on the facts and legal issues of the case.

As with expungement motions (see §13.54), the court may admit evidence in the form of oral testimony, as well as declarations, and may make orders to provide for discovery by an affected party. CCP §405.34. The most obvious evidence in a motion under §405.34 is the damages that the moving party will suffer from continued maintenance of the lis pendens.

If the moving party succeeds on its motion for an undertaking from the claimant, it may ultimately recover against the undertaking imposed (as set forth in CCP §996.440; see §13.42), an amount not to exceed the undertaking, on a showing that:

- The claimant did not prevail on the real property claim; and
- The person seeking recovery suffered damages as a result of maintenance of the lis pendens.

Although CCP §405.34 does not have minimum evidentiary requirements to support a motion to require an undertaking, it specifies certain subjects that may not be considered in a party's effort to recover on an undertaking ordered under this section. Specifically, the court may not consider the claimant's intent or the presence or absence of probable cause.

The moving party may obtain relief under CCP §405.34, in the court's discretion, even if the moving party does not seek expungement under CCP §405.23, §405.31, or §405.32 (see §§13.57-13.91). The drafters of the 1992 lis pendens statutes separated this form of relief from the expungement provisions and modified it in order to make it more consistent with other provisional remedies and to alleviate confusion. See Comment 1 to CCP §405.34.

PRACTICE TIP: It is almost always advisable to request an order requiring the claimant to file an undertaking to indemnify the property owner for any damages incurred as a result of the lis pendens if the owner ultimately prevails in the action. For discussion of the property owner's possible damages that might be covered by such an undertaking, see §§13.41-13.43. This undertaking requirement may be the property owner's most effective method of expungement. The trial court may be more willing to order an undertaking than to order outright expungement, which will follow in any event under CCP §405.34 if the other party is unable or unwilling to meet the undertaking requirements. See, *e.g., Earp v Nobmann* (1981) 122 CA3d 270, 175 CR 767, disapproved on other grounds in *Silberg v Anderson* (1990) 50 C3d 205, 212, 266 CR 638. See §§13.96-13.105.

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§13.42 B. Nature and Amount of Undertaking; Enforcement

An undertaking under CCP §405.34 must be "of such nature and in such amount as the court may determine to be just." The purpose of such an undertaking is to indemnify the moving party for damages he or she may suffer from the continued maintenance of the lis pendens on the record.

In its order requiring an undertaking, the court must set a return date for the claimant to demonstrate compliance and, if the claimant fails to do so, the court must order the lis pendens expunged without further notice or hearing. CCP §405.34. Thus, such a self-executing return provision must be included in a proposed order to be lodged with the court by a successful moving party. See §13.119.

Like recovery on undertakings required under CCP §405.33 (see §13.105), recovery on undertakings required under §405.34 may be obtained under CCP §996.440, on the requisite showing by the moving party. The amount recovered may not exceed the amount of the undertaking. CCP §405.34. To obtain recovery on an undertaking required under §405.34, a party must demonstrate that:

- The claimant did not prevail on the real property claim; and
- The person seeking recovery suffered damages as a result of the maintenance of the notice.

In assessing damages in a proceeding to enforce an undertaking, the court may not consider the claimant's intent or the presence or absence of probable cause. CCP §405.34.

A successful defendant may recover attorney fees from a lis pendens bond filed by the plaintiff/claimant. See *On v Cow Hollow Prop.* (1990) 222 CA3d 1568, 1572, 272 CR 535 (decided under former CCP §§409.1-409.2).

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§13.43 C. Modifying Undertaking

Modification of an undertaking required under CCP §405.34 is governed by CCP §405.37, the same provision that governs modification of an undertaking required under CCP §405.33. For discussion of the procedures for modifying an undertaking under CCP §405.37, see §13.104. An order modifying or exonerating an undertaking may be conditioned on a new undertaking. CCP §405.37.

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IX. EXPUNGEMENT: TACTICS AND PROCEDURES

A. Tactical Considerations

§13.44 1. Alternatives for Expungement Relief

While the underlying action is pending, a lis pendens is extinguished by recording either a notice of its withdrawal or an expungement order. CCP §§405.30, 405.50. Otherwise, the lis pendens is merged into a judgment or dissolved on dismissal of an action (see §§13.108-13.115 on termination of lis pendens). If the lis pendens is expunged and the expungement order is recorded, a subsequent purchaser or encumbrancer takes title unencumbered by the judgment ultimately rendered in the action in which the lis pendens was recorded. CCP §405.61; *FDIC v Charlton* (1993) 17 CA4th 1066, 1070, 21 CR2d 686. On withdrawal, see §§13.113-13.115.

Because of the adverse impact of a lis pendens on the affected property's marketability, property owners usually want to move for an order from the court expunging the lis pendens as soon as possible after receiving notice that one has been recorded. The court may order various forms of relief on expungement motions, and counsel must consider which potential order would be appropriate under the circumstances. As a rule, counsel should probably seek expungement on all of the bases set forth in CCP §§405.23 and 405.31-405.34 that apply, although the motion may have to seek relief in the alternative because some of the applicable bases for expungement may be inconsistent. At times, however, pursuing options involving an undertaking might be disadvantageous to the client's position. An expungement motion may also be combined with a demurrer or motion for summary judgment. See CCP §§430.10 (demurrer), 437c (summary judgment), but note that the filing and response periods in summary judgment motions have been lengthened, so if speed is important the two motions would have to be filed and served separately. Moreover, the standard for granting summary judgment is higher, so unless that standard can easily be met or the motion will be made in any event, combining the two motions is not recommended.

The alternative forms of relief that the court might order on an expungement motion are:

- Outright expungement without an undertaking on the grounds set forth in CCP §405.23, §405.31, or §405.32 (see §§13.56-13.91);
- Expungement conditioned on an undertaking by the moving party if the court finds, without reaching the merits, that an undertaking can secure adequate relief to the party who recorded the notice (CCP §405.33; see §§13.46, 13.96-13.105); and
- Continued maintenance of the lis pendens conditioned on the filing of an undertaking by the party who recorded the notice (CCP §405.34; see §§13.41-13.43, 13.46).

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§13.45 2. Court Must Evaluate Merits of Case on Expungement Motion

When an expungement motion is filed under CCP §405.32, the claimant must demonstrate, usually at an early stage of the proceedings, by a preponderance of the evidence that the real property claim on which the lis pendens is based has "probable validity." See §§13.87-13.91. This hearing process could become the type of "mini-trial" on the merits that was not permitted under the California Supreme Court's interpretation of the former statutes. See *Malcolm v Superior Court* (1981) 29 C3d 518, 526, 174 CR 694, discussed in §13.3. See also *Orange County Airport Hotel Assocs. v Hongkong & Shanghai Banking Corp.* (9th Cir 1995) 52 F3d 821, 824. Unlike the former statutes, "good faith" and "proper purpose" are no longer sufficient to maintain a lis pendens; the claimant must now show a probably valid claim. See *Hunting World, Inc. v Superior Court* (1994) 22 CA4th 67, 70, 26 CR2d 923.

Under CCP §405.30, the court may permit discovery on an expungement motion and may permit the taking of oral testimony (although this is unlikely in most cases). Because of these provisions and the increased burden imposed on the claimant, a substantial period of time may elapse before an expungement motion is heard and decided. In the authors' view, however, the burden of proving the probable validity of the claim by a preponderance of the evidence should have the effect of deterring a claimant from improperly recording a lis pendens and using it to gain leverage without having a valid real property claim (see §§13.5-13.7).

PRACTICE TIP: If a summary judgment motion is appropriate, for tactical reasons it may be advisable to file a motion to expunge at the same time. In this way, the facts of the case can be put before the court, which may create a greater willingness by the court to grant expungement if the case supporting the notice is perceived as weak.

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§13.46 3. Undertaking From Claimant or Owner

Sound practice often calls for the property owner moving, as an alternative to outright expungement, for an order requiring the claimant to file an undertaking as a condition of maintaining the lis pendens under CCP §405.34. This is because the owner may not be sufficiently confident of success to base an expungement motion solely on grounds that the action does not state a real property claim or have probable validity. For further discussion of motions under §405.34, see §§13.41-13.43.

The owner may also find it advantageous to obtain expungement by moving for an order under CCP §405.33, allowing the owner to file an undertaking to indemnify the claimant. This method of expungement is particularly useful if the owner wants to sell the property quickly and can persuade the court that a relatively small amount will cover any damages that the claimant may incur. For further discussion of expungement under §405.33, see §§13.96-13.105.

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§13.47 B. Who May Make Motion

A motion to expunge may be made by any party to the action or by any nonparty with an interest in the real property affected by the lis pendens. A nonparty must, however, obtain leave of court to intervene at or before the time the expungement motion is brought. CCP §405.30.

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C. When Motion May Be Made

§13.48 1. At Any Time After Lis Pendens Has Been Recorded

A motion to expunge may be made in the court in which the action is pending at any time after a notice of pendency of action has been recorded. CCP §405.30.

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§13.49 2. After Entry of Judgment

Although an expungement motion is usually made in the trial court before judgment is entered, it may also be made after entry of judgment. A lis pendens does not cease to be effective to give constructive notice of the underlying action until the judgment in the action becomes final, either after the time for appeal has expired or after a final decision on appeal (see §§13.14, 13.110). CCP §1049; *Garcia v Pinhero* (1937) 22 CA2d 194, 197, 70 P2d 675. Because of this continued cloud on title, an owner who wants title cleared quickly may need to seek expungement after judgment is entered but before the time for appeal has expired or a notice of appeal has been filed. See §13.110.

Mere entry of judgment, however, does not entitle the victorious party to expungement of a lis pendens before finality. See *Knapp Dev. & Design v Pal-Mal Props.* (1987) 195 CA3d 786, 240 CR 920; *Mason v Superior Court* (1985) 163 CA3d 989, 210 CR 63. But under the post-1992 "probable validity" standard on expungement motions (see §§13.87-13.90), the trial court must, absent one improbable exception, expunge the lis pendens if the recording party loses the case on its merits and the defending party requests expungement after judgment is entered, even before it is final. *Mix v Superior Court* (2004) 124 CA4th 987, 21 CR3d 826. Unless a motion for expungement is granted, the lis pendens remains of record until the judgment becomes final, but the *Mix* decision states expungement after entry of judgment, albeit not conclusive pending appeal, is easily accomplished under the probable validity standard. The only exception is if the trial judge determines that the judgment probably will be reversed on appeal. See §§13.50, 13.87.

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§13.50 3. While Appeal Is Pending

A lis pendens remains effective as long as the underlying action is pending, and the supreme court held under the pre-1992 lis pendens statute that an action is still pending as long as an appeal is pending. *Peery v Superior Court* (1981) 29 C3d 837, 176 CR 533. Thus, a lis pendens will remain a cloud on title while an appeal is being pursued. During that time a property owner seeking to remove that cloud may move to expunge the lis pendens even after an appeal has been filed. But the post-1992 statute neither declared what standard is to be applied by a trial court hearing a postjudgment expungement motion nor provided a standard for when such a motion is reviewed by a court of appeal on a writ. Rather, the courts of appeal provided the standard by interpreting legislative intent.

In the event that the recording party loses the case on its merits and the defending party requests expungement after judgment is entered, the trial court must apply the post-1992 "probable validity" standard applicable to pretrial expungement motions (see §§13.87-13.90), and the trial court must expunge the lis pendens unless it believes that the judgment will be reversed on appeal. *Mix v Superior Court* (2004) 124 CA4th 987, 989, 21 CR3d 826.

When the recording party seeks appellate review of a posttrial expungement order by a petition for writ of mandate, the standard on review is whether the petitioner's real property claim has "probable validity." *Amalgamated Bank v Superior Court* (2007) 149 CA4th 1003, 1008, 57 CR3d 686. The probable validity of the claim is established if the court finds that "it is more likely than not the real property claim will prevail at the end of the appellate process." 149 CA4th at 1017. The court of appeal must assess whether the petitioner has demonstrated a prima facie case for reversing the judgment, based on the trial court record and the parties' arguments. But the "mini-review" is not equivalent to "a full-scale resolution of the underlying appeal." 149 CA4th at 1008.

As to which is the proper court in which to bring a postjudgment expungement motion, under CCP §405.30 (and former CCP §§409.1-409.2), "the court in which the action is pending" may expunge the lis pendens. Thus, the trial court is the proper tribunal to hear an expungement motion even after judgment has been entered. *Peery v Superior Court* (1981) 29 C3d 837, 842, 176 CR 533. A motion to expunge is properly filed in the trial court, even after an appeal has been taken, in the interest of efficient judicial administration. *United Prof. Planning, Inc. v Superior Court* (1970) 9 CA3d 377, 88 CR 551. One important exception must be noted, however: If a judgment entered in favor of the party seeking expungement contains an order for expungement, an appeal from that judgment prosecuted by the claimant divests the trial court of jurisdiction over the issue of expungement under CCP §916. In that case, only a court of appeal could enter a postjudgment expungement order on a writ of mandate, or it might direct the trial court to do so after deciding the merits of the appeal.

PRACTICE TIP: The court of appeal noted in *Amalgamated Bank v Superior Court*, 149 CA4th at 1010 that an inherent safeguard for recording parties (if the trial court grants a motion to expunge after a judgment on the merits) is to petition for a writ of mandate within 20 days of service of written notice of the order. The order expunging the lis pendens will not take effect and cannot be recorded until the proceeding commenced by the petition is finally adjudicated. CCP §405.35. If appropriate, the court of appeal may expedite the appeal on the merits and consider the writ and the appeal simultaneously. See *Behniwal v Superior Court* (2005) 133 CA4th 1048, 35 CR3d 162.

The rule allowing a trial court to expunge a lis pendens after an appeal has been filed also applies to bankruptcy proceedings. *Weston v Rodriguez (In re Weston)* (Bankr ED Cal 1989) 110 BR 452, aff'd without published opinion (9th Cir 1992) 967 F2d 596.

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§13.51 4. After Initial Denial of Motion

A motion to expunge may be renewed after an initial denial, and the court has inherent power to reconsider and correct its previous ruling. *Greenberg v Superior Court* (1982) 131 CA3d 441, 182 CR 466; see CCP §1008. Indeed, the opinion in *Hunting World, Inc. v Superior Court* (1994) 22 CA4th 67, 74, 26 CR2d 923, suggests that, even if a court denies an expungement motion brought early in the action, a delay in prosecuting the action or in developing its evidence of fraud will reveal the action is meritless and may justify the granting of an expungement motion at a later time in the action.

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§13.52 D. Notice Requirements

There are no special notice provisions or service requirements on motions to expunge; expungement motions are subject to the notice requirements and briefing schedules set forth in CCP §1005. See CCP §1005(a)(11). On service by mail and related methods generally, see CCP §1013. On motion service generally, see California Civil Procedure Before Trial, chaps 9, 17-18 (4th ed Cal CEB 2004).

If there are compelling reasons why a motion to expunge should be heard at an earlier date, the attorney may apply to the court for an order shortening the time required for service of the motion. CCP §1005(b); Cal Rules of Ct 3.1300(b). Shortening time is appropriate if expungement would otherwise be ineffective because of particular circumstances, *e.g.,* a deadline for approval of financing to sell the property. On shortening time, see California Civil Procedure Before Trial §§12.60-12.65 (4th ed Cal CEB 2004).

PRACTICE TIP: Although an order shortening the time for notice of the hearing on a motion to expunge may be appropriate in certain circumstances, it seems unlikely that ex parte issuance of an expungement order would be upheld except by consent (*e.g.,* if the claimant wanted to avoid possible severe damages if the motion were heard and granted at a later time), because CCP §§405.30-405.34 (the statutory expungement sections) seem to require a hearing before expungement may be ordered. See also Cal Rules of Ct 3.1200-3.1207 (governing ex parte orders). The statutory expungement sections, however, do not necessarily preclude ex parte issuance of an expungement order in appropriate circumstances. This issue must await further judicial development.

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§13.53 E. Burden of Proof

The burden of proof in connection with a motion to expunge varies depending on the basis on which expungement is sought. On motions to expunge under CCP §§405.31 (pleading does not set forth a real property claim; see §§13.58-13.86) and 405.32 (no probable validity to real property claim; see §§13.87-13.91), the claimant, not the moving party, bears the burden of proof. CCP §405.30.

Although CCP §405.30 does not expressly prescribe the burden of proof on expungement motions under CCP §405.33 (adequate relief can be secured by an undertaking; see §13.96-13.105) or motions to expunge a void and invalid lis pendens for failure to comply with service and filing requirements (CCP §§405.22-405.23; see §13.57), the drafters' Comment to §405.30 states that, by operation of Evid C §§500 and 550, the moving party bears the burden of proof on §405.33 motions, and the claimant bears the burden of proving that the lis pendens complies with CCP §405.22. See Comment 4 to CCP §405.30.

When the claimant bears the burden of proof, so that the moving party need not initially support the motion with evidence, the court's power to award sanctions (see §13.7) and the attorney fee provisions of CCP §405.38 (see §13.55) were considered sufficient by the drafters of the 1992 statutes to deter frivolous motions designed to harass the claimant. See Comment 4 to CCP §405.30.

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§13.54 F. Evidentiary and Discovery Issues

The court may consider oral evidence as well as documentary evidence in hearing a motion to expunge. CCP §405.30. Deciding whether to submit evidence, and what form of evidence to submit, will depend on the grounds for expungement. Some considerations that may bear on this decision are discussed in §13.88.

Also, the court may make any orders it deems just to provide for discovery by any party affected by an expungement motion. CCP §405.30. See Comment to CCP §405.30. Nevertheless, the claimant's attorney should not count on the ability to obtain discovery as a matter of right. In light of the drastic effects of a lis pendens, requests for discovery could result in fierce battles in many cases.

PRACTICE TIP: Because the claimant has the burden under CCP §405.32 of proving the probable validity of the real property claim (see §13.53), the claimant should be permitted to conduct discovery in response to an expungement motion. The claimant may argue that a denial of an opportunity to conduct discovery would constitute an abuse of the court's discretion or a denial of the claimant's right to due process. Faced with such a discovery request, the moving party might argue that the lis pendens appears to be frivolous or that the claimant is in possession of all relevant evidence and discovery is unnecessary.

A claimant who faces an expungement motion made on the ground that the lis pendens is void and invalid (CCP §405.23) or that the claimant has not pleaded a real property claim (CCP §405.31) will be hard pressed to secure discovery in advance of the hearing on the motion because such expungement motions do not depend on extrinsic evidence that would logically be the product of discovery.

PRACTICE TIP: Attorneys for both claimants and moving parties should schedule any desired discovery before the hearing date on the expungement motion and, if time constraints do not permit, seek the court's permission to obtain the requested discovery at the earliest opportunity.

Often the claimant will be unable to complete discovery before its opposition to the motion must be filed (which may be as little as seven days after the motion was filed). The problem may be exacerbated by the "hold" placed on the plaintiff's discovery after a case has been filed under CCP §§2025(b)(2), 2030(b), 2031(b), and 2033(b) if the expungement motion was filed soon after the action was commenced.

The court has authority to continue the expungement hearing to permit discovery and submission of additional evidence. CCP §405.30. See Comment 4 to CCP §405.30. A claimant who needs discovery to oppose an expungement motion should request a stipulation shortening the time for discovery from the moving party and if necessary should seek a continuance of the hearing on the motion and an expedited discovery schedule from the court.

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§13.55 G. Costs and Attorney Fees

An order granting or denying a motion to expunge or requiring an undertaking of either the claimant or the moving party must include an award of reasonable costs and attorney fees to the prevailing party, unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney fees and costs unjust. CCP §405.38. (Note that after ruling that a lis pendens had been properly expunged on the ground that the action did not affect title to or possession of real property, one court noted in dictum that because the defendant also had no interest in the property, its entitlement to attorney fees in the case presented "an interesting question," which was left to the lower court to answer. *Moseley v Superior Court* (1986) 177 CA3d 672, 679, 223 CR 116.)

The standard set forth in CCP §405.38 reads the same as that applied to awards of attorney fees and costs on discovery motions. See, *e.g.,* CCP §§2023(b)(1), 2025(g), (i), (j)(3), (q)(1)-(2), 2030(*l*), 2031(*l*), 2033(*l*). Whether awards will become the rule under CCP §405.38 remains to be decided. As with discovery motions, the likelihood of a fee award probably will depend on the discretion of the judge hearing the motion, except in egregious cases.

When a claimant withdraws the lis pendens while a motion to expunge is pending, the moving party is not automatically entitled to recover attorney fees as a "prevailing party" under §405.38. Rather, the trial court must determine which party realized its objectives in the proceeding, by considering the merits of the motion and whether the claimant acted with substantial justification in withdrawing the lis pendens, or whether, in light of the circumstances, the imposition of fees would otherwise be unjust. *Castro v Superior Court* (2004) 116 CA4th 1010, 10 CR3d 865.

Identifying the prevailing party can sometimes prove difficult for other reasons. On one hand, if a motion to expunge is granted under CCP §405.23 (failure to comply with filing and service requirements, see §13.57), §405.31 (lack of real property claim, see §§13.58-13.86), or §405.32 (failure to establish probability of claim, see §§13.87-13.91), it is relatively easy to decree that the moving party is the prevailing party. See *Trapasso v Superior Court* (1977) 73 CA3d 561, 140 CR 820 (applying former CCP §409.1). On the other hand, imposition of an undertaking requirement under CCP §405.33 (see §§13.96-13.105) or §405.34 (see §§13.41-13.43) may present problems because the claimant's right to record the notice is not in issue. As the *Trapasso* court noted (73 CA3d at 570), if the moving party on a motion to expunge offers to furnish an undertaking in an amount the court finds adequate, and the court grants the motion over the claimant's opposition, the court may declare the moving party to be the prevailing party. But if the court finds the security offered by the moving party to be inadequate and grants the motion on the condition that greater security is given, the court may rule that the claimant is the prevailing party.

Similarly, deciding who is the prevailing party may also be difficult on a motion to require the claimant to provide an undertaking under CCP §405.34. By its nature, the motion does not seek expungement, and the propriety of recording the lis pendens, the existence of a real property claim, or the probable validity of the claim are not in issue. In these circumstances, even if the moving party obtains an order for an undertaking, an award of attorney fees to either party may be unjust.

In appropriate cases, attorney fees and costs might be assessed directly against an attorney under CCP §§128.6-128.7 (in state court) or under Fed R Civ P 11 (in federal court). See Comment 4 to CCP §405.30. It is unclear whether attorney fees are recoverable under CCP §405.38 for successfully seeking *review* of an order granting or denying a motion to expunge. A party seeking review of an attorney fees award must petition for a writ of mandate under CCP §405.39. *Shah v McMahon* (2007) 148 CA4th 526, 55 CR3d 792.

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X. GROUNDS FOR EXPUNGEMENT

§13.56 A. Summary of Different Grounds

There are five separate grounds on which a lis pendens may be expunged. Depending on the particular facts and allegations, an attorney seeking to expunge a lis pendens may base the expungement motion on any number of the applicable grounds. The statutory bases for expunging a lis pendens are the following:

- The notice is void and invalid for failing to comply with the recording, service, or filing requirements of CCP §405.22 (CCP §405.23; see §13.57).
- The complaint or cross-complaint on which the lis pendens is based does not assert a real property claim (CCP §405.31; see §§13.58-13.86).
- The claimant failed to establish the probable validity of the claim on which the lis pendens is based (CCP §405.32; see §§13.87-13.91).
- The claimant can be afforded adequate relief by the property owner's filing of an undertaking (CCP §405.33; see §§13.96-13.105).
- The claimant has failed to file an undertaking ordered by the court as a condition to maintaining the lis pendens (CCP §405.34; see §§13.41-13.43).

In addition to these grounds for expungement, any party or other interested person may move at any time to require the claimant to file an undertaking to protect the moving party. CCP §405.34. See §13.41. Before preparing a motion for expungement, the attorney should review tactical considerations and procedures. See §§13.44-13.55.

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§13.57 B. Notice Fails to Comply With Filing and Service Requirements (CCP §405.23)

A lis pendens that does not meet the service and filing requirements of CCP §405.22 is "void and invalid." CCP §405.23. See Comment to CCP §405.23. On burden of proof requirements, see §13.53.

One case decided under an older version of the statute recognizes an exception for substantial compliance by the claimant coupled with facts demonstrating waiver by the party seeking expungement. See *Biddle v Superior Court* (1985) 170 CA3d 135, 215 CR 848. In another case, however, the court held that failure to comply with the technical requirements for filing and serving a lis pendens justified expungement. See *McKnight v Superior Court* (1985) 170 CA3d 291, 215 CR 909. It appears that the drafters of the 1992 lis pendens statutes intended to maintain the principles of both *McKnight* and *Biddle*. See Comment to CCP §405.23.

PRACTICE TIP: When faced with an expungement motion for failing to comply with technical requirements, a claimant's best course of action may simply be to "cure" the claimed defects before the hearing, thus making the motion moot, or to request the court to defer ruling on the motion or to stay the expungement order for a limited period of time to enable the claimant to remedy the defects. If the claimant waits to cure the defect until after the notice has been expunged, he or she must obtain leave of court before recording a new notice on the property. CCP §405.36; see §13.95.

Because CCP §405.38 permits an award of attorney fees to the "party prevailing on any motion under [the] chapter," curing the defect might also deprive the defendant of an opportunity to recover attorney fees for the motion, even though the propriety of the motion arguably was demonstrated by the claimant's action after the motion was filed.

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§13.58 C. Pleading Does Not Contain Real Property Claim (CCP §405.31)

The court must order a lis pendens expunged if it finds that the pleading on which the lis pendens is based does not contain a real property claim. CCP §405.31. Expungement under §405.31 raises strictly an issue of the sufficiency of the pleading and is similar in many respects to a demurrer. Any reference to or examination of evidence would be a subject for expungement under CCP §405.32 (no probable validity to real property claim); see §§13.87-13.91. See Comment to CCP §405.31.

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§13.59 1. Applicable Standard; Required Showing

Under CCP §§405.20 and 405.31 a lis pendens must be based on an action that asserts a "real property claim." Code of Civil Procedure §405.4 defines "real property claim" to include an action that affects (a) title to, or the right to possession of, specific real property, or (b) use of an easement identified in the pleading, other than a public utility easement.

In deciding whether an action asserts a real property claim under CCP §405.31, the court need look no further than the pleadings. Although CCP §405.30 provides for admission of testimony as well as declarations in connection with an expungement motion, the drafters of §§405.30-405.31 indicated that, with the exception of judicially noticed matters such as those considered on a demurrer, evidence from either side should not be required to ascertain whether the action asserts a real property claim. Indeed, the drafters noted that case law had become confused because of the courts' "failure to distinguish between allegations (pleadings) and evidence." Comment 1 to CCP §405.31.

The supreme court in *Kirkeby v Superior Court* (2004) 33 C4th 642, 647, 15 CR3d 805, ruled that to decide whether an action asserts a real property claim, "the court must engage in a demurrer-like analysis." Quoting from the legislative history of CCP §405.31, the court explained that rather than analyzing whether the complaint states any claim at all, as is done on a general demurrer, the court conducts a limited analysis of whether the complaint states a real property claim. Noting the potential for abusing the lis pendens procedure by crafty pleading, the court observed that many other statutory grounds exist for seeking expungement of the lis pendens in an action of questionable merit. They are summarized in §13.56 and detailed in §§13.57-13.91.

PRACTICE TIP: If the governing statute for a particular legal action does not specify whether a lis pendens is authorized, counsel should consider case law holding that various actions do or do not affect title or possession (see §§13.63-13.85), and then argue by analogy to the particular case. In the authors' view, the most useful abstract definition of the test is that the claimant must demonstrate that the action affects some "right" to the real property, either an ownership interest (see *Nash v Superior Court* (1978) 86 CA3d 690, 150 CR 394) or a possessory interest (see *Kendall-Brief Co. v Superior Court* (1976) 60 CA3d 462, 131 CR 515).

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§13.60 2. Amending Complaint to Assert Real Property Claim

An interesting situation is presented when the claimant has not alleged a real property claim but could amend the pleading to do so. Under CCP §405.36, once a lis pendens has been expunged, the claimant cannot record another one on the affected property without leave of the court in which the action is pending. See §13.95. If a sale of the property is pending, normal motion procedures and service requirements may be too lengthy to permit the claimant to amend the pleading and to file a motion to permit recordation of a new lis pendens after leave of court and before the sale. Therefore, a claimant who can demonstrate that the pleading can be amended to state a real property claim should seek to amend the pleading at the earliest opportunity.

If the claimant is still permitted to amend without leave of court under CCP §472, he or she should do so immediately. If not, the claimant should seek leave to amend the pleading before the hearing on the expungement motion by stipulation and order or by order shortening time. Although the lis pendens statutes do not expressly so provide, the claimant could argue that the court should exercise its discretion to continue the hearing on the motion to expunge to the same date as the hearing on the motion to amend; then, if the court grants the motion to amend, the motion to expunge would be subject to denial as being moot.

WARNING: If the owner transfers the property to anyone other than a named defendant pending the expungement motion and before the complaint is properly amended to state a real property claim, arguably the lis pendens is ineffective to give notice of the action to the transferee. See §§13.58, 13.94.

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§13.61 3. Burden of Proof

The claimant bears the burden of proving that the pleading on which the lis pendens is based contains a real property claim. CCP §405.30. Because this ground for expungement tests the pleading alone, the claimant must satisfy this burden without reliance on evidence outside the pleading or matters judicially noticed. See Comments 1-2 to CCP §405.31. See also *BGJ Assocs., LLC v Superior Court* (1999) 75 CA4th 952, 956, 89 CR2d 693. An expungement motion on this ground is thus like a demurrer, with one significant difference: In ruling on a demurrer, the court evaluates whether the pleading states any cause of action at all, and an order granting a demurrer often gives leave to amend the pleading; on an expungement motion, the issue is limited to whether the action, as pleaded, states a real property claim and is therefore sufficient to support a lis pendens. See *BGJ Assocs., LLC v Superior Court, supra,* citing Comment 2 to CCP §405.31.

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§13.62 4. Standing to Record Lis Pendens

A party who records a lis pendens (*i.e.,* a claimant) must be "a party to an action who asserts a real property claim" and must therefore have a direct interest in the real property to which the lis pendens applies. CCP §§405.1 (defining claimant), 405.20. Nonetheless, some ambiguity may result from case law interpreting the standing issue under the former provisions. Former CCP §§409-409.9 did not expressly require that the party recording the lis pendens allege a personal right to title to or possession of the property. See, *e.g., Kendall-Brief Co. v Superior Court* (1976) 60 CA3d 462, 468, 131 CR 515 (plaintiffs/owners of adjoining parcel sued to enjoin use of private road to defendant/developer's parcel and recorded lis pendens on developer's parcel and private road). But see *Moseley v Superior Court* (1986) 177 CA3d 672, 675, 223 CR 116 (county resident and renters' association sought to compel county to reinstate price control program and recorded lis pendens on 491 condos that had been subject to price control; action did not support lis pendens, because no owner was party to underlying action).

PRACTICE TIP: The *Kendall-Brief* decision is notable for the specter it raises of actions in which a lis pendens might be recorded even though the plaintiff asserts no right himself or herself to title to or possession of the affected property. Such use of a lis pendens could occur when adjoining owners seek to prevent some use of the property in question but do not allege any interest in the property; common examples are environmental cases and cases to enjoin a use that causes damage to the plaintiff's property.

In addition, a lis pendens is not available in an action to impose a constructive trust on real property owned by a partnership (see §13.78), and the validity of the lis pendens depends on the plaintiff's, not a third party's, claims (see *Lewis v Superior Court* (1994) 30 CA4th 1850, 1862, 37 CR2d 63).

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§13.63 5. Particular Actions

A lis pendens must be expunged if the claimant is unable to respond to an expungement motion by showing that the action affects title to or possession of real property. See §§13.17, 13.59. See also §§13.18-13.20. Because the 1992 lis pendens statutes preserve the former standard (compare, *e.g.*, CCP §405.4's definition of "real property claim" with the interpretation of the former statute in *Allied E. Fin. v Goheen Enters.* (1968) 265 CA2d 131, 133, 71 CR 126), most case law decided under the previous statutes should provide helpful precedents in interpreting the 1992 provisions. Sections 13.64-13.85 summarize particular causes of action analyzed under current and former law.

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§13.64 a. Attorney Fees

An action for attorney fees is merely an action to recover money and does not affect title to or possession of the defendant's real property, even if the defendant promises to pay the attorney out of real property sale proceeds in escrow. *Hardy v San Fernando Valley Chamber of Commerce* (1950) 99 CA2d 572, 576, 222 P2d 314.

PRACTICE TIP: An action on a contract that expressly gives an attorney a lien or encumbrance on real property, however, might be held to affect title to the property and thus to support a lis pendens. On the ethical issues in taking a real property lien for payment of attorney fees, see Fee Agreement Forms Manual (2d ed Cal CEB 2007).

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§13.65 b. Breach of Contract

An action for damages for breach of contract does not entitle the plaintiff to record a lis pendens, even if the contract provides for the plaintiff to obtain a loan for improvements on the defendant's real property. *Allied E. Fin. v Goheen Enters.* (1968) 265 CA2d 131, 71 CR 126. Presumably, if the contract expressly entitled the plaintiff to a lien or an encumbrance on the real property, an expungement motion would be denied.

The propriety of a lis pendens in an action to enforce a contract to make a will arose in *Westbrook v Superior Court* (1986) 176 CA3d 703, 222 CR 317. The court ruled it was not an action affecting title to or possession of real property, because the facts did not support a remedy for a constructive trust on the property. The court reasoned that when a testator agrees to leave to a person whatever property the testator owns at the time of death and the testator has not yet died, it would be inappropriate to impose a constructive trust on specific property owned or possessed by the testator, for two reasons: (1) While living, the testator has the right to consume or dispose of the property in good faith for reasonably necessary living expenses; and (2) the specific property in which the person may assert an interest under the contract cannot be identified until the testator's death.

Additionally, a lender's motion to expunge a lis pendens is properly granted if the court rules in favor of the lender on the only claim in the underlying action that affects real property, leaving only the borrower's contractual claims. *Ziello v Superior Court* (1995) 36 CA4th 321, 331, 42 CR2d 251. See also §13.77.

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§13.66 c. Cancellation of Instrument

An action to cancel an instrument affecting real property interests will support a lis pendens. See *Martin v Lawrence* (1909) 156 C 191, 103 P 913 (deed); *Ross v Title Guar. & Trust Co.* (1934) 136 CA 393, 29 P2d 236 (promissory note and deed of trust). On cancellation of instruments, see chap 6. A lis pendens recorded in connection with an action to cancel a deed of trust extends the time period under CC §882.020 for enforcing the power of sale in the deed of trust. *Slintak v Buckeye Retirement Co.* (2006) 139 CA4th 575, 43 CR3d 131.

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§13.67 d. Constructive Trust on Real Property

Actions to impose a constructive trust on real property (see chap 15) have engendered a substantial amount of attention in appellate courts deciding whether an action affects title to or possession of real property. See, *e.g., Coppinger v Superior Court* (1982) 134 CA3d 883, 185 CR 24; *BGJ Assocs.*, *LLC v Superior Court* (1999) 75 CA4th 952, 89 CR2d 693. See also *Kirkeby v Superior Court* (2004) 33 C4th 642, 650 n7, 15 CR3d 805 (ruling that fraudulent conveyance claims clearly support lis pendens, but declining to address issue on other types of constructive trust claims). The lis pendens statutes do not address this cause of action directly, leaving it for judicial interpretation. See Comment 5 to CCP §405.4.

In *Coppinger v Superior Court, supra,* the court denied expungement under former CCP §409.1(a) in an action to impose a constructive trust, but ordered expungement on the filing of an undertaking under former CCP §409.2. Decisions after *Coppinger* attempted to limit it to its facts, and the weight of the authority holds that a constructive trust cause of action is not sufficient to support a lis pendens, particularly if the cause of action is being used to secure a potential money judgment. See *Campbell v Superior Court* (2005) 132 CA4th 904, 34 CR3d 68 (lis pendens not available in action to recover money obtained by undue influence and used for remodeling defendant's house); *BGJ Assocs.*, *LLC v Superior Court, supra* (holding actions that combine theories of liability for monetary damages and constructive trust are not claims justifying lis pendens); *Lewis v Superior Court* (1994) 30 CA4th 1850, 37 CR2d 63 (rejecting *Coppinger* and holding that constructive trust claim does not support lis pendens); *Urez Corp. v Superior Court* (1987) 190 CA3d 1141, 235 CR 837 (actions for damages, declaratory relief, and imposition of constructive trust). See also *Pacific Lumber Co. v Superior Court* (1990) 226 CA3d 371, 276 CR 425; *Hunting World, Inc. v Superior Court* (1994) 22 CA4th 67, 26 CR2d 923 (noting limitations of *Coppinger* and disapproving it, but declining to opine whether *Coppinger* survives).

PRACTICE TIP: In any event, counsel for the property owner should consider seeking expungement when a cause of action to impose a constructive trust on real property is accompanied by the recordation of a lis pendens. Arguably, a constructive trust claim is a real property claim only if the claimant alleges a direct claim against the affected property, rather than a claim to the property based merely on "tracing" funds allegedly obtained by some tort extrinsic to the property or a claim to the property used only as a collateral means to collect money damages. Many reported cases could be reconciled on that ground. See *Hunting World, Inc. v Superior Court* (1994) 22 CA4th 67, 73, 26 CR2d 923. See also §§15.22, 15.40-15.46.

In light of the foregoing, requesting injunctive relief from the court under CCP §§525-534 at the beginning of a constructive trust action may be more effective and should be considered in lieu of using a lis pendens. See §13.6A.

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§13.68 e. Ejectment

Although an ejectment action (see chap 10) need not always affect title to real property, it will necessarily affect possession and thus should always support a lis pendens. *McLean v Baldwin* (1902) 136 C 565, 69 P 259.

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§13.69 f. Equitable Lien

Whether an action involving an equitable lien (see chap 15) will support recordation of a lis pendens depends on the factual and legal basis for the lien. One court held that "an action to establish or foreclose an equitable lien" is clearly one that affects the title or the right to possession of real property. *Okuda v Superior Court* (1983) 144 CA3d 135, 141, 192 CR 388 (holding that good faith improver statute (CCP §§871.1-871.7) gives court broad equitable powers to adjust property interests, including remedy of equitable lien, sufficient to support lis pendens). See also *Kirkeby v Superior Court* (2004) 33 C4th 642, 650 n7, 15 CR3d 805 (ruling that fraudulent conveyance claims clearly support lis pendens, but declining to address issue on equitable lien claims); *Hunting World, Inc. v Superior Court* (1994) 22 CA4th 67, 26 CR2d 923 (discussed in §§13.67, 13.71, 15.44-15.46).

Another court disapproved *Okuda,* noted that the claimant alleged a beneficial interest and sought the remedies of constructive trust and equitable lien only for the purpose of securing a claim for money damages, and ruled that the action did not affect either title to or possession of real property. See *Urez Corp. v Superior Court* (1987) 190 CA3d 1141, 235 CR 837 (noting that claimant was junior lienholder under deed of trust who sued for money damages after foreclosure wiped out his beneficial interest but who did not sue for rescission to reinstate his interest). See also cases following *Urez*, *e.g.*, *Campbell v Superior Court* (2005) 132 CA4th 904, 34 CR3d 68 (lis pendens not available in action to recover money obtained by undue influence and used for remodeling defendant's house); *Wardley Dev., Inc. v Superior Court* (1989) 213 CA3d 391, 262 CR 87 (lis pendens inappropriate in creditor action under CCP §708.210 to impress equitable lien against real property solely to secure payment of money judgment on commercial transaction unrelated to property).

In an action seeking an equitable lien, requesting injunctive relief from the court under CCP §§525-534 at the beginning of the action may be more effective than using a lis pendens. See §13.6A.

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§13.70 g. Foreclosure of Chattel Mortgage

An action to foreclose a chattel mortgage does not affect title to or possession of real property and is subject to expungement. *Security First Nat'l Bank v Sartori* (1939) 34 CA2d 408, 93 P2d 863.

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§13.71 h. Fraudulent Conveyance

A creditor's action to set aside a fraudulent conveyance of real property under CC §§3439-3439.12 is a lawsuit that clearly affects title to the property, and a lis pendens filed in connection with that action, if properly pleaded, will survive a motion to expunge. *Kirkeby v Superior Court* (2004) 33 C4th 642, 650 n7, 15 CR3d 805 (ruling that fraudulent conveyance claims support lis pendens, but declining to address issue on other types of constructive trust and equitable lien claims). See *Hunting World, Inc. v Superior Court* (1994) 22 CA4th 67, 26 CR2d 923. See also *Resolution Trust Corp. v Smith* (9th Cir 1996) 100 F3d 964 (unpublished opinion; may not be cited except under 9th Cir R 36-3) (money judgment directly associated with fraudulent conveyance claim relates back to date lis pendens was recorded).

An action to set aside a fraudulent conveyance may often take the form of an action to impose a constructive trust (see §13.67) or equitable lien (see §13.69). See Comment 5 to CCP §405.4. Case law on those causes of action should be considered if the basis for the action is a fraudulent conveyance. See, *e.g., Kirkeby v Superior Court, supra*. See also *Lewis v Superior Court* (1994) 30 CA4th 1850, 37 CR2d 63 (noting that fraudulent conveyance claim was unsupported; party claimed only that money was wrongfully appropriated and invested in property that was later conveyed). See also *Hunting World, Inc. v Superior Court, supra* (claimant's unjustified delay in prosecuting fraudulent conveyance action or in revealing its evidence of fraud may undermine validity of action and justify expungement).

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§13.72 i. Easement

An action to establish, terminate, or enforce rights to an easement supports the recordation of a lis pendens. See CCP §405.4. See also *Park 100 Inv. Group II v Ryan* (2009) 180 CA4th 795, 808, 103 CR3d 218 (dicta supporting recordation of lis pendens by servient owner against dominant estate in quiet title action to eliminate easement on servient estate); *Woodridge Escondido Prop. Owners Ass'n v Nielsen* (2005) 130 CA4th 559, 30 CR3d 15 (action for injunctive and declaratory relief to enforce agreement prohibiting construction of permanent structures in easement area). Similarly, an action seeking an injunction against the use of an easement by an adjacent landowner may justify the recording of a lis pendens. In *Kendall-Brief Co. v Superior Court* (1976) 60 CA3d 462, 468, 131 CR 515, the plaintiffs sued to enjoin a claimed access easement across their parcel via a private road and recorded a lis pendens against the property of the developer defendant. The court held that the action affected the right to possession of the developer's property because, if the plaintiffs prevailed, the developer's access would be seriously impaired and the right to possession of property includes access to it.

PRACTICE TIP: Although the authors are unaware of any decisions addressing this issue, they believe that a similar action based on a *nonpossessory* easement, such as a deed restriction on use, might not qualify as an action affecting title or possession.

For discussion of easement litigation, see California Easements and Boundaries: Law and Litigation, chaps 1, 8, 10 (Cal CEB 2008).

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Source: Real Property/California Real Property Remedies and Damages/13 Lis Pendens/§13.73 j. Judicial Foreclosure

§13.73 j. Judicial Foreclosure

A lis pendens may be recorded in connection with an action to foreclose a mortgage or a deed of trust. *Johnson v Friant* (1903) 140 C 260, 73 P 993; *Bolton v Logan* (1939) 30 CA2d 30, 85 P2d 546. Note, however, that a lis pendens is ineffective if recorded in connection with a nonjudicial foreclosure sale because there is no pending action to support the notice (see §13.84). *Carpenter v Smallpage* (1934) 220 C 129, 29 P2d 841. On judicial and nonjudicial foreclosure, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chaps 2-3 (4th ed Cal CEB 2009).

NOTE: A lis pendens (arising from a prior action to cancel a deed of trust) that has not been withdrawn or expunged extends the time period under CC §882.020 for enforcing the power of sale in the deed of trust. *Slintak v Buckeye Retirement Co.* (2006) 139 CA4th 575, 43 CR3d 131.

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§13.74 k. Leasehold Interest

An action to establish rights pertaining to a leasehold interest affects the right to possession of real property and will support a lis pendens. *Parker v Superior Court* (1970) 9 CA3d 397, 400, 88 CR 352 (although leasehold is not real property, it is "estate" in land or in real property; to hold that leasehold does not affect right of possession of real property under broad language of lis pendens statute is unreasonable). See also *Drinkhouse v Spring Valley Water Works* (1890) 87 C 253, 25 P 420; *Goldstein v Ray* (1981) 118 CA3d 571, 575, 173 CR 550; Anno, *Propriety of Filing of Lis Pendens in Action Affecting Leasehold Interest*, 67 ALR3d 747, §4 (1975). On actions between lessees and lessors generally, see California Landlord-Tenant Practice (2d ed Cal CEB 1997).

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§13.75 I. Marital Dissolution

In proceedings under the Family Code (Fam C §§1-20043), the petitioner or respondent may record a lis pendens if the petition, response, or preliminary declaration of disclosure adequately states a "real property claim" by alleging or identifying a community interest in specific real property. See *Gale v Superior Court* (2004) 122 CA4th 1388, 19 CR3d 554. Under Fam C §754, if a lis pendens in a proceeding for dissolution, nullity, or legal separation is recorded in any county in which one spouse resides on real property that is the separate property of the other, the property shall not for a period of 3 months after the recordation "be transferred, encumbered, or otherwise disposed of voluntarily or involuntarily without the joinder of both spouses, unless the court otherwise orders."

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§13.76 m. Mechanics' Lien

A lis pendens is authorized in connection with the foreclosure of a mechanics' lien (CC §§3084, 3146; see *Howard S. Wright Constr. Co. v Superior Court* (2003) 106 CA4th 314, 130 CR2d 641), but not in an action solely for damages on a contract; a lis pendens is not the equivalent of an attachment lien (*Abbett Elec. Corp. v California Sav. & Loan* (1991) 230 CA3d 355, 366, 281 CR 362). For further discussion, see California Mechanics' Liens and Related Construction Remedies, chap 3 (3d ed Cal CEB 1998).

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§13.77 n. Money Damages

Generally, actions for money damages only, even if the action relates in some way to specific real property, will not support a lis pendens. *BGJ Assocs.*, *LLC v Superior Court* (1999) 75 CA4th 952, 967, 89 CR2d 693; *Ziello v Superior Court* (1995) 36 CA4th 321, 332, 42 CR2d 251; *Urez Corp. v Superior Court* (1987) 190 CA3d 1141, 1145, 235 CR 837.

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§13.78 o. Personal Property

A lis pendens is ineffective and may be expunged in an action to establish title to personal property because a lis pendens may be recorded only in connection with a "real property claim." See *MacDermot v Hayes* (1917) 175 C 95, 170 P 616. In addition, a lis pendens is not available in an action by limited partners to impose a constructive trust on partnership property, because the interest of the partners was in the partnership, *i.e.,* in personal property, and not in the real property. *North Coast Bus. Park v Superior Court* (1984) 158 CA3d 858, 205 CR 81.

Although some statutes authorize recording a lis pendens for claims against either real or personal property, the intent behind these statutes creates considerable doubt about whether recording a lis pendens would actually operate as constructive notice to a subsequent purchaser or encumbrancer of the personal property. See CCP §§872.020, 872.250 (partition actions); Prob C §1004 (third party claims against either real or personal property of a decedent).

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§13.79 p. Prescriptive Easement

The current lis pendens statute, CCP §405.4, defines "real property claim" to include an action that affects the use of an easement identified in the pleading, other than a public utility easement, and this should include easements obtained by prescription. A case predating this statute held that a declaratory relief action to establish the existence of a prescriptive easement affects title to or possession of the real property and thus supports recordation of a notice of pendency of action. *Baker v Burbank-Glendale-Pasadena Airport Auth.* (LA Super Ct 1982) No. C413871, rev'd on other grounds in *Baker v Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 C3d 862, 218 CR 293. See *Brinkley v Appleby* (1969) 276 CA2d 244, 245, 80 CR 734.

In *Baker v Burbank-Glendale-Pasadena Airport Auth., supra* (an action brought by homeowners adjacent to an airport alleging noise, smoke, and vibration problems resulting from overflights), the airport cross-complained to establish prescriptive easements over the homeowners' properties and recorded lis pendens against each of them. When one homeowner later sought to sell his property and the lis pendens was disclosed by the preliminary report, some title insurance companies refused to issue a "clear" title insurance policy to the prospective purchaser, who refused to complete the transaction unless the lis pendens was removed.

WARNING: The difficulties created by the title companies' refusal to issue clear policies may have been caused by a lack of understanding of the purpose and intent of the lis pendens statutes on the part of the prospective purchasers, brokers, lenders, and title insurers. The prospective purchaser and the prospective lender could have taken their interests in the real property subject to the possibility that their interests would be subordinate to whatever prescriptive easement over the homeowner's properties was subsequently established in the pending litigation. Unless the litigation could result in a title that the prospective purchaser does not want or expect, or in impairment of the lender's security, the existence of the lis pendens should not affect the seller's ability to complete the transaction.

On litigating prescriptive easements, see California Easements and Boundaries: Law and Litigation, chaps 1, 8, 10 (Cal CEB 2008).

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§13.80 q. Quiet Title Action

A lis pendens would be proper in an action to quiet title to real property (see chap 7), because by definition the action affects title. See *Peery v Superior Court* (1981) 29 C3d 837, 176 CR 533; *Swartfager v Wells* (1942) 53 CA2d 522, 128 P2d 128. Note that the plaintiff is required by statute to record a lis pendens in a quiet title action. See CCP §761.010(b), cited in §13.20.

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§13.81 r. Reformation

An action to reform a deed or other real property instrument (see chap 2) ordinarily constitutes a real property claim under CCP §405.31, although the authors have found no reported cases squarely so holding. See, *e.g., Empfield v Superior Court* (1973) 33 CA3d 105, 108 CR 375 (decided under former CCP §409.1).

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§13.82 s. Rescission

An action based on rescission of either a real property purchase and sale agreement or an installment land sale contract (see chap 1) usually affects title to or possession of the real property and thus should support recordation of a lis pendens. See, *e.g., Empfield v Superior Court* (1973) 33 CA3d 105, 108 CR 375; *Wilkins v Oken* (1958) 157 CA2d 603, 321 P2d 876. An aggrieved seller's recordation of a notice of rescission or a lis pendens is a protected act in furtherance of the seller's rights under the anti-SLAPP statute, CCP §425.16. See *Salma v Capon* (2008) 161 CA4th 1275, 74 CR3d 873. See also *Park 100 Inv. Group II v Ryan* (2009) 180 CA4th 795, 804, 103 CR3d 218 (anti-SLAPP statute protects owner of servient estate from tort liability for recordation of lis pendens against dominant estate in quiet title action to eliminate easement).

A buyer of real property who rescinds on the basis of the seller's failure or refusal to perform is entitled to a purchaser's lien on the property as security for reimbursement of any consideration paid. CC §3050; *Montgomery v Meyerstein* (1921) 186 C 459, 199 P 800. The rescinding buyer may sue for restitution and to establish and foreclose the statutory lien (*Harder v Allred* (1923) 61 CA 394, 214 P 1017), and may record a lis pendens to make the lien enforceable against a subsequent buyer (see *South San Bernardino Land & Improvement Co. v San Bernardino Nat'l Bank* (1899) 127 C 245, 59 P 699).

A lis pendens is not proper in a shareholder's action to rescind the sale of corporate shares and to impose a constructive trust on corporate real property. Even if the shareholder prevailed and the sale of shares was rescinded, title to the real property would remain with the corporation, not with the shareholders, and therefore the action would not affect title to or possession of the real property. *Pacific Lumber Co. v Superior Court* (1990) 226 CA3d 371, 276 CR 425.

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§13.83 t. Specific Performance

A buyer's action for specific performance of a real property purchase and sale agreement (see chap 5) is an action in which a lis pendens is both appropriate and necessary. Without giving constructive notice, a buyer who wants to enforce a purchase agreement would be left with no effective remedy because the defaulting seller would be free to sell the property to another party. See *Abbott v 76 Land & Water Co.* (1911) 161 C 42, 118 P 425; *Brock v Pearson* (1891) 87 C 581, 25 P 963; *Brandolino v Lindsay* (1969) 269 CA2d 319, 75 CR 56.

EXAMPLE: A buyer under a terminated purchase and sale agreement, claiming that the termination was improper, may record a lis pendens in an action to (1) enforce the agreement against the seller and (2) prevent or invalidate a purported subsequent sale to another buyer. Alternatively, if the seller were to get "cold feet" and, after entering into a second purchase and sale agreement, decide to revoke an earlier termination of the first agreement, the second buyer may record a lis pendens in an action against the seller to enforce the second agreement.

An action for specific performance of an oral agreement to convey real property will also support a lis pendens, but the relative weakness of such a case may be raised in an expungement motion under CCP §405.32 to test the probable validity of the claim. See §§13.87-13.91. See also *Hilberg v Superior Court* (1989) 215 CA3d 539, 263 CR 675. Recordation of a lis pendens does not, however, secure priority for interests under provisions of the purchase and sale agreement that do not relate to title or possession of real property. *Feiler v U.S.* (9th Cir 1995) 62 F3d 315. One California court of appeal held that a lis pendens filed in an action for specific performance does not impart notice of a potential attorney fee award to subsequent transferees or lienholders, and if the buyer succeeds on the action, any attorney fee award the buyer obtains in the judgment cannot be deducted from the purchase price as an offset. *Behniwal v Mix* (2007) 147 CA4th 621, 54 CR3d 427. See §§5.21, 5.30, 5.45.

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§13.84 u. Trustee Sale

A lis pendens recorded in connection with a trustee sale in a nonjudicial foreclosure may be expunged. *Carpenter v Smallpage* (1934) 220 C 129, 29 P2d 841. The reason, of course, is that a nonjudicial sale is not an "action," so no action is pending. A notice of default must be recorded in connection with a nonjudicial foreclosure (CC §2924), and this procedure functions the same way as a lis pendens. On nonjudicial foreclosure generally, see California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 2 (4th ed Cal CEB 2009). On judicial foreclosure, see §13.73.

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§13.85 v. Validation of Reclamation Assessments

A lis pendens is not available in action adjudicating the validity of assessments for reclamation (flood control) purposes, because the action does not affect title to or possession of real property. *Reclamation Dist. No. 785 v Lovdal Bros.* (1919) 42 CA 271, 183 P 598.

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§13.86 6. No Undertaking If Action Not Based on Real Property Claim

If the court finds that the complaint or cross-complaint does not state a real property claim as defined in the lis pendens law (see §13.17-13.18), it must expunge the lis pendens and cannot require the moving party (*e.g.*, the property owner) to file an undertaking as a condition of expungement. CCP §405.31. See also Comment 3 to CCP §405.31.

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D. Failure to Establish Probable Validity of Claim (CCP §405.32)

§13.87 1. Overview

Code of Civil Procedure §405.32 authorizes expungement of a lis pendens if the claimant is unable to establish the "probable validity" of the real property claim supporting the lis pendens. This means the court will examine the merits of the underlying action on a motion to expunge a lis pendens. See Comments 2-3 to CCP §405.32. Thus, the court does not examine the recording party's intent or purpose in recording the lis pendens, but rather uses an objective "probable validity" standard. CCP §§405.3, 405.32. See *Amalgamated Bank v Superior Court* (2007) 149 CA4th 1003, 1015, 57 CR3d 686 and *Mix v Superior Court* (2004) 124 CA4th 987, 21 CR3d 826. See also §13.45.

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§13.88 2. Nature of Motion and Hearing

Expungement motions based on a claimant's failure to establish the probable validity of the real property claim are governed by CCP §405.32. A claimant is thus required to substantiate the basis for recording the lis pendens with declarations and other documentary evidence and may also do so with oral testimony. CCP §405.30. On evidentiary and discovery issues, see §13.54. As with the other expungement motions, normal civil law and motion procedures apply. CCP §1005(a)(11). On motion practice generally, see California Civil Procedure Before Trial, chap 12 (4th ed Cal CEB 2004).

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3. Applicable Standards

§13.89 a. Claimant Has Burden of Proof

As with expungement motions under CCP §405.31 (pleading does not state a real property claim; see §13.58), the claimant has the burden of proof under CCP §405.32. The court must order expungement unless the claimant establishes by a preponderance of the evidence the probable validity of the claim. Failure to do so precludes the court from ordering an undertaking (see §13.96) as a condition of expungement under CCP §405.34.

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§13.90 b. Establishing Probable Validity

In deciding whether a claim has probable validity, the trial court considers the relative merits of the parties' factual and legal presentations and makes a decision on the probable outcome of the litigation. See *Kirkeby v Superior Court* (2004) 33 C4th 642, 651, 15 CR3d 805; *Ziello v Superior Court* (1995) 36 CA4th 321, 332, 42 CR2d 251. See also *Hunting World, Inc. v Superior Court* (1994) 22 CA4th 67, 70, 26 CR2d 923. Although the lis pendens statutes authorize live testimony (see §13.88), typically the court will not permit testimony.

PRACTICE TIP: Counsel should inquire about the court's policy on introducing live testimony and, if available, should make a formal request to the court in advance of the hearing. If authorized, a party seeking testimony from another party or a nonparty should arrange for a court reporter to take the testimony, and take proper steps to ensure the appearance of those witnesses, either by notice or subpoena. See California Trial Practice: Civil Procedure During Trial, chap 4 (3d ed Cal CEB 1995).

As defined in lis pendens law, a claim has probable validity if "it is more likely than not that the claimant will obtain a judgment against the defendant on the claim." CCP §405.3. The drafters of the 1992 lis pendens legislation drew heavily on attachment law (CCP §481.190) for the probable validity test. See Comment 4 to CCP §405.32; CCP §§484.090-493.060, 512.060. See also *Howard S. Wright Constr. Co. v Superior Court* (2003) 106 CA4th 314, 130 CR2d 641. Somewhat like summary judgment motions, attachment or expungement hearings enable a court to determine the probability of success at trial based on the resolution of disputed facts presented by affidavits and declarations. The court is not required to accept sworn testimony or even undisputed declaratory evidence but may make contrary findings based on inferences drawn from other evidence. See California Civil Procedure Before Trial §§32.2-32.3 (4th ed Cal CEB 2004).

The standard of review in expungement motions is the "substantial evidence" standard that usually applies to review of preliminary injunctions. *Howard S. Wright Constr. Co. v Superior Court, supra*. A trial court's interlocutory decision on the likelihood that the plaintiff will prevail at trial reflects the court's evaluation of the dispute based on the record before it at the time of its ruling. On review, the appellate court does not reweigh conflicting evidence or determine the credibility of witnesses, but rather examines whether the trial court's factual determinations are supported by substantial evidence. If the material facts are not disputed, however, then the issue is a question of law, and the court of appeal will independently review the undisputed evidence.

In attachment cases, a decision of the trial court is not easily overturned on appeal. *Loeb & Loeb v Beverly Glen Music, Inc.* (1985) 166 CA3d 1110, 1120, 212 CR 830. By analogy, the same result can be expected on appeal from the grant or denial of a motion to expunge a lis pendens under CCP §405.3.

Although dispositive on the issues in the pretrial expungement motion, the court's findings do not decide the ultimate validity of the claim on which the lis pendens is based, except to preclude an unsuccessful plaintiff from seeking similar interim relief in a subsequent action without changed circumstances, as in the case of attachments. See CCP §484.100, (attachment) and California Law Revision Comment to that statute.

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§13.91 4. No Undertaking If Claimant Does Not Establish Probable Validity

The court may not order the moving party to give an undertaking as a condition of expunging the notice if the court finds that the claimant has not established the probable validity of the real property claim. CCP §405.32.

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XI. EXPUNGEMENT ORDER

§13.92 A. Drafting Considerations

An order expunging a lis pendens should follow the format for other court papers. See Cal Rules of Ct 2.100-2.119; California Civil Procedure Before Trial, chap 11 (4th ed Cal CEB 2004). The original is filed with the court after the judge has signed it, and a certified copy must be recorded to make the expungement effective. See §13.94. The essential elements of an expungement order are:

- The date of the hearing on the motion to expunge;
- The department number and name of the judge presiding over the hearing;
- The names of the parties;
- The names of the attorneys appearing on behalf of the parties;
- The court's actual order;
- The legal basis and any factual findings supporting the order;
- A description of the lis pendens by recording data, including the instrument number (or book and page number), recordation date, and a legal description of the property (see §13.30); and
- A statement concerning the effect of the expungement order phrased generally in the language of CCP §§405.60-405.61 indicating the lis pendens no longer constitutes constructive notice of the statements in it.

Counsel for the prevailing party should tailor the order to fit the needs of the particular case. The form for expungement orders for various situations (see §13.118) may be used directly or altered as appropriate. For example, if the order requires the recording party to file an undertaking as a condition of maintaining the lis pendens, counsel might draft the order to require that the undertaking be recorded and that expungement will occur automatically if the undertaking is not recorded by a given date. Note also that CCP §995.340 provides that an undertaking given in an action or proceeding must be filed with the court. See §13.119.

Counsel may also include findings to support the expungement order to facilitate defense of the order if it is challenged (see §13.106). The order may also contain an award of costs and attorney fees under CCP §405.38 to the party prevailing on the motion (see §13.55); for a form of an order awarding attorney fees, see §13.118.

PRACTICE TIP: Before submitting the proposed order to the court for signature, counsel should consider having a title insurance company review the order to be sure the language of the order satisfies the standards of the company for issuing a title insurance policy to a subsequent purchaser.

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§13.93 B. When Order Is Effective

An order expunging a lis pendens is not effective, and may not be recorded in the county recorder's office, until the time to file a petition for writ of mandate seeking review of the order has expired. CCP §405.35. An order granting or denying an expungement order is not appealable but is reviewable by petition for writ of mandate, which must be filed and served within 20 days after service of written notice of the expungement order (or up to 10 additional days if extended by the court). CCP §405.39. See §13.106. See Comment to CCP §405.35.

If a petition for writ of mandate is filed within the required time, an expungement order is not effective and may not be recorded until the proceeding commenced by the petition has been finally adjudicated; *i.e.*, if the petition is timely, the expungement order is automatically stayed by operation of law. CCP §405.35. See *Amalgamated Bank v Superior Court* (2007) 149 CA4th 1003, 1010, 57 CR3d 686. In any event, in appropriate circumstances, an appellate court may issue a temporary stay of the expungement order pending an appeal of the judgment or the disposition of a petition for a writ of mandate on the order. See *Carver v Teitsworth* (1991) 1 CA4th 845, 2 CR2d 446. The county recorder has no duty to confirm compliance with CCP §405.35 or with any order expunging a lis pendens. CCP §405.35. See Comment to CCP §405.35.

PRACTICE TIP: If the requisite amount of time has elapsed after the order's entry, the expungement order is effective and recording is proper. If recording is sought before that time, however, counsel should check with the recorder's office before attempting to record the order. The recorder may accept the order for recordation, but recordation may not become effective until the statutory period has elapsed.

Although CCP §405.35 imposes no duty on the county recorder, some recorders may require documentation that the period for seeking review has expired. Some recorders, for example, may not accept for recording an expungement order presented within the potential 20-day writ period (CCP §405.39) unless it is accompanied by:

(1) Proof of service of the order, showing appropriate time lapse between the service date and the date on which recording is requested; and

(2) A declaration of the attorney recording the order that no extension of time to petition for a writ of mandate was granted to the claimant.

WARNING: The time period for requesting review is not governed by CCP §405.39 if the expungement order is included in a judgment entered in favor of the property owner; in that event, the order is reviewable in an appeal from the judgment itself. See §13.110. Although no reported case has addressed this issue, under CCP §916, perfecting the appeal by immediately filing a notice of appeal may stay the effectiveness of the expungement decree pending appeal. (A notice of appeal must normally be filed within the earliest of 60 days after the clerk serves the party filing the notice of appeal with a notice of entry of judgment or file-stamped copy of the judgment, 60 days after service of notice of entry of judgment, or 180 days after entry of judgment. Cal Rules of Ct 8.104(a).) Alternatively, the claimant could either request that the trial court or the court of appeal stay the expungement order in the judgment pending appellate review (see CCP §918) or seek an order under CCP §923 to preserve the status quo pending the appeal. See also *Mix v Superior Court* (2004) 124 CA4th 987, 997, 21 CR3d 826; *Rebco Dev. v Superior Court* (1977) 67 CA3d 13, 136 CR 351.

Whether expungement is obtained in an order after a pretrial motion or as part of a judgment after trial, the consequences of premature recording of an expungement order or judgment are uncertain. The expungement order might be void, or it might be inoperative only during the writ or appeal period. It is also unclear whether the plaintiff would have a claim against the expunging party for damages caused by premature recording and whether the plaintiff may, or must, pursue a claim (such as a quiet title action) to expunge the prematurely recorded order. A deliberate, premature recording that the expunging party uses as a platform for transferring the property to a third party may constitute an actionable abuse of process.

Although CCP §405.35 expressly relieves the county recorder of any liability for premature recording, it is unclear whether a title company would be liable for not identifying the premature recording of the expungement order or judgment if it issued a clean title policy in connection with a transfer of the property. Depending on the policy terms and other circumstances, the title insurer may be required to defend an action brought against the third party transferee.

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§13.94 C. Effect of Recording Certified Copy of Order

On recordation of a certified copy of a final expungement order, neither the lis pendens nor any information derived from it constitutes actual or constructive notice of any matters in the lis pendens or of anything relating to the action, or creates any duty of inquiry in any person thereafter dealing with the property. CCP §405.60. This provision in the current lis pendens statutes continues former law. The section is intended to ensure free transferability of real property after expungement. See Comment to CCP §405.60. The same provisions and intent apply to withdrawal of a lis pendens under CCP §405.50 (see §§13.113-13.115).

Moreover, under CCP §405.61, no one except a nonfictitious party to the action is considered to have actual notice of the action or of any matter claimed in it after recordation of a certified copy of a final order expunging the lis pendens or on withdrawal of the lis pendens. Section 405.61 applies regardless of whether such a person possesses actual knowledge of the action or of when or how such knowledge was obtained and provides for absolute, complete, and free transferability of real property after expungement. CCP §405.61. See Comment to CCP §405.61.

Recording a final expungement order eliminates all notice created by the lis pendens, both actual and constructive, to persons who are not parties to the lawsuit. Thus, following recordation of the order, the claimant cannot enforce its mechanics' lien against the defendant's property after the defendant sells the property to a third party, even if the third party has actual notice that the claimant has instituted foreclosure proceedings to collect on the mechanics' lien. *Knapp Dev. & Design v Pal-Mal Props.* (1987) 195 CA3d 786, 240 CR 920. The drafters intended that CCP §405.61 continue in effect the *Knapp* court's interpretation of former CCP §409.8. See Comment to CCP §405.61; *Lewis v Superior Court* (1994) 30 CA4th 1850, 37 CR2d 63.

PRACTICE TIP: As the prospects of expungement increase, it becomes wiser not to record the lis pendens in the first place. See §13.5.

Some statutes that authorize or require a lis pendens (see §§13.17-13.20) provide for filing a notice at some place other than the county recorder's office. See, *e.g.,* Str & H C §6619 (lis pendens filed with applicable city or county treasurer); Prob C §9354(b) (lis pendens filed with clerk of probate court). The safest practice is also to file the expungement order with the offices designated by statute, such as the probate court or county treasurer, as well as with the applicable county recorder.

Although effective to expunge the lis pendens, a recorded expungement order is not a final order and therefore has no collateral estoppel effect against another lis pendens filed in a later action. *Rebco Dev. v Superior Court* (1977) 67 CA3d 13, 136 CR 351. In addition, an order expunging a lis pendens does not extinguish a previously recorded abstract of judgment. *FDIC v Charlton* (1993) 17 CA4th 1066, 1070, 21 CR2d 686.

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§13.95 D. Expunged Notice May Not Be Recorded Again Without Leave of Court

Once the trial court has granted expungement and the order has been recorded, the claimant may not record another lis pendens on "the affected property" without leave of the court in which the action is pending. CCP §405.36. In addition, to the extent that a lis pendens is expunged as "void and invalid" under CCP §405.23 (see §13.57), or because the complaint does not state a real property claim (see §13.58), leave of court is required to record an amended lis pendens, although the claimant may request leave of court to amend either the lis pendens or both the complaint and the lis pendens at the expungement hearing (see §§13.59-13.61). See Comment to CCP §405.36.

Although §405.36 prohibits rerecording a lis pendens on "the affected property" without leave of court, it is arguable that a party may record a lis pendens on property other than the property that was described in the original lis pendens. The discussion of §405.36 in the Comment does not indicate whether this was the intended interpretation or whether the section was meant to bar rerecording of *any* lis pendens. See Comment to CCP §405.36.

It could also be argued from the "affected property" language that recording another lis pendens on "the affected property" is prohibited even if it is based on another action. In *Richardson v Dallas R. Hall & Assocs.* (ND Cal May 23, 1996, No. C952846 TEH) 1996 WL 308261, 1996 US Dist Lexis 7563, plaintiffs twice filed similar lawsuits and lis pendens on the same property. The court held that, because the lis pendens in the first action was expunged, plaintiffs could not record another lis pendens on the same property without leave of court and, as such, the second lis pendens was expunged. Comment to §405.36 does not resolve this issue.

Following the expungement and in the absence of a second, court-approved lis pendens, a nonparty purchaser of the real property is conclusively presumed to be a bona fide purchaser, even if the purchaser has actual notice that the action was pending. See §13.94. Thus, even if a claimant prevailed in its appeal of a summary judgment granted by the trial court, the claimant's failure to seek an order to record a new lis pendens, or otherwise to seek an order under CCP §923 to preserve the status quo pending the appeal, permits the unrestricted transfer of the property. See *Knapp Dev. & Design v Pal-Mal Props.* (1987) 195 CA3d 786, 240 CR 920 (decided under prior statute).

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§13.96 XII. EXPUNGEMENT CONDITIONED ON OWNER'S FURNISHING OF UNDERTAKING (CCP §405.33)

A court must expunge a lis pendens if it finds that the real property claim has probable validity but that adequate relief can be secured to the claimant by an undertaking. CCP §405.33. As drafted, this provision preserves and clarifies preexisting law. See Comment 1 to CCP §405.33. Accordingly, the case law that developed under former CCP §409.2 should still be reliable precedent. See, *e.g., Markley v Superior Court* (1992) 5 CA4th 738, 7 CR2d 328 (holding that CCP §995.240 governs only situations in which an undertaking is required by statute).

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§13.97 A. Tactical Considerations

Sound practice often calls for moving, as an alternative to outright expungement, for an order requiring that the claimant file an undertaking as a condition of maintaining the lis pendens (CCP §405.34, discussed in §§13.41-13.43) or requiring the property owner to file an undertaking as a condition of granting expungement (CCP §405.33).

A problem posed for property owners by §405.33 is that an undertaking might prove too costly to justify seeking expungement on that basis because the property owner will probably have to post collateral with the bonding company for the full amount of the undertaking (see §13.100). See Howard, Borenstein & Ceran, *Lis Pendens: A Provisional Remedy*, 6 LA Law 11, 34 (Mar. 1983). Moreover, if the claimant prevails, the undertaking could provide a ready source of potential recovery that would otherwise not be available (see §13.101).

Another potential significant disadvantage for an owner in obtaining expungement by filing an undertaking is the possibility that the amount of the undertaking, and thus the moving party's potential liability, may be greater than the usual statutory measure of damages. *Stewart Dev. Co. IV v Superior Court* (1980) 108 CA3d 266, 166 CR 450. On the buyer's usual measure of damages, see chap 4.

Although the amount and expense of an undertaking are important factors in deciding whether to pursue expungement, it is important to remember that the undertaking premium is a recoverable cost for the prevailing party at the conclusion of the action. CCP §995.250. Thus, the higher the undertaking amount that is set, the greater the premium and the amount of collateral that will be required, and the larger the recoverable costs could be for the party filing the undertaking.

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§13.98 B. Elements of Expungement Motion Under CCP §405.33

The court must expunge a lis pendens on the basis of an undertaking given by the moving party under CCP §405.33 if it finds that the real property claim has probable validity but that an undertaking can secure "adequate relief" to the claimant. No other substantive bases for expungement, such as those in CCP §405.23 (see §13.57), §405.31 (see §§13.58-13.86), or §405.32 (see §§13.87-13.91), are required. The undertaking must be in an amount sufficient to indemnify the claimant for any damages proximately resulting from expungement if the claimant prevails on the real property claim that is the subject of the expungement motion. CCP §405.33.

Expungement may not be conditioned on an undertaking if the court finds that the pleading does not state a real property claim (CCP §405.31) or that the claim lacks probable validity (CCP §405.32).

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§13.99 C. When "Adequate Relief" Can Be Secured by Undertaking

The focus of the inquiry under CCP §405.33 is whether monetary damages will adequately compensate the claimant. See Comment to CCP §405.33. The undertaking must be of a nature and in an amount that will indemnify the claimant for all the claimant's damages that proximately result from the expungement if the claimant prevails on the real property claim. CCP §405.33. On burden of proof requirements, see §13.53.

The loss of a commercial investment opportunity is presumed to be a loss that can be offset by a pecuniary award. See Comment 6 to CCP §405.33. Filing an undertaking, therefore, will provide adequate security to support expungement if the claimant is interested in the real property only for its monetary value. See *Trapasso v Superior Court* (1977) 73 CA3d 561, 140 CR 820; *Empfield v Superior Court* (1973) 33 CA3d 105, 108 CR 375. The conclusive presumption of CC §3387 that real property is unique applies only to real property improved with a single-family dwelling that the claimant intends to occupy. CCP §405.33. Thus, §405.33 shifts the burden on the moving party to overcome this presumption by a preponderance of the evidence in actions concerning property other than single-family dwellings. See Comment to CCP §405.33; *Real Estate Analytics v Vallas* (2008) 160 CA4th 463, 72 CR3d 835 (noting that presumption under CC §3387 survived amendments to lis pendens statute in 1992).

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D. Nature and Amount of Undertaking

§13.100 1. Basic Bond Principles Apply

Under the Bond and Undertaking Law (CCP §§995.010-996.560), there is no significant legal distinction between a bond and an undertaking (CCP §995.140), and, if a statute requires or allows a court to order a bond, an undertaking may be substituted, and vice versa (CCP §995.210). Technically, a distinction between bonds and undertakings still exists, although it has little legal significance: A bond is executed by both principal and sureties (CCP §995.140(a)), while an undertaking is executed by the sureties alone (CCP §§995.140(b), 995.190). See generally *Alexander v Superior Court* (1928) 91 CA 312, 266 P 993. A party on whom an undertaking requirement is imposed may deposit cash or other specified substitutes. See CCP §995.710.

An undertaking must be executed by two or more individuals as personal sureties or by one "admitted surety insurer" (essentially a corporate surety certified by the Insurance Commissioner; see CCP §995.120; Cal Rules of Ct 3.1130), or by any combination of personal sureties and admitted surety insurers. CCP §995.310. If executed by personal sureties, it must be fully collateralized, *i.e.,* it must be accompanied by each surety's affidavit stating that he or she is worth the amount of the undertaking over and above all debts and liabilities and exclusive of exempt property. CCP §§995.510-995.520. Under CCP §2015.5, a declaration may be substituted for an affidavit.

If the amount of the undertaking exceeds $5000, the affidavit or declaration must contain specified information about the property. CCP §995.520(c). If the amount of the undertaking exceeds $10,000 and is executed by more than two personal sureties, a personal surety's worth may be less than the amount of the undertaking when the aggregate worth of all sureties is twice the amount of the undertaking. CCP §995.520(d). On requirements for admitted surety insurers, see CCP §§995.610-995.660.

A corporate underwriter's willingness to issue an undertaking in connection with a lis pendens will depend on several factors, *e.g.*:

- The applicant's financial condition and chances of prevailing in the litigation;
- The company's attitude toward the type of undertaking; and
- The amount of potential liability.

Lis pendens undertakings frequently present more hazard for the underwriter than other types of undertakings, and full collateral may be required of the applicant, either in cash or easily liquidated property, before the undertaking will be written.

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§13.101 2. Amount of Expungement Undertaking

An undertaking ordered as a condition of expungement must be of such a nature and in such an amount to indemnify the claimant for all damages the claimant may incur that proximately result from the expungement if the claimant prevails on the real property claim. CCP §405.33. The amount of the undertaking is a question of fact for the trial court, and its decision will not be overturned unless an abuse of discretion is shown. *Trapasso v Superior Court* (1977) 73 CA3d 561, 140 CR 820.

When deciding the amount of the undertaking, the court needs to evaluate the damage that the claimant shows it may suffer if the lis pendens is ordered expunged. *Trapasso v Superior Court, supra*. The court may also take into account the likelihood that the party in whose favor the undertaking is ordered will prevail on the merits. *Howden-Goetzl v Superior Court* (1970) 7 CA3d 135, 86 CR 323. These rulings are consistent with the intent of the expungement statutes, which is to afford indemnification for damages incurred from expungement, not to provide security for the ultimate recovery of damages in the action.

Factors that may be considered in fixing the amount of an undertaking still are not clearly defined, and counsel must be creative when formulating arguments on this issue. In a case in which the plaintiff sought specific performance of an agreement to convey real property for development, the court of appeal noted that, if ordered by the trial court, the undertaking should include protection against all damages resulting from expungement and should not be limited to the narrow measure of damages available to a buyer under CC §3306. The buyer's expected profits from the development, however, were too speculative to be included within the undertaking requirement. *Stewart Dev. Co. IV v Superior Court* (1980) 108 CA3d 266, 277, 166 CR 450.

NOTE: After *Stewart*, CC §3306 was amended to authorize the recovery of consequential damages and interest. Thus, the amount of an undertaking may include these additional items that could result from an expungement. See, *e.g., Reese v Wong* (2001) 93 CA4th 51, 112 CR2d 669.

In another case, the court ordered expungement conditioned on an undertaking but remanded it to the trial court for the manner of fixing the amount. The plaintiff alleged fraud in the sale of real property and sought to rescind that sale or to impose a constructive trust on other real property allegedly purchased by the defendant with proceeds of the fraudulent sale. The plaintiff argued that the appropriate measure of damages was the full purchase price of the first parcel of property, but, because the fraud involved undisclosed termite infestation, the plaintiff could probably have been compensated by an award of damages sufficient to cure that defect. *Coppinger v Superior Court* (1982) 134 CA3d 883, 185 CR 24.

PRACTICE TIP: The measure the court should use in fixing the amount of the undertaking is open to question. If the court selects damages to remedy the defect as the measure, the amount of the undertaking would probably be quite small. It is also important to note that the court in *Coppinger* excluded as evidence a letter from the plaintiff's counsel offering to settle the case for some $2000, under the evidentiary rule that settlement negotiations are inadmissible (Evid C §1154). Counsel should be aware of this holding when preparing declarations on the issue of the amount of the undertaking.

Counsel seeking expungement should set forth in detail the damages that the moving party will suffer if the lis pendens is not expunged. Declarations on potential damages are important in persuading the court to require an undertaking if it does not expunge the notice, and in obtaining as large a undertaking as possible. In addition to showing that damages will not provide adequate compensation, the party opposing an expungement motion should file declarations minimizing the potential damages to the property owner in an effort to keep the amount of any undertaking that the court may order to a minimum. Also, under CCP §405.37 (see §§13.103-13.104), it should also be possible to present evidence at a future date to modify the required undertaking if the undertaking is no longer adequate.

When contesting the amount of an undertaking, it is important to distinguish between an undertaking by the party seeking expungement under CCP §405.33 and an undertaking by the claimant under CCP §405.34 (see §13.41) as a condition of maintaining the lis pendens. Under CCP §405.33, the undertaking must be sufficient to indemnify the claimant for all damages proximately resulting from expungement that the claimant may incur if the claimant prevails on the real property claim, but it need not be sufficient to make the claimant whole on claims other than the real property claim. See *CMSH Co. v Antelope Dev.* (1990) 223 CA3d 174, 180, 272 CR 605 (interpreting former CCP §409.1). Conversely, under CCP §405.34, the court may order an undertaking by the claimant in an amount that it finds to be just. Thus, the undertaking need not be sufficient to make the property owner whole if the owner prevails on the real

property claim. See §13.42.

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§13.102 E. Written Findings Not Required

The court is not required to make a written finding on whether an undertaking can secure adequate relief to the claimant. CCP §405.33. A ruling granting a motion brought under CCP §405.33 implies a finding by the court on every fact necessary to support the ruling. See *Trapasso v Superior Court* (1977) 73 CA3d 561, 567, 140 CR 820. See also *Sheets v Superior Court* (1978) 86 CA3d 68, 149 CR 912. A trial court's order expunging a lis pendens should be vacated, however, if the only evidentiary basis for the order is an affidavit that is devoid of any facts on which a finding of adequate relief could be based. See *Swanston v Superior Court* (1971) 15 CA3d 355, 92 CR 572.

When ordering a lis pendens conditionally expunged under §405.33, the court must set a return date for the moving party to fulfill the condition. If the moving party fails to do so, the court must deny the motion to expunge without further notice or hearing. Although in particular cases the court's order may specify procedures for review of the moving party's compliance, none are set forth in §405.33.

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§13.103 F. Objecting to Undertaking

No procedure is expressly set forth in CCP §405.33 for challenging the sufficiency of an undertaking filed in connection with an order for expungement. It could be argued that CCP §405.37, which establishes procedures for exonerating or modifying an undertaking (see §13.104), governs any objections to the sufficiency of an undertaking ordered under CCP §405.33. The claimant may be able to invoke the procedures for objecting to the undertaking established in the Bond and Undertaking Law (CCP §§995.010-996.560), set forth in CCP §§995.910-995.960.

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§13.104 G. Modifying Undertaking

Under CCP §405.37, a court may "exonerate or modify" an undertaking required under CCP §405.33 (see §§13.96-13.105) or §405.34 (see §§13.41-13.43) for good cause, after notice and a hearing, or by stipulation. An order exonerating or modifying an undertaking may be conditioned on a new undertaking. CCP §405.37. Thus it should be possible for the party for whose benefit an undertaking was ordered to return to court to argue that the amount of the undertaking should be increased if intervening factors have made the amount insufficient.

Because CCP §405.37 does not specify a notice period for the motion, customary notice standards apply under CCP §1005(b), and at least 21 days' notice would be required. See CCP §1005(a)(13). A modification on an ex parte application under appropriate circumstances must meet the standards of Cal Rules of Ct 3.1200-3.1207. Provisions for moving to modify insufficient or excessive undertakings in civil actions generally are set forth in CCP §§996.010-996.030.

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§13.105 H. Enforcing Undertaking

Enforcement of bonds and undertakings in actions and proceedings is governed generally by CCP §§996.410-996.495. Code of Civil Procedure §405.33 expressly provides that recovery on an undertaking may be obtained under CCP §996.440.

An undertaking that is given as a condition of expungement or nonexpungement of a lis pendens protects only against damages that actually result from the expungement or nonexpungement. An undertaking that is filed to obtain expungement of a lis pendens cannot be enforced to satisfy a judgment in the underlying action if that judgment is based on a claim that would not support recordation of the lis pendens. *CMSH Co. v Antelope Dev.* (1990) 223 CA3d 174, 180, 272 CR 605; *Elder v Carlisle Ins.* (1987) 193 CA3d 1313, 1319, 238 CR 897 (unjust enrichment remedy for improvements to property owned by another does not support lis pendens). See also §13.77. But see *Hunting World, Inc. v Superior Court* (1994) 22 CA4th 67, 26 CR2d 923; *Okuda v Superior Court* (1983) 144 CA3d 135, 141, 192 CR 388, discussed in §§13.69, 13.71.

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XIII. REMEDIES AFTER MOTION FOR UNDERTAKING OR EXPUNGEMENT

§13.106 A. Review by Writ of Mandate

An order granting or denying a motion to expunge a lis pendens, or to require an undertaking under either CCP §405.33 or §405.34, is not an appealable order. CCP §405.39. See *Howard S. Wright Constr. Co. v Superior Court* (2003) 106 CA4th 314, 130 CR2d 641. See also *Orange County Airport Hotel Assocs. v Hongkong & Shanghai Banking Corp.* (9th Cir 1995) 52 F3d 821 (expungement not appealable collateral order under 28 USC §1291, and not appealable under 28 USC §1292 as order having practical effect of refusing injunction). Because an order granting or denying expungement is not a final (*i.e.,* appealable) order unless it is included in the judgment (see §13.110), it has no collateral estoppel effect. *Rebco Dev. v Superior Court* (1977) 67 CA3d 13, 136 CR 351.

The party aggrieved by such an order, however, may petition a reviewing court for a writ of mandate. CCP §405.39. See *Howard S. Wright Constr. Co. v Superior Court, supra*. If the petition is filed within the required statutory period, the expungement order is automatically stayed by operation of law pending the writ proceedings. CCP §405.35. See *Amalgamated Bank v Superior Court* (2007) 149 CA4th 1003, 1010, 57 CR3d 686.

Mandamus provides a more expeditious method of review than appeal and thus enables the courts to exercise some control over misuse of the lis pendens procedure as a lever to force settlement. *Howden-Goetzl v Superior Court* (1970) 7 CA3d 135, 137, 86 CR 323. On the standard of review in a writ proceeding, see *Howard S. Wright Constr. Co. v Superior Court, supra* (pretrial expungement order), discussed in §13.90, and *Amalgamated Bank v Superior Court, supra* (posttrial order), discussed in §13.50. On procedures for seeking and opposing a writ of mandate, see California Civil Writ Practice, chaps 14-24 (4th ed Cal CEB 2008).

As a general rule, because the statutory procedure for a writ of mandate is the only available method of review, failure to pursue that remedy bars later appellate review, even by appeal from the main action. *Miller v R.K.A. Mgmt. Corp*. (1979) 99 CA3d 460, 160 CR 164. Note that in *Miller,* the court also imposed sanctions against the appellants for pursuing a sham appeal merely to cloud title to the buyer's real property. A limited exception to the general rule arises if a judgment entered in the property owner's favor includes an order expunging the lis pendens; in such a case, an appeal from the judgment raises the expungement issue under CCP §916.

A petition for writ of mandate must be filed and served within 20 days after the court or a party serves written notice of the entry of the order granting or denying expungement. CCP §405.39. See *Okuda v Superior Court* (1983) 144 CA3d 135, 192 CR 388. A copy of the petition also must be delivered to the clerk of the court that issued the order with a request to place it in the court file. CCP §405.39. The court that issued the order may extend the initial 20-day period for one additional period not to exceed 10 days; this extension must be ordered within the initial 20-day period. CCP §405.39. The reviewing court cannot consider any petition not filed within that time. *California-Hawaii Dev. v Superior Court* (1980) 102 CA3d 293, 297, 162 CR 365.

A mandamus proceeding under CCP §405.39 includes the review of an award of attorney fees made under CCP §405.38. An order for attorney fees is incidental to the order granting or denying expungement, and the award may well be affected by the reviewing court's decision on the propriety of the expungement order. Judicial efficiency thus calls for reviewing the award of attorney fees in the same proceeding as that in which the order on the motion to expunge is reviewed (as is done on discovery motions). See *Shah v McMahon* (2007) 148 CA4th 526, 55 CR3d 792 (petition for writ of mandate is proper procedure for review of attorney fees award after order of expungement). See discussion about awarding attorney fees as monetary sanctions on discovery motions in California Civil Discovery Practice, chap 2 (4th ed Cal CEB 2006).

NOTE: If the court of appeal denies the petition brought under CCP §405.39, refusing to hear it or denying it on its merits, the lis pendens statutes do not provide for review of such denial by the supreme court. Relief may be available under the writ procedure set forth in Cal Rules of Ct 8.485-8.493 or the petition for review procedure under Cal Rules of Ct 8.500-8.552. In either event, there is no automatic waiting period for recordation of the expungement order (after the court of appeal decision) to allow for the writ to the supreme court. This issue will have to be resolved by the courts or the legislature. If the plaintiff acts quickly, it may request from the court of appeal a writ of supersedeas or a temporary stay of the effect of the order pending acceptance or denial of review by the supreme court. See California Civil Writ Practice, chaps 19, 26 (4th ed Cal CEB 2008).

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§13.107 B. Advancement or Special Setting for Trial

If expungement is denied, an owner's attorney might consider proposing to the court that the denial order include an order setting an early trial date. Expediting the trial might help a property owner who is anxious to dispose of the property and might be acceptable to a court that is unwilling to order expungement. Advancing or specially setting the case for trial is within the trial court's powers on a showing of good cause by the moving party. Cal Rules of Ct 3.1335. Advancement is appropriate if a trial date has already been set, and special setting is appropriate if no date has been set. See *Swartzman v Superior Court* (1964) 231 CA2d 195, 41 CR 721. On procedures, see California Civil Procedure Before Trial, chap 42 (4th ed Cal CEB 2004).

A motion for advancement or special setting must be supported by a strong showing of necessity because such a motion is asking the court to deviate from its normal trial-setting practice. Economic hardship alone is usually not sufficient, unless declarations show that the hardship is serious and will be aggravated. See Civ Proc Before Trial §42.11. Such a showing might be possible for an owner whose property is subjected to a lis pendens.

PRACTICE TIP: A request for advancement or special setting could be combined with an expungement motion, but some attorneys believe that advocating alternative relief could weaken the expungement motion. Accordingly, an attorney who decides not to seek alternative relief may reserve the request for advancement or special setting for a subsequent motion.

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XIV. TERMINATION

§13.108 A. Effect of Termination

A recorded lis pendens is incidental to the court action and is effective to give constructive notice as long as the action is pending. *Albertson v Raboff* (1956) 46 C2d 375, 379, 295 P2d 405. An action is considered pending from the date on which it is filed until final decision on appeal, passage of the time for appeal, or satisfaction of the judgment. CCP §1049. See also *Contini v Western Title Ins. Co.* (1974) 40 CA3d 536, 542, 115 CR 257. A lis pendens may be terminated sooner, however, by one of several methods (see list in §13.109). Not all methods have the same effect.

EXAMPLE: On recordation of either a notice of withdrawal (under CCP §405.50; see §13.114) or an order of expungement (under CCP §405.23, §405.31, §405.32 or §405.33; see §13.94), neither the lis pendens nor any information derived from it constitutes actual or constructive notice of any of the matters contained, claimed, alleged, or contended in the notice, or of any of the matters related to the action. CCP §405.60. Moreover, no one other than a named, nonfictitious party to the action at the time of recording the notice of withdrawal or order is considered to have actual knowledge of the action, regardless of whether the person had actual knowledge of any of those matters. CCP §405.61.

On weighing the risks of recording a lis pendens, see §§13.4-13.7.

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§13.109 B. Methods of Termination

A notice of pendency of action may be terminated by a variety of methods:

- Expungement because (1) the plaintiff failed to comply with filing and service statutes (see §13.57); (2) the plaintiff's pleading does not contain a real property claim (see §13.58); or (3) the plaintiff failed to show the probable validity of a real property claim (see §13.87);
- Conditional expungement on the defendant's furnishing of an undertaking (see §13.96);
- Entry of a *final* judgment in the action (see §13.110);
- Settlement of the action (see §13.111);
- Dismissal of the action (see §13.112); or
- Withdrawal of the lis pendens under CCP §405.50 (see §§13.113-13.115).

Under each method of termination, some document must actually be recorded as evidence that the lis pendens has been terminated and is no longer effective to give constructive notice. A form of notice of withdrawal is set forth in §13.120.

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§13.110 1. By Judgment

A lis pendens ceases to be effective to give constructive notice of the underlying action when the judgment in the action becomes final, either after a final decision on appeal or after the time for appeal has expired (see §13.14). CCP §1049; *Garcia v Pinhero* (1937) 22 CA2d 194, 197, 70 P2d 675. The judgment also limits the notice's effect to matters actually established by the judgment. *Rose v Knapp* (1957) 153 CA2d 379, 386, 314 P2d 812. A judgment is conclusive as to all the parties and their successors in interest with actual or constructive knowledge of the pendency of the action. CCP §1908(a)(2). A recorded lis pendens gives constructive notice to the parties and to anyone acquiring an interest from them from the time it is recorded (CCP §405.24) until judgment is actually entered.

The party who prevails in the action, whether the claimant or the property owner, must take further steps to protect his or her interests. After the judgment becomes final, the prevailing claimant could still lose priority to a bona fide purchaser who acquires the property thereafter, because of the judgment's effect in terminating the lis pendens. See, *e.g., Stout v Gill* (1930) 110 CA 445, 294 P 446.

PRACTICE TIP: To avoid this problem, the successful claimant should record an abstract or a certified copy of the final judgment (see Govt C §27326) in the county in which the property is located to give notice to prospective purchasers or encumbrancers. For strategy when the claimant does not prevail and the judgment expressly orders expungement, see the Warning in §13.93.

If the property owner prevails, the lis pendens remains effective to give notice of the action until the judgment becomes final, *i.e.,* until it has been affirmed on appeal or the time for appeal has expired. See CCP §1049. Various options for terminating a notice are available to the property owner after a favorable judgment has been entered:

- *Obtaining a withdrawal of the notice under CCP §405.50 (see §13.113) from the party who recorded it*. The problem with this method is that it depends on the cooperation of the opposing party. After having lost on the merits, however, the claimant may be willing to stipulate to termination of the lis pendens. See §13.111.
- *Moving to expunge the lis pendens after judgment and to obtain an expungement order that is separate from the final judgment*. A property owner who has prevailed at trial should find it relatively easy to prevail in an expungement motion under CCP §405.32 on the ground that the claim lacks "probable validity." See *Amalgamated Bank v Superior Court* (2007) 149 CA4th 1003, 1015, 57 CR3d 686, cited in §§13.50, 13.87, 13.93.
- *Seeking to have the court include in the judgment an order expunging the lis pendens,* so that recording an abstract or a certified copy of the judgment once it becomes final will also expunge the lis pendens. Note, however, that inclusion of the expungement order in the judgment affords the claimant the avenue of appeal as a means of attacking the expungement order (as opposed to mandamus; see §13.106) and the right to have the expungement stayed pending the appeal (see Warning in §13.93). An appeal may cause further delay in actually obtaining expungement because the action is still pending while the appeal is pending (see §13.94). See *Knapp Dev. & Design v Pal-Mal Props.* (1987) 195 CA3d 786, 791, 240 CR 920; *Mason v Superior Court* (1985) 163 CA3d 989, 210 CR 63.

PRACTICE TIP: The attorney for a property owner who prevails in the action should contact a title insurance company and inquire whether recording the final judgment, or some other procedure, will suffice to support insurable title.

Title examiners usually will delete a lis pendens from title reports and policies on receiving satisfactory proof from the court file that a final judgment has been ordered in the defendant's favor. This result does not, of course, protect the defendant during the time between entry and finality of judgment.

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§13.111 2. By Settlement

Although courts have stated that settlement of the underlying action terminates a lis pendens (see *Harris v Whittier Bldg. & Loan Ass'n* (1936) 18 CA2d 260, 266, 63 P2d 840; *Olson v Cornwell* (1933) 134 CA 419, 426, 25 P2d 879), further documentation is usually required to render the lis pendens ineffective to bind future purchasers and encumbrancers and to satisfy a title company, lender, or future purchaser. As a practical matter, title company requirements should be satisfied as part of any settlement to assure that the property is transferable free of the lis pendens and that title is insurable on future transactions.

A settlement agreement can be structured in different ways so that termination of the lis pendens appears on the record:

- The parties may stipulate that the claimant will record a notice of withdrawal of the lis pendens under CCP §405.50. See §13.113. The disadvantage of this approach is that the settlement is not self-executing (see, *e.g.*, CCP 664.6) and a claimant can record the lis pendens again after withdrawing it (see §13.115). Either execution and delivery of a notice of withdrawal may be made a precondition to the effectiveness of the settlement agreement or withdrawal may be accomplished by establishing an escrow for the relevant settlement documents, including the notice of withdrawal. See withdrawal form in §13.120.
- The parties may stipulate to expungement of the lis pendens by court order, which is then recorded. The stipulation may be part of a broader stipulation covering various items in the settlement agreement, or the parties may use a specific stipulation to expunge the lis pendens. The advantage of an expungement order is that afterward the lis pendens cannot be recorded again without the court's permission. See §13.95. Another method of structuring a stipulation is to attach a completed, signed notice of withdrawal as an exhibit to the stipulation, which is returned to the expunging party for recording; this method does not require a court order.
- The settlement agreement may provide for dismissal of the action. Recording the notice of dismissal should be sufficient documentation of termination of the notice. See §13.112.
- The parties may stipulate to entry of judgment incorporating the terms of the settlement and include in the judgment an order expunging the lis pendens. Recordation of a certified copy of the judgment should be effective notice of termination of the lis pendens. See Govt C §§27280, 27326.

PRACTICE TIP: Structuring the settlement to include a full release of all potential malicious prosecution and slander of title claims is a good strategy for the party who recorded the lis pendens. See *Palmer v Zaklama* (2003) 109 CA4th 1367, 1 CR3d 116.

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§13.112 3. By Dismissal

Dismissal of the underlying action (either voluntarily or by court order) and recordation of a document evidencing the dismissal terminate a lis pendens and render it ineffective to give constructive notice of the action. *Garcia v Pinhero* (1937) 22 CA2d 194, 196, 70 P2d 675 (dismissal by court after demurrer sustained); *Harris v Whittier Bldg. & Loan Ass'n* (1936) 18 CA2d 260, 266, 63 P2d 840 (voluntary dismissal after settlement); *Olson v Cornwell* (1933) 134 CA 419, 426, 25 P2d 879 (voluntary dismissal after settlement).

Recordation after the dismissal is crucial. A court of appeal, *e.g.,* held that a lis pendens (arising from a dismissed court action to cancel a deed of trust) that had not been formally withdrawn or expunged extended the time period under CC §882.020 for enforcing the power of sale in the deed of trust. See *Slintak v Buckeye Retirement Co.* (2006) 139 CA4th 575, 43 CR3d 131. The court stated that even after judgment, a lis pendens effectively remains on the record unless a statutory ground for expungement is established, citing *Knapp Dev. & Design v Pal-Mal Props.* (1987) 195 CA3d 786, 791, 240 CR 920.

A lis pendens terminated by a dismissal of the underlying action is not effective to give constructive notice of a new, related action; a new lis pendens must be recorded in connection with the new action. *Garcia v Pinhero, supra*.

PRACTICE TIP: Dismissal operates to terminate a lis pendens only if the dismissal disposes of the entire action. If causes of action were filed by parties other than the lis pendens claimant, particularly if those causes of action contain real property claims (*e.g.,* a declaratory relief action seeking a judgment that the claimant has no interest in the property), the lis pendens may continue to cloud title.

If the dismissal is involuntary, it must be put in the form of a written court order, executed by the court, and filed in the action. When filed, such an order constitutes a judgment and is effective for all purposes. CCP §581d. If the dismissal is voluntary, the court clerk's entry of the dismissal on the Judicial Council Form CIV-110: Request for Dismissal makes the dismissal effective for all purposes. For this form and others, and discussion of both involuntary and voluntary dismissal, see California Civil Procedure Before Trial, chap 39 (4th ed Cal CEB 2004).

In either event, a certified copy of the document evidencing the dismissal should be recorded to effect termination of the lis pendens. Govt C §§27280, 27326. It is apparently immaterial whether the dismissal is with or without prejudice. Either an expungement order (see §§13.118-13.119) or a notice of withdrawal of the lis pendens (see §13.120) could also be recorded to terminate the notice on dismissal of the action, but recording the dismissal document seems to be the simplest procedure.

PRACTICE TIP: Do not assume that the dismissal itself will be sufficient for title companies to pick up. The property owner's attorney should present some documentation of the dismissal or withdrawal of the lis pendens so that the title company can easily ascertain that fact. The attorney for the property owner should also check with a title company to ensure that the documents to be recorded will, in its view, remove the cloud on title caused by the lis pendens.

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4. By Withdrawal

§13.113 a. Statutory Requirements (CCP §405.50)

At any time after a notice of pendency of action has been recorded, the notice may be withdrawn by recording a notice of withdrawal in the office of the recorder in which the notice of pendency of action was recorded. The notice must be executed by the party who recorded the lis pendens or by that party's successor in interest, and the notice must be acknowledged. CCP §405.50. For a form, see §13.120.

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§13.114 b. Effect of Withdrawal

Recording a notice of withdrawal renders the lis pendens ineffective (1) to constitute actual or constructive notice of any matters contained in it or of any matters contained, claimed, alleged, or contended in the action; or (2) to create a duty of inquiry in any person thereafter dealing with the affected property. CCP §405.60. Thus, a notice of withdrawal, when recorded, has the same effect as an order expunging a lis pendens. See *Lewis v Superior Court* (1994) 30 CA4th 1850, 1871, 37 CR2d 63. See §13.94.

Moreover, once a notice of withdrawal has been recorded, no one other than a named, nonfictitious party to the action at the time the notice of withdrawal is recorded is considered to have actual knowledge of the action or of any matter contained, claimed, or alleged in it, regardless of whether that person had actual knowledge of any of those matters and regardless of how the knowledge was obtained. CCP §405.61. See *Lewis v Superior Court, supra*. An order of expungement has the same effect. CCP §405.61. See §13.93.

To avoid any uncertainty, the legislature expressed its intent that "this section shall provide for the absolute and complete free transferability of real property after the expungement or withdrawal of a notice of pendency of action." CCP §405.61. See Comment to CCP §405.61.

One appellate court stated that the "statutory provisions make clear that once a lis pendens is withdrawn or expunged, title to the property must be treated as though the lis pendens had never been filed." The withdrawal of a lis pendens makes the named defendants "bona fide purchasers." *Lewis v Superior Court, supra*. The court's position is not entirely accurate, however, because certain named, nonfictitious parties at the time the withdrawal or expungement order is recorded are still deemed to have actual notice of the claim. CCP §405.61. The statement is accurate to the extent it pertains to any other transferees of the property. See, however, *Bishop Creek Lodge v Scira* (1996) 46 CA4th 1721, 54 CR2d 745 (in action for fraudulent conveyance, withdrawal of lis pendens does not obliterate actual knowledge of lis pendens or underlying action).

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§13.115 c. Rerecording Notice After Withdrawal

Under CCP §405.36, after a notice of pendency of action has been *expunged*, the claimant may not record another notice concerning the "affected property" without leave of the court in which the action is pending. See §13.95. By its own language, §405.36 is limited to rerecording after *expungement*—not rerecording after *withdrawal* under CCP §405.50. Thus, it appears possible for a claimant to execute and record a notice of withdrawal and then to record a new lis pendens on the same property without leave of court, either in the same action or in a new action.

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XV. FORMS

§13.116 A. Form: Notice of Pendency of Action (Lis Pendens)

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Recording requested by and after recording return to:	)	
Attorney for Plaintiff, _ _[*name*]_ _	)	**(Space above this line for recorder's use)**

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
vs	)	**NOTICE OF PENDENCY OF ACTION**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	

PLEASE TAKE NOTICE that this action was commenced in the above-named court on _ _[*date*]_ _ **by** _ _[*name(s); specify all named plaintiffs*]_ _ **against** _ _[*name(s); specify all named defendants that are adverse parties to real property claims or owners of record title*]_ _**, and is now pending.**

The _ _[*complaint/cross-action*]_ _ **alleges a real property claim affecting real property located in** _ _ _ _ _ _ **County, California, commonly known as** _ _[*specify street address or other common designation*]_ _**,**

[*Add one of the following alternatives*]

[*Alternative 1: Legal description included in notice*]

and described as follows: _ _[*insert verbatim legal description of affected real property*]_ _**.**

[*Alternative 2: Legal description attached to notice; attach photocopy of legal description set forth in litigation guaranty or preliminary report*]

and legally described in Exhibit A, attached to and incorporated into this notice by reference.

[*Continue*]

The property is designated as Assessor's Parcel No. _ _ _ _ _ _ **in the** _ _ _ _ _ _ **County Assessor's office.**

Date: _ _ _ _ _ _

__[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

[*For party appearing in propria persona, substitute signature line of party for that of attorney, and add signature lines for court approval of notice for recording; see §13.32*]

[*Acknowledgment is optional; see Comment, below*]

Copies: Original (present to county recorder); duplicate originals (record if property is located in more than one county); copy (file with court); copies for service (one for each adverse party and owner shown on county assessor's records; other copies as required by specific statutes (see §§13.19-13.20); office copies.

Comment: The notice should be prepared in both recording form and in the form and format of a pleading under Cal Rules of Ct 2.100-2.119; see §§13.24-13.33, 13.36-13.40. Under CCP §405.22, immediately following recordation, a copy of the notice must be filed in the court in which the action is pending. On rules of form and format for court papers

generally, see California Civil Procedure Before Trial, chap 11 (4th ed Cal CEB 2004).

This form conforms to the general requirements of CCP §405.21 for a notice to be signed by the attorney of record for a plaintiff/claimant. It may be adapted as necessary for other circumstances (*e.g.,* notice on a cross-complaint, notice to be signed by a party in propria persona and approved by a judge) and in cases brought under other statutes authorizing recordation of a notice (see §§13.19-13.20).

On the advisability of having the notice acknowledged by a notary, see §13.32.

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Source: Real Property/California Real Property Remedies and Damages/13 Lis Pendens/§13.117 B. Form: Motion to Expunge Notice of Pendency of Action; Alternatively, to Require Plaintiff to File Undertaking

§13.117 B. Form: Motion to Expunge Notice of Pendency of Action; Alternatively, to Require Plaintiff to File Undertaking

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_ _[*Name of attorney; State Bar number*]_ _
_ _[*Address*]_ _
_ _[*Telephone number*]_ _
Attorney for Defendant, _ _[*name*]_ _

Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**NOTICE OF MOTION AND**
vs	)	**MOTION TO EXPUNGE**
	)	**NOTICE OF PENDENCY OF**
_ _[*Name(s)*]_ _,	)	**ACTION; ALTERNATIVELY,**
Defendant(s)	)	**TO REQUIRE PLAINTIFF TO**
	)	**FILE UNDERTAKING; POINTS**
	)	**AND AUTHORITIES**
	)	
	)	**Hearing:** _ _[*date; time*]_ _
	)	**Dep't:** _ _[*number*]_ _
	)	**Hearing judge:** _ _[*name*]_ _
	)	**Action filed:** _ _[*date*]_ _
_____	)	**Trial date:** _ _[*if set*]_ _

PLEASE TAKE NOTICE that on _ _[*date and time*]_ _**, or as soon thereafter as the motion may be heard, in Department** _ _[*number*]_ _ **at** _ _[*address*]_ _**, California,** _ _[*defendant/moving party*]_ _, _ _[*name*]_ _**, will move for an order from the Court expunging from the record the notice of pendency of action recorded on** _ _[*date*]_ _**, in the county recorder's office of** _ _ _ _ _ _ **County, California, as** _ _[*specify instrument number and other pertinent recording information*]_ _**.**

This motion is made on the ground(s) that

[*Insert one or more of the following options*]

[*Option 1*]

the notice of pendency of action is void for failure to comply with the service and filing requirements of Code of Civil Procedure §405.22 (see CCP §§405.23, 405.30).

[*Option 2*]

the _ _[*complaint/specify other pleading*]_ _ **on which the notice of pendency of action is based does not contain a real property claim (see Code of Civil Procedure §405.31).**

[*Option 3*]

the _ _[*plaintiff/specify claimant in other pleading*]_ _ **cannot establish by a preponderance of the evidence the probable validity of the alleged real property claim (see Code of Civil Procedure §405.32).**

[*Continue*]

[*If moving party also seeks to have notice expunged under CCP §405.33 on ground that adequate relief can be secured to claimant by filing of undertaking, add*]

Alternatively, the motion is made under Code of Civil Procedure §405.33 on the ground that adequate relief can be secured to _ _[*plaintiff/claimant*]_ _ **if** _ _[*defendant/moving party*]_ _ **files an undertaking of a nature and in an amount and within the time to be established by the Court to indemnify** _ _[*plaintiff/claimant*]_ _ **for all**

damages proximately resulting from the expungement that _ _[*plaintiff/claimant*]_ _ may incur if _ _[*plaintiff/claimant*]_ _ prevails on the alleged real property claim.

[*If moving party seeks an undertaking from the claimant, add*]

If the motion for expungement is not granted, _ _[*defendant/specify moving party*]_ _ requests an order under Code of Civil Procedure §405.34, requiring that _ _[*plaintiff/claimant*]_ _, _ _[*name*]_ _, file an undertaking of a nature and in an amount to be fixed by the Court to indemnify _ _[*defendant/moving party*]_ _, _ _[*name*]_ _, for all damages that _ _[*defendant/moving party*]_ _ may incur as a result of maintenance of the notice if _ _[*defendant/moving party*]_ _ ultimately prevails in the action.

[*Continue*]

Finally, _ _[*defendant/moving party*]_ _ requests an award of costs and attorney fees under Code of Civil Procedure §405.38 for services performed in connection with this motion.

The motion will be based on this notice of motion; the attached declaration(s) of _ _[*name(s)*]_ _; the attached memorandum of points and authorities; the papers, records, and files in this action; any matters of which the court takes judicial notice; and any oral and documentary evidence presented at the hearing on this motion.

Date: _ _ _ _ _ _ **_ _[*Name of firm*]_ _**

By: __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO EXPUNGE NOTICE OF PENDENCY OF ACTION

I. FACTS

On or about _ _[*date*]_ _, _ _[*name*]_ _ (Borrower), who is a family relative of plaintiff, executed an agreement for an adjustable rate mortgage evidenced by a note ("Note") and secured by a Deed of Trust on the real property located at _ _[*address*]_ _ ("Property"). (The Note and the Deed of Trust together are attached as Exhibit A.) Under the terms of the Note and Deed of Trust, Borrower was required to make monthly payments on the first of every month. The Deed of Trust granted the power of sale in the event of a default.

The mortgage was part of a purchase transaction enabling Borrower to purchase a single family home as income property, for a purchase price of $200,000, on which Borrower paid $30,000 as a down payment. (The final escrow settlement document evidencing these terms is attached as Exhibit B.)

On _ _[*date*]_ _, Borrower deeded the property to _ _[*name*]_ _, his nephew, who is the plaintiff in this action. The complaint states that Borrower transferred title to repay plaintiff for an alleged unsecured loan in the amount of $15,000, made to Borrower for improvements to the Property. The Deed was not recorded until _ _[*date*]_ _. Defendant _ _[*name*]_ _ was not informed of this transfer and did not learn that it had occurred until _ _[*date*]_ _.

After the transfer of title, no payments whatsoever were made on the loan. On _ _[*date*]_ _, defendant sent Borrower a Notice of Intent to Foreclose. (A copy of the notice is attached as Exhibit C.) Because no payments were made, Defendant planned a foreclosure, obtained a trustee sale guaranty from a title insurance company, and on _ _[*date*]_ _, first learned that Borrower had transferred the Property to plaintiff. The guaranty did not list of record a request for notice by plaintiff under Civil Code §2924b. (A copy of the Trustee Sale Guaranty is attached as Exhibit E.) Thereafter a Notice of Default and Intent to Sell (Default Notice) was recorded in the _ _ _ _ _ _ County Recorder's Office on _ _[*date*]_ _, as Instrument No. _ _[*number*]_ _. (A copy of the Default Notice is attached as Exhibit D.) The Default Notice was also sent by certified mail on _ _[*date*]_ _, to both Borrower and plaintiff at the street address of the Property. (A copy of the Proof of Service is attached as part of Exhibit D.)

On _ _[*date*]_ _, a Notice of Trustee's Sale (Sale Notice) was recorded in the _ _ _ _ _ _ County Recorder's Office as Instrument No. _ _[*number*]_ _. The Sale Notice provided for a sale date of _ _[*date*]_ _. (A copy of the Sale Notice is attached as Exhibit F.) Also on the same date, the Sale Notice was sent by certified mail to both Borrower and Plaintiff at the street address of the Property. (A Proof of Service is attached as Exhibit G.) On _ _[*date*]_ _, the Sale Notice was posted on the front door of the Property and on a public bulletin board. (Proof of Posting is attached as Exhibit H.) On _ _[*date*]_ _, and _ _[*date*]_ _, the Sale Notice was published in the Burbank Leader. (A copy of the Proof of Publication is attached as Exhibit I.)

On _ _[*date*]_ _, four business days before the trustee sale, plaintiff requested an opportunity to bring the loan current. Defendant made every effort to accommodate plaintiff, despite plaintiff's not having made any payments on the loan. The trustee sale was postponed by mutual agreement from _ _[*date*]_ _, until _ _[*date*]_ _, to allow plaintiff time to bring the loan current. (The certificate of postponement is attached as Exhibit J.)

As of _ _[*date*]_ _, the first extension date, plaintiff had not brought the loan current, nor had he made satisfactory arrangements to do so. Nevertheless, in a further effort to accommodate plaintiff, Defendant further postponed the trustee sale from _ _[*date*]_ _, until _ _[*date*]_ _. (The certificate of postponement is attached as Exhibit K.) The trustee sale was continued again until _ _[*date*]_ _ at the discretion of the trustee. (The certificate of postponement is attached as Exhibit L.) Plaintiff failed to bring the loan current by that date, and the sale was held and consummated.

On _ _[*date*]_ _, plaintiff filed this action to set aside the trustee sale, for monetary damages, and for an equitable lien or a constructive trust, and also mailed and recorded a notice of pending action (lis pendens). The envelope containing the notice was sent to Defendant's office by ordinary first-class mail. (A copy of the addressed envelope is attached as Exhibit M.)

In answers to interrogatories propounded by defendant, plaintiff testified that he did not move into the property, which he rented out to other persons, and that he owns another residence at _ _[*address*]_ _, where he has lived since _ _[*date*]_ _. (A copy of plaintiff's answers to interrogatories is attached as Exhibit N.)

II. EXPUNGEMENT OF THE LIS PENDENS IS PROPER.

A. Plaintiff's Lis Pendens Does Not Comply With Serving and Filing Requirements.

Code of Civil Procedure §405.22 requires that, before a claimant records a notice of pendency of action, a copy of the notice must be mailed, by registered or certified mail, return receipt requested, to adverse parties and all record owners. A lis pendens that does not meet the service requirements of §405.22 is void and invalid and must be expunged. Code of Civil Procedure §405.23. See Comment to §405.23. Here, plaintiff simply sent the lis pendens by ordinary, first-class mail. Clearly the service of the lis pendens did not in comply with the statute, and the court must expunge the lis pendens.

B. Plaintiff's Complaint Does Not Plead a Real Property Claim.

The court must order a lis pendens expunged if it finds that the pleading on which the lis pendens is based does not contain a real property claim. Code of Civil Procedure §405.31. Plaintiff's complaint does not assert a real property claim sufficient under the law to support his recording of a lis pendens. Plaintiff is essentially using the lis pendens as a strong-arm tactic to secure a monetary damage claim. This type of use of a lis pendens has been disapproved in a number of court decisions. See, *e.g.*, *BGJ Assocs., LLC v Superior Court* (1999) 75 CA4th 952, 967, 89 CR2d 693; *Ziello v Superior Court* (1995) 36 CA4th 321, 332, 42 CR2d 251; *Urez Corp. v Superior Court* (1987) 190 CA3d 1141, 1145, 235 CR 837. Plaintiff did not use the Property as a residence at any time, and is primarily freezing the transferability of the Property to guarantee that the unsecured $15,000 he allegedly lent to Borrower will be repaid from the Property. Under the cases that have interpreted Code of Civil Procedure §405.31, plaintiff has not stated an interest in the property sufficient to warrant the recording of a lis pendens. Therefore, the lis pendens is subject to expungement.

C. Plaintiff Cannot Establish the Probable Validity of His Claim.

Even if the court were to find that plaintiff's complaint properly asserts a real property claim sufficient under the law to support his recording of a lis pendens, plaintiff cannot establish in defense of this motion the probable validity of his claim. Code of Civil Procedure §405.32 requires the court to order "that the notice be expunged if the court finds that the claimant has not established by preponderance of the evidence the probable validity of the real property claim." The court shall not order the moving party to give an undertaking as a condition of expunging the notice (as is permitted under Code of Civil Procedure §405.33) "if the court finds the claimant has not established the probable validity of the real property claim." In the present action, the plaintiff has not established, nor can he establish, the probable validity of his real property claim. As such, expungement of the notice of pending action is proper, and no undertaking is required of Defendant.

1. The Foreclosure Sale Complied With All Statutory Requirements

Defendant obtained title to the property through a nonjudicial foreclosure. The foreclosure sale and the transfer of title complied with all statutory requirements. Specifically, the requirements for nonjudicial foreclosure are in Civil Code §§2924 *et seq*. Section 2924a provides, in pertinent part, that:

> **. . . (1) the trustee, mortgagee, or beneficiary . . . shall first file for record, in the office of the recorder . . . , a**

notice of default, identifying the mortgage or deed of trust, . . . [stating that] a breach of the [secured] obligation . . . has occurred . . . , and setting forth the nature of each breach actually known to the beneficiary and of his or her election to sell or cause to be sold the property to satisfy that obligation . . . , and if the default is curable pursuant to Section 2924c, [containing] the statement specified in paragraph (1) of subdivision (b) of Section 2924c; (2) not less than three months shall elapse from the filing of the notice of default; and (3) [a]fter the elapse of the three months . . . , the . . . trustee . . . shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that set forth in Section 2924f.

These requirements have been complied with.

[*If appropriate, add the following text preceded by citations to CC §§2923.5-2923.6, 2924.52-2924.55 and facts showing that trustee, mortgagee, or beneficiary complied with extended notice periods, workout negotiations, and due diligence requirements for trustee sales adopted in 2008-2009.*]

These requirements have also been complied with.

[*Continue*]

As set forth in the facts above, a Default Notice that complied with all statutory requirements was recorded and served. As described in further detail, more than three months after recording of the Default Notice, the trustee recorded and served the Sale Notice, which complied with all statutory requirements. Furthermore, all postponements of the scheduled sale date were in compliance with Civil Code §2924g.

In addition to the above-described statutory compliance, the Trustee's Deed as a matter of law establishes prima facie evidence of compliance with all notice requirements. Specifically, Civil Code §2924c provides that:

. . . recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of the copies of the notice of sale or publication of a copy thereof shall constitute prima facie evidence of the compliance with these requirements.

The Trustee's Deed specifically provides "all requirements of law regarding mailing of copies of notices and the posting of publication of the Notice of Sale have been complied with." As such, the Trustee's Deed itself establishes prima facie compliance with the notice requirements.

Because defendant has established the validity of the Trustee's Deed, plaintiff cannot possibly establish by a preponderance of the evidence the likelihood of success on any claim to an interest in the Property and thus the notice of pending action should be expunged.

2. Transfer of the Property From Borrower to Plaintiff Does Not Create Any Additional Notice Requirements.

The undisclosed transfer of the Property from Borrower to plaintiff did not affect defendant's obligation to provide notice of the foreclosure sale. Civil Code §§2924 *et seq*. itself creates no obligation to provide notice to any successor in interest to mortgaged property. Instead, §2924b provides a mechanism that allows any person who desires to receive notice of a default to record a Request for Notice. Absent compliance with §2924b, a successor in interest to property that is subject to a mortgage has no notice rights.

Not only did plaintiff not record a request for notice under §2924b, plaintiff did not even inform defendant of his interest in the Property. As such, plaintiff had no rights to receive notice. In addressing this notice issue, the court in *Lancaster Sec. Inv. v Kessler* (1958) 159 CA2d 649, 324 P2d 634, held that, even if the beneficiary had knowledge of the successor in interest and its address, there were no notice requirements unless the successor in interest had satisfied §2924b. In the present case, as in *Lancaster*, plaintiff was not entitled to notice. Defendant, having provided notice to Borrower had satisfied its obligation under the Civil Code. Defendant provided additional notice to plaintiff solely as a courtesy but was not legally obligated to do so.

III. IF THE COURT DECLINES TO EXPUNGE THE NOTICE, PLAINTIFF SHOULD BE REQUIRED TO PROVIDE AN UNDERTAKING.

Code of Civil Procedure §405.34 provides in pertinent part that the court may "require the claimant to give the moving party an undertaking as a condition of maintaining the notice in the record title." An undertaking required under that section "shall be of such nature and in such amount as the court may determine to be just." In the present situation, an undertaking is just and necessary to protect defendant against the losses it has suffered and will continue to suffer as a result of the notice of pending action.

The plaintiff's notice of pending action has rendered the property unmarketable. As a result, defendant will be forced to expend substantial sums of money for carrying cost, payment of taxes, maintenance, and insurance until such time as the notice of pending action is expunged. These ongoing expenses will continue to accrue until this action is resolved. Defendant reasonably estimates these expenses to be not less than

$30,000.00. (See Declaration of _ _[*name*]_ _, attached hereto.) Therefore, defendant requests that the plaintiff be required to provide an undertaking in that amount.

IV. DEFENDANT IS ENTITLED TO RECOVER ITS ATTORNEY FEES.

Code of Civil Procedure §405.38 provides that the court shall award to any party prevailing on an expungement motion its reasonable attorney fees and costs of making or opposing the motion, "unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney fees and costs unjust." In the present situation, plaintiff did not act with substantial justification. As set forth in this Motion, plaintiff's real property claim is without merit and does not support the filing of a lis pendens in any event. Moreover, the lis pendens was not properly served. There are no circumstances that would make the imposition of attorney fees on plaintiff unjust. As such, attorney fees should be awarded.

CONCLUSION

For the foregoing reasons, defendant respectfully requests that the lis pendens be expunged or that the plaintiff be required to post an undertaking in the sum of $30,000. Defendant further respectfully requests that it be awarded its attorney fees and costs in making this motion.

Date: _ _ _ _ _ _ _ _[*Name of firm*]_ _

By: __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*name*]_ _

Copies: Original (file with court clerk with proof of service); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: The expungement remedies are not exclusive; the motion may seek expungement under one or more legal bases provided in CCP §§405.31-405.33 and may seek in the alternative that the claimant be required to file an undertaking under CCP §405.34. Relief may be obtained under §405.34 whether or not expungement is sought. See §§13.41-13.43. See also Comment 1 to CCP §405.34. Thus, if expungement is not sought, but an undertaking from the claimant is desired, this form should be modified appropriately.

Also in this form, the points and authorities do not address an expungement order conditioned on the owner's filing of an undertaking under CCP §405.33 (see §13.96-13.105), although optional language for it is provided in the notice of motion and mention is made under II.C. (paragraph 1) of the brief. Depending on the strategy counsel wishes to use, additional law and argument about this conditional order may be added to the opening brief or may play a greater part in the closing (reply) brief.

This form complies with CCP §405.30 for a lis pendens recorded under CCP §405.20. If the lis pendens is based on another statute (see §§13.19-13.20), counsel should consult the applicable statute. Many of those statutes specify that the procedures under CCP §§405-405.61 should be followed. At least 21 days' notice of the motion must be given, with the usual added days for service by mail or other method. CCP §§1005, 1013 (see §13.52).

To get the necessary evidence before the court, counsel should also file declarations of parties and of counsel, setting forth relevant, admissible facts in support of the motion, authenticating all exhibits necessary for the motion, and detailing the attorney fees incurred. The court may permit oral testimony on the motion, and may make any necessary orders for discovery. CCP §405.30.

An order granting or denying a motion to expunge or requiring an undertaking of either the claimant or the moving party must include an award of reasonable costs and attorney fees to the prevailing party, unless the court finds that the other party acted with substantial justification or that other circumstances make the imposition of attorney fees and costs unjust. CCP §405.38. See §13.55.

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Source: Real Property/California Real Property Remedies and Damages/13 Lis Pendens/§13.118 C. Form: Order Granting Motion to Expunge Notice of Pendency of Action With Alternative Conditioning Grant of Motion on Owner's Furnishing of Undertaking

§13.118 C. Form: Order Granting Motion to Expunge Notice of Pendency of Action With Alternative Conditioning Grant of Motion on Owner's Furnishing of Undertaking

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Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No.** _ _ _ _ _ _
	)	**ORDER GRANTING MOTION**
vs	)	**TO EXPUNGE NOTICE OF**
	)	**PENDENCY OF ACTION**
_ _[*Name(s)*]_ _, **Defendant(s)**	)	_ _[*e.g., CCP §405.31*]_ _
	)	**Heard on:** _ _[*date*]_ _
	)	**Dep't:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*name*]_ _

The motion of _ _[*defendant/moving party, _ _[name*]_ _]_ _, for an order expunging the notice of pendency of action recorded in this action was heard in Department _ _[*number*]_ _ of the above-named court on _ _[*date*]_ _, before the Honorable _ _[*name of judge*]_ _. Plaintiff, _ _[*name*]_ _, appeared by _ _[*name(s) of attorney(s)*]_ _, and defendant appeared by _ _[*name(s) of attorney(s)*]_ _. _ _[*Specify appearances of other parties as appropriate.*]_ _

The Court, having considered the _ _[*testimony*]_ _, declarations, points and authorities, and other documents and evidence supporting and opposing the motion, and having heard the arguments of counsel, finds that

[*Add one of the following alternatives*]

[*Alternative 1: Expungement granted unconditionally*]

the notice of pendency of action recorded in this action should be expunged without conditions on the grounds that:

[*Insert one or more of the following options under Alternative 1*]

[*Option 1: see §13.57*]

The notice of pendency of action is void and invalid for failure to comply with the service and filing requirements of Code of Civil Procedure §405.22 (see CCP §§405.23, 405.30).

[*Option 2: see §13.58*]

The _ _[*complaint/specify other pleading*]_ _ on which the notice of pendency of action is based does not contain a real property claim (see CCP §405.31).

[*Option 3: see §13.87*]

The _ _[*plaintiff/specify claimant in other pleading*]_ _ did not establish by a preponderance of the evidence the probable validity of the alleged real property claim (see CCP §405.32).

[*Continue*]

IT IS THEREFORE ORDERED that the motion of _ _[*defendant/moving party*]_ _, _ _[*name*]_ _, is granted and the notice of action pending recorded in the office of the county recorder of _ _ _ _ _ _ County on or about _ _[*date*]_ _, _ _[*as Instrument No. _ _/at Book _ _, page _ _*]_ _, is expunged, so that neither the notice nor any information derived from it shall constitute actual or constructive notice of any of the matters contained, claimed, alleged, or contended in it or of any of the matters relating to the action, or shall create a duty of inquiry in any person thereafter dealing with the affected property.

[*Alternative 2: Expungement granted on owner's filing of undertaking*]

The Court, having considered the _ _[*testimony*]_ _, declarations, points and authorities, and other documents and evidence in support of and opposition to the motion, and having heard counsels' arguments, finds that the notice of pendency of action recorded in this action should be expunged on the ground that adequate relief can be secured to _ _[*plaintiff/claimant*]_ _, _ _[*name*]_ _, if _ _[*defendant/moving party*]_ _, _ _[*name*]_ _, files an undertaking. The court further finds that an undertaking in the amount of _ _[*dollar amount*]_ _ is necessary to indemnify _ _[*plaintiff/claimant*]_ _ for all damages proximately resulting from the expungement if _ _[*plaintiff/claimant*]_ _ prevails on the real property claim.

IT IS THEREFORE ORDERED that _ _[*defendant/moving party*]_ _, _ _[*name*]_ _, show to this court at or before _ _[*time*]_ _ on _ _[*date*]_ _, that it has filed an undertaking in the amount of _ _[*dollar amount*]_ _ to indemnify _ _[*plaintiff/claimant*]_ _. If _ _[*defendant/moving party*]_ _ files the required undertaking, this court shall issue an order forthwith, without further notice or hearing, expunging the notice of pendency of action recorded by _ _[*plaintiff/claimant*]_ _ on _ _[*date*]_ _ in the official records of _ _ _ _ _ _ County as _ _[*specify recording data*]_ _.

[*Continue*]

[*Add if fees and costs awarded*]

IT IS FURTHER ORDERED that _ _[*plaintiff/specify claimant*]_ _, _ _[*name*]_ _, pay to _ _[*defendant/moving party*]_ _, _ _[*name*]_ _, the sum of _ _[*dollar amount*]_ _ for reasonable costs and attorney fees incurred in connection with this motion.

[*Continue*]

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Copies: Original (file with court clerk after signature by judge); copy (for certification after signature to be filed with county recorder); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: This form is for use when the court expunges a lis pendens under CCP §405.23, §405.31, or §405.32, all of which are addressed in the motion form in §13.117. It also offers language to use if the court orders expungement conditioned on the moving party's filing of an undertaking under CCP §405.33. See §13.96. The prevailing party is entitled to an award of costs and attorney fees unless the court finds that the other party acted with substantial justification or that circumstances would make an award unjust. See §13.55.

Once the order has been signed by the judge and filed by the court clerk, counsel for the moving party should obtain a certified copy for recording. On the effect of the order and its recordation, see §13.94.

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Source: Real Property/California Real Property Remedies and Damages/13 Lis Pendens/§13.119 D. Form: Order Denying Motion to Expunge Notice of Pendency of Action and Granting Motion to Require Claimant to File Undertaking

§13.119 D. Form: Order Denying Motion to Expunge Notice of Pendency of Action and Granting Motion to Require Claimant to File Undertaking

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Superior Court of California, County of _ _ _ _ _ _
_ _[_ _ _ _ _ _ *District/Division*]_ _
_ _[*Limited Civil Case*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	)	**No. _ _ _ _ _ _**
	)	**ORDER DENYING MOTION TO EXPUNGE NOTICE OF PENDENCY OF ACTION AND GRANTING MOTION TO REQUIRE PLAINTIFF TO FILE UNDERTAKING**
vs	)	
_ _[*Name(s)*]_ _, **Defendant(s)**	)	
	)	
	)	**Heard on:** _ _[*date*]_ _
	)	**Dep't:** _ _[*number*]_ _
_____	)	**Hearing judge:** _ _[*name*]_ _

The motion of _ _[*defendant/moving party*]_ _, _ _[*name*]_ _ for an order expunging the notice of pendency of action recorded in this action or, in the alternative, for an order requiring _ _[*plaintiff/claimant*]_ _, _ _[*name*]_ _, to file an undertaking, was heard in Department _ _[*number*]_ _ of the above-named court on _ _[*date*]_ _, before the Honorable _ _[*name of judge*]_ _. Plaintiff appeared by _ _[*name(s) of attorney(s)*]_ _, and defendant appeared by _ _[*name(s) of attorney(s)*]_ _. _ _[*Specify appearances of other parties as appropriate.*]_ _

The court, having considered _ _[*testimony*]_ _, the pleadings, declarations, points and authorities, and other documents and evidence submitted in support of and in opposition to the motion, finds that:

[*If applicable, add one or more of the following optional findings*]

[*Option 1: CCP §405.23*]

The _ _[*plaintiff/claimant*]_ _, _ _[*name*]_ _, fully complied with the filing and service requirements of the lis pendens statute, Code of Civil Procedure §405.22;

[*Option 2: CCP §405.31*]

The _ _[*complaint/specify other pleading*]_ _ contains a real property claim sufficiently pleaded to support the recordation of the lis pendens;

[*Option 3: CCP §405.32*]

_ _[*Plaintiff/Claimant*]_ _, _ _[*name*]_ _, has established by a preponderance of the evidence the probable validity of the real property claim alleged in the _ _[*complaint/specify other pleading*]_ _;

[*Continue*]

_ _[*Defendant/Moving party*]_ _, _ _[*name*]_ _, is likely to sustain substantial damages if the notice of pendency of action remains in effect because _ _[*state facts indicating potential damages*]_ _;

Despite the above findings, this case presents many sharply contested issues of fact and law, and there is a reasonable possibility that the _ _[*defendant/moving party*]_ _, _ _[*name*]_ _, could prevail in this action yet have no recourse to recover the losses caused by the notice of pendency of action; and

Each party acted with substantial justification in support of and opposition to this motion.

IT IS THEREFORE ORDERED that:

1. The motion of _ _[*defendant/moving party*]_ _, _ _[*name*]_ _, to expunge the notice of pendency of action recorded in this action is DENIED.

2. The motion of _ _[*defendant/moving party*]_ _ for an order under Code of Civil Procedure §405.34 requiring _ _[*plaintiff/claimant*]_ _, _ _[*name*]_ _, to file an undertaking is GRANTED. _ _[*Plaintiff/Claimant*]_ _ shall provide an undertaking to _ _[*defendant/moving party*]_ _, _ _[*name*]_ _, in the amount of _ _[*dollar amount*]_ _ to the effect that, if _ _[*plaintiff/claimant*]_ _ does not prevail on the real property claim alleged in the _ _[*complaint/specify other pleading*]_ _, it shall indemnify said _ _[*defendant/moving party*]_ _ for all losses caused by maintenance of the notice of pendency of action recorded on _ _[*date*]_ _, in the official records of _ _ _ _ _ _ County as _ _[*specify recording data*]_ _.

3. _ _[*Plaintiff/Claimant*]_ _ shall show to this court at or before _ _[*time*]_ _ on _ _[*date*]_ _, that it has filed the undertaking required by paragraph 2 of this order. If _ _ _[*plaintiff/claimant*]_ _ fails to do so, this court shall issue its order forthwith, without further notice or hearing, expunging the notice of pendency of action.

4. Each party shall bear its own costs and attorney fees incurred in connection with this motion.

Date: _ _ _ _ _ _ __[*Signature*]__
Judge of the Superior Court

Copies: Original (for signature by judge and filing); copies (one for each party and attorney of record); office copies.

Comment: This form is for use when the court denies expungement under CCP §§405.31-405.32 but requires that the claimant file an undertaking under CCP §405.34 as a condition of maintaining the lis pendens. See §13.41. The prevailing party is entitled to an award of costs and attorney fees unless the court finds that the other party acted with substantial justification. CCP §405.38. Because this order grants some relief to both the claimant and the party seeking expungement, the form provides for no award of costs and attorney fees. The form may be revised to provide an award for a particular case.

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Source: Real Property/California Real Property Remedies and Damages/13 Lis Pendens/§13.120 E. Form: Notice of Withdrawal of Notice of Pendency of Action

§13.120 E. Form: Notice of Withdrawal of Notice of Pendency of Action

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Recording requested by and after recording return to:	
Attorney for Plaintiff, _ _[*name*]_ _	**(Space above this line for recorder's use)**

Superior Court, County of _ _ _ _ _ _ _
_ _[_ _ _ _ _ _ *Judicial District*]_ _

_ _[*Name(s)*]_ _, **Plaintiff(s)**	**No.** _ _ _ _ _ _
vs	**NOTICE OF WITHDRAWAL OF NOTICE OF PENDENCY OF ACTION (CCP §405.50)**
_ _[*Name(s)*]_ _, **Defendant(s)**	

PLEASE TAKE NOTICE that _ _[*name of party who recorded notice of pendency of action or successor in interest*]_ _ **withdraws the notice of pendency of action recorded in this action on** _ _[*date*]_ _, _ _[*as Instrument No.* _ _*/at Book* _ _, *page* _ _]_ _ **in the office of** _ _ _ _ _ _ **County, California, so that it does not (1) constitute constructive or actual notice of any of the matters contained, claimed, alleged, or contended in it or of any matters relating to this lawsuit or (2) create any duty of inquiry in any person dealing with the affected property described in the notice after the date of recordation of this notice of withdrawal.**

The notice of pendency of action that is withdrawn concerned real property located in _ _ _ _ _ _ **County, California, commonly known as** _ _[*specify street address, assessor's parcel number, or other common designation*]_ _ **and described as follows:** _ _[*Give legal description of real property or attach description as an exhibit*]_ _**.**

The Assessor's Parcel Number is: _ _[*number*]_ _

Date: _ _ _ _ _ _ _ _[*Name of firm*]_ _

By: __[*Signature*]__
_ _[*Typed name*]_ _
Attorney for _ _[*plaintiff/party who recorded notice*]_ _

[*Acknowledgment*]

Copies: Original (present to county recorder); duplicate originals (record if property is located in more than one county); copies for service (one for each attorney of record and unrepresented party); office copies.

Comment: The actual contents of a notice of withdrawal are not specified in CCP §405.50, except for the requirements that the notice be executed by the party who recorded the lis pendens or by that party's successor in interest and that it be acknowledged. See §§13.113-13.115. To ensure the broadest possible notice, however, the attorney should include the assessor's parcel number, the legal description of the property, and the language concerning the notice of withdrawal as it appears in a portion of CCP §405.60. A notice of withdrawal must be acknowledged before it can be recorded. CCP §405.50. See Govt C §27287.

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14

Alternative Dispute Resolution for Real Property Actions

Linda DeBene
Malcolm Sher

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I. INTRODUCTION

§14.1 A. Why Alternative Dispute Resolution?

Over 150 years ago, Abraham Lincoln said, "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser—in fees, expenses and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough." Lincoln, Notes for a Law Lecture, Abraham Lincoln Online, Speeches and Writings (1850), Source: The Collected Works of Abraham Lincoln, Vol. 2, Basler, ed. (see http://www.hti.umich.edu/l/lincoln).

Lincoln's advice is still worthwhile today. The challenge of alternative dispute resolution (ADR) is that it has no hard and fast rules. ADR can be mediation, arbitration, settlement conferences, or other processes that resolve a case without the need for trial. Alternative dispute resolution processes have developed and continue to develop as alternatives or substitutes to litigation. Litigation, by contrast, is a well-established system with hard and fast rules. Using ADR, a mediator or special master can follow whatever approach the parties agree to devise. To some degree, an arbitrator can do the same and, by agreement, he or she may not even need to follow the law of the jurisdiction in which the dispute has arisen. In this way, the parties and counsel, with the guiding hand of the neutral mediator or arbitrator, can make the ADR process into one that can effectively meet their needs.

At this stage in ADR's growth, not all of the new processes have had positive results, whether because they are innovative or because they are used in contexts different from the norm (*e.g.,* the use of mandatory arbitration in employment circumstances is the subject of highly contested litigation and recent cases). In some contexts, statutes have been passed to mandate ADR, litigation has followed, appeals have been taken, and rules continue to be established.

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§14.2 B. Chapter Scope

Because each real estate case is unique, there is no magic formula for successful ADR implementation. The goal of this chapter is to acquaint the reader with alternatives to real property litigation, or with remedies that can be used in conjunction with litigation, and to provide references to other sources for further discussion of alternative tools that may aid in rapid, successful, and perhaps a more economical, resolution of real property claims. The practitioner is encouraged to refer to those sources after analysis of the remedies discussed in this chapter if one of those remedies or tools is more appropriate to the claim at issue. For example, contract-drafting issues for ADR are discussed in other sources that are cross-referenced, as applicable, in this chapter.

This chapter examines ADR in the real estate context, discussing the available alternatives, the mandatory requirements, and practice tips to use as a guide in evaluating a real estate dispute. Statutory ADR requirements are discussed in §§14.3-14.10. Specifically, disputes relating to homeowners' associations are discussed in §§14.3-14.4, and elective or directive statutory schemes are discussed in §§14.5-14.7. General civil mediation and arbitration statutory schemes are set forth in §§14.8-14.10.

In addition, contract provisions for ADR are discussed in §§14.11-14.25 (contractual mandatory mediation in §§14.11-14.15 and contractual binding arbitration in §§14.16-14.25). Elective procedures after a dispute arises (but before court litigation has commenced) are discussed in §§14.26-14.29. Alternative methods in conjunction with filed litigation are discussed in §§14.30-14.37. Dual forum issues are discussed in §§14.38-14.39A. Practice points on arbitration are set forth in §§14.40-14.52, and points on mediation are set forth in §§14.54-14.85.

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II. STATUTORY ADR REQUIREMENTS

A. Mandatory Requirements Relating to Homeowners' Associations

§14.3 1. Declaratory or Injunctive Relief Relating to CC&Rs

Common interest developments are regulated separately for prelitigation ADR. See CC §§1363.810-1363.850, 1369.510-1369.590. When a dispute between a homeowners' association and a member involves either (1) declaratory, injunctive, or writ relief or (2) that relief plus a money damages claim of $5000 or less, then the association or property owner must attempt to submit the dispute to a form of ADR, such as mediation, arbitration, conciliation, or other nonjudicial procedure involving a neutral party in the decisionmaking process. CC §§1369.510, 1369.520. It is initiated by any party serving on the other party a Request for Resolution under CC §1369.530. A refusal to participate in ADR may be considered by the court when awarding attorney fees and costs to the prevailing party in a later court action. See CC §1369.580; §14.56.

In addition and in supplement to CC §§1369.510-1369.590, homeowner's associations must provide "fair, reasonable, and expeditious" procedures for resolving disputes between the association and a member owner that involve the owner's rights, duties, or liabilities under the Davis-Stirling Common Interest Development Act (CC §§1350-1378) or under the governing documents of the association. CC §§1363.810-1363.820. Minimum standards for this "internal" dispute resolution procedure are set forth in CC §1363.830, and provide that property owners may not be charged a fee to participate. When an association does not provide a fair, reasonable, and expeditious dispute resolution procedure, a statutory procedure is provided. See CC §1363.840. Written notice (CC §1357.130) and a special meeting (CC §1357.140) are required when a homeowner's association changes, or reverses a change to, any operating rule involving dispute resolution procedures. See CC §1357.120(a)(5).

For further discussion, see Advising California Common Interest Communities, chaps 7, 10 (Cal CEB 2003).

Many CC&R provisions contain mandatory arbitration or mediation requirements. Review of any CC&R provisions applicable to the property in dispute should be a preliminary step in determining whether the claim must be handled through ADR processes or may be litigated without first pursuing ADR. In limited situations, such provisions may be unenforceable. For example, a developer who drafted, signed, and recorded the CC&Rs may not use a CC&R binding arbitration provision to preclude homeowners (or the homeowners' association) from prosecuting an action in court against that developer for construction or design defect damages. *Villa Milano Homeowners Ass'n v Il Davorge* (2000) 84 CA4th 819, 102 CR2d 1 (refused to enforce arbitration clause because it was unconscionable). In *Treo @ Kettner Homeowners Ass'n v Superior Court* (2008) 166 CA4th 1055, 83 CR3d 318, the court did not enforce an ADR provision in CC&Rs requiring submission of disputes to judicial reference under CCP §638 because the developer-drafted provision was not a written contract sufficient to waive the right to trial by jury as the legislature intended in the context of §638.

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§14.4 2. Construction Defect Litigation

If a lawsuit will be predicated on developer or contractor liability for construction defects, two separate statutes, cited in §§14.4A-14.4B, mandate prelitigation dispute resolution of such claims. These laws are varied and complex. For comprehensive discussion, see Advising California Common Interest Communities, chap 10 (Cal CEB 2003); California Construction Contracts, Defects, and Litigation, chap 15 (Cal CEB 2008).

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§14.4A a. Calderon Amendment (CC §1375)

Civil Code §§1375-1375.1, sometimes called the Calderon Amendment, requires that, before a homeowners' association (for a project of 20 units or more) files an action for damages "against a builder of a common interest development based on a claim for defects in the design or construction" of the project, the association must follow statutory ADR requirements. One requirement is a mediation of sorts, *i.e.,* a series of meet-and-confer sessions between the builder (with other potentially responsible parties) and the association's board of directors, during which the parties exchange and discuss their proposals for submitting the dispute to "alternative dispute resolution" (CC §1375(d)-(f)), selecting a dispute resolution facilitator (CC §1375(f)(1)), and preparing and implementing a case management plan for discovery (CC §1375(f)-(h)). Another step involves the exchange and consideration of settlement offer proposals between the association's board and the responsible parties, including the builder. CC §1375(k). The Calderon Amendment ADR process was substantially expanded effective July 1, 2002, but will become inoperative July 1, 2010, unless extended. CC §1375(r)-(s)).

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§14.4B b. Right to Repair Act (SB 800)

Civil Code §§895-945.5, often referred to as the Right to Repair Act or SB 800, established construction standards for new residential structures effective January 1, 2003. See CC §§896-897. Before a homeowner files an action for damages against any construction participant specified in §§896-897 for defects in the "construction, design, specifications, surveying, planning, supervision, testing, or observation of construction" that violate the established standards, the homeowner must first fulfill statutory ADR requirements. "Homeowner" includes a single-family-dwelling owner as well as a common-interest-development homeowners' association. See CC §895(f)). Because SB 800 applies to all new residential dwellings (single-family homes and units of attached buildings) originally sold on or after January 1, 2003, except for condominium conversions, SB 800 supersedes the Calderon Amendment (CC §§1375-1375.1), discussed in §14.4A, and it significantly affects both procedural and substantive rights of homeowners, housing builders, developers, and contractors, and other construction participants. For further discussion, see California Construction Contracts, Defects, and Litigation, chap 15 (Cal CEB 2008).

NOTE: There is no mention of remodel work in SB 800, but the law is said to provide "for detailed and specific liability standards for *newly* constructed housing." See *Rosen v State Farm Gen. Ins. Co.* (2003) 30 C4th 1070, 135 CR2d 361, in which the supreme court, quoting from the Senate Commission on Judiciary Analysis of SB 800, narrowly construed SB 800 and held it applicable "only to residences originally sold on or after January 1, 2003," precluding retroactive application. *Rosen v State Farm Gen. Ins. Co., supra*.

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B. Elective or Directive Statutory Schemes Providing for ADR

§14.5 1. Cost of Maintaining Easement (CC §845)

When there are multiple owners of an easement that is a private right-of-way, disputes may arise among them over apportionment of the cost for maintaining the easement. Lacking an agreement apportioning the cost of maintenance, the cost shall be shared proportionately to the use made of the easement by each owner. Any owner of the easement "may apply to any court where the right-of-way is located and that has jurisdiction over the amount in controversy for the appointment of an impartial arbitrator to apportion the cost." CC §845(c). This arbitration proceeding is nonbinding, and if one or more parties do not accept the award, the court may enter a judgment establishing each owner's proportionate liability. CC §845(c).

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.6 2. Administrative Proceedings (Govt C §11420.10)

§14.6 2. Administrative Proceedings (Govt C §11420.10)

Under the adjudication provisions of the Administrative Procedure Act (Govt C §§11400-11470.50), and applicable to adjudicative proceedings commenced on or after July 1, 1997, all agencies and some quasi-public agencies (except the legislature, courts, governor, or office of the governor), including any agency that would have jurisdiction over matters involving real-estate-related disputes, may refer a dispute that is the subject of an adjudicative proceeding for resolution by mediation, binding arbitration, or nonbinding arbitration. Govt C §11420.10(a). Government Code §11420.30 establishes the confidentiality of communications in any ADR proceeding under the Act, and §11420.10(a) mandates that any ADR be by a "neutral" mediator or arbitrator. See California Administrative Hearing Practice §6.52 (2d ed Cal CEB 1997).

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.7 3. Real-Estate-Related Conduct Charged as Misdemeanor (Pen C §§14150-14156)

§14.7 3. Real-Estate-Related Conduct Charged as Misdemeanor (Pen C §§14150-14156)

The local district attorney's office may establish an ADR program for conflict resolution on conduct charged as a misdemeanor. Pen C §14151. See Pen C §§14150-14156. Some real-estate-related matters could fall within this ADR statutory scheme (*e.g.*, trespasses to real property; theft from real property by tenants or others; destruction or damage to real property; preventing or obstructing entry onto land in which the person has an interest by easement or license; theft by mortgagors of improvements from real property; sale of property covered by a security interest without payment to the secured party; the contractor's use of funds for a building project diverted to another project; use of residential property without the owner's consent; and cutting, destroying, or removing trees from the property). See Pen C §14152.

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.7A 4. Other Statutory ADR Requirements

§14.7A 4. Other Statutory ADR Requirements

Statutory requirements for prelitigation ADR in many types of real property civil cases will continue to rise. For general discussion of other California statutes requiring ADR that are outside the scope of this chapter, see DeBene, *Cutting to the Chase: The Litigator's Guide to Statutory ADR in Real Property Disputes*, 25 CEB Real Prop L Rep 122 (May 2002).

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C. General Civil Mediation and Arbitration Programs

§14.8 1. Statutes and Court Rules

- **Judicial arbitration.** In unlimited civil cases, CCP §§1141.10-1141.31 require cases with an amount in controversy of not more than $50,000 that are filed in counties with 18 or more judges to proceed to nonbinding arbitration, followed by an optional trial de novo procedure. Judicial arbitration is available in any civil action on stipulation by all parties regardless of the amount in controversy. CCP §1141.12.
- **Arbitration based on agreement.** CCP §1280.
- **Reference by agreement or court order.** CCP §§638-639.
- **Private judging.** CCP §638(a); Cal Const art VI, §21.
- **Civil action mediation.** CCP §§1775-1775.15; Cal Rules of Ct 3.850-3.878. Civil action mediation is a mandatory pilot program required in Los Angeles County trial courts; any other court may elect to implement the program. A participating court can refer to mediation any action in which judicial arbitration would otherwise be required (no more than $50,000 in controversy), including an action requesting equitable relief. CCP §1775.5. Some local court rules allow parties to stipulate into the program regardless of the amount in controversy.
- **ADR rule for civil cases.** Cal Rules of Ct 3.221, 3.800, 10.781-10.783. Each court must make available to the plaintiff, at the time of filing of the complaint, an ADR information package that includes general information about the potential advantages and disadvantages of ADR and descriptions of the principal ADR processes, information about the ADR programs available in that court, and an ADR stipulation form that parties may use to stipulate to the use of an ADR process. Cal Rules of Ct 3.221(a). In counties participating in the Dispute Resolution Programs Act, the court must also provide information about the availability of local dispute resolution programs funded under that Act. Cal Rules of Ct 3.221(a)(3). The plaintiff must serve a copy of this package on each defendant along with the complaint. Cross-complainants must serve a copy of the ADR information package on any new parties to the action along with the cross-complaint. Cal Rules of Ct 3.221(c).

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§14.9 2. Local Rules

Many state and federal courts have established rules requiring submission of certain filed actions to their ADR programs. Others have various stages of voluntary programs in which the judges encourage participation. For example, the Contra Costa Superior Court has several pretrial programs for mediation or early neutral evaluation of cases. Contra Costa Superior Court has implemented revised ADR rules for both arbitration and mediation effective January 1, 2008. See Contra Costa Ct R, Appendix C. The rules apply to all court-administered ADR programs except mediation provided by family court services. The rules provide, among other things, ethical and practice standards for ADR panel members regarding:

- The disclosure of actual or potential conflicts of interest;
- Confidentiality;
- Knowledge of the process (*i.e.*, having sufficient training, education, and experience); and
- Pro bono contributions and fees for service.

Go to http://www.cc-courts.org to access information about the ADR programs in that county. See, *e.g.,* Contra Costa Ct R 11; Contra Costa Ct R App C (Rules 101-713). The First District Court of Appeal has a mandatory mediation program. For information on this program, go to http://www.courtinfo.ca.gov/courts/courtsofappeal/1stDistrict and click on "Local Rules and Orders" to access 1st Dist Local R 2, Mediation in Civil Appeals.

The California Judicial Council webpage contains links to articles about ADR programs throughout the state. http://www.courtinfo.ca.gov/reference/4_3adr.htm. Many of California's court programs are discussed in the Judicial Council's August 1999 report on Alternative Dispute Resolution in Civil Cases (Report of the Task Force on the Quality of Justice, Subcommittee on Alternative Dispute Resolution and the Judicial System), available at http://www.courtinfo.ca.gov/reference/documents/adrreport.pdf or from the home page under "Reference."

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.10 3. County Bar Programs

§14.10 3. County Bar Programs

Many local bar associations have programs for finding and retaining ADR providers. For example, the San Francisco County Bar Association offers Voluntary Early Mediation and Early Settlement programs. See http://www.sfbar.org. Check with the local bar association of the applicable jurisdiction for similar programs.

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III. CONTRACT PROVISIONS

A. Contractual Mandatory Mediation

§14.11 1. Residential Purchase Contract Documents

The California Association of Realtors (CAR) has included mediation provisions for buyer-seller disputes in residential purchase contract documents since 1993. See http://www.car.org under "Product Mall," available to subscribers. See also paragraph 26.A in the form California Residential Purchase Agreement and Joint Escrow Instructions (CAR form RPA-CA, rev 4/10), reprinted with permission in California Real Property Sales Transactions §6.24 (4th ed Cal CEB 2007). Typically the mediation provisions in these and other real estate brokerage company or local real estate board form purchase contracts is mandatory. The mediation provisions apply also to brokers, but only if they agree in writing to participate.

One clause in an earlier version of the CAR residential purchase contract form, which is present in the current version, provided that a party who refuses to mediate before either side commences a civil action or arbitration is barred from later recovering attorney fees, even if that party prevailed in the action, arbitration, or proceeding. In *Frei v Davey* (2004) 124 CA4th 1506, 22 CR3d 429, the court of appeal reversed a large attorney fee award because the prevailing party in a trial had refused to mediate before the litigation commenced. See full discussion of *Frei* in §14.56. See also DeBene, *Getting Ready for Mediating Pre-Litigation Real Estate Cases Under CAR Form Contracts*, Contra Costa Law (May 2006). Arbitration provisions, discussed in §§14.16-14.17, are set up to be elective by the agreement and initialing of the parties.

PRACTICE TIP: Because the forms of either CAR or brokerage companies vary, it is important to review the specific language of each mediation or arbitration paragraph to evaluate its scope. In *Villacreses v Molinari* (2005) 132 CA4th 1223, 34 CR3d 281, *e.g.,* incomplete and ambiguous language in an escrow contact was held to constitute an unenforceable arbitration provision because it did not adequately define the scope of the disputes to be arbitrated. Moreover, in a real estate dispute, it is essential for counsel to ascertain whether he or she can file a lawsuit, record a lis pendens, or seek injunctive relief without violating a mandatory ADR provision. See, *e.g., Johnson v Siegel* (2000) 84 CA4th 1087, 101 CR2d 412.

Typically, the ADR provisions in the CAR forms (paragraph 26.C.(1)) exclude remedies such as judicial or nonjudicial foreclosure proceedings or other actions to enforce a deed of trust, mortgage, or installment land sale contract; unlawful detainer actions; mechanics' lien proceedings; and matters within the jurisdiction of a small claims, probate, or bankruptcy court. See also CCP §1281.8, which retains the issuance of many provisional remedies in the jurisdiction of the court. Construction contracts, however, frequently allow arbitration of equitable claims, and statutory support exists for related provisional remedies pending arbitration. See discussion and authorities cited in California Construction Contracts, Defects, and Litigation, chap 7 (Cal CEB 2008).

In older CAR (and some nonstandard) real estate brokerage purchase forms, more unusual claims and remedies were not listed in the stated exception language. These may require injunctive relief or recordation of a notice of pending action (*i.e.,* lis pendens; see chap 13). For example, in a specific performance claim in which anticipatory breach is documented, the action will require a lis pendens. Alternatively, if the property will be purchased subject to easements "of record" and the seller either has granted an easement to another but not recorded it (*i.e.*, a claim by the third person occurs before closing), or if an easement that was not to be recorded is recorded and cannot be removed before closing, an action by the buyer may require a lis pendens. The current CAR residential sales form (CAR form RPA-CA rev 4/10) (see p 981), Paragraph 26.C.(1), states that the filing of a court action "to enable the recording of a notice of pending action, for order of attachment, receivership, injunction, or other provisional remedies, shall not constitute a waiver of the mediation and arbitration provisions." See additional discussion on this language in §14.56.

The filing of a lawsuit is essential before the recordation of a lis pendens. *Manhattan Loft, LLC v Mercury Liquors,*

Inc. (2009) 173 CA4th 1040, 93 CR3d 457. Code of Civil Procedure §1298.5 provides that, if a party to an action records a lis pendens under CCP §409, such activity in conjunction with the filing of a lawsuit does not constitute a waiver of any right of arbitration that that person has by contract, nor is that party prevented from petitioning the court to compel arbitration for the other parties to the contract. See also California Real Property Sales Transactions §§6.15-6.19 (4th ed Cal CEB 2007). On maintaining a lis pendens pending arbitration, see Const Contracts and Defect §7.54.

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§14.12 2. Residential Home Building Contracts

Although not all building contracts for residential property are prepared using American Institute of Architects (AIA) forms, many do use AIA forms or the AIA terms have been taken (albeit in modified formats) from AIA forms. AIA forms generally contain mandatory arbitration provisions. In the late 1990s, mediation as a condition precedent to arbitration was added to the AIA forms. Many building contracts contain mediation, judicial reference, or arbitration provisions, or a combination of these, inserted by the builder to avoid the expense of litigation. Although these provisions implicitly contain a waiver of the right to litigate the dispute before a jury, they were generally endorsed by the court in *Grafton Partners v Superior Court* (2005) 36 C4th 944, 32 CR3d 5, discussed in §14.25. But see *Treo @ Kettner Homeowners Ass'n v Superior Court* (2008) 166 CA4th 1055, 83 CR3d 318, cited in §14.3 (court did not enforce provision in CC&Rs requiring submission of disputes to judicial reference because developer-drafted provision was not sufficient to waive right to trial by jury).

PRACTICE TIP: The issues are similar to those in real estate purchase contracts, discussed in §14.11; *i.e.,* can the plaintiff file a lawsuit and record a lis pendens or sue to obtain injunctive relief without violating the mandatory mediation or arbitration provisions? Counsel should review specific contract language, which may provide exceptions, and should review CCP §1281.8 for arbitration exceptions.

For AIA contract forms, see http://www.aia.org. For discussion of arbitration, see Const Contracts and Defect, chap 7.

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3. Insurance Policies

§14.13 a. Examining Policies

Many insurance policies contain mandatory arbitration or mediation provisions. They may apply to disputes by an insured against an insurer (see, *e.g., Alexander v Blue Cross* (2001) 88 CA4th 1082, 106 CR2d 431), disputes between the insured and the insurer irrespective of which party initiates the action, disputes within the claims adjusting process, such as property appraisals for valuation purposes (see, *e.g.*, *Mahnke v Superior Court* (2009) 180 CA4th 565, 103 CR3d 197), subrogation claims between insurers, indemnity or contribution claims between insurers, and other claims that could arise between insurers and third persons from whom they wish to gain reimbursement or payment. Insurers frequently change their policy language on newly issued policies, and it is highly important for counsel or a party to review in detail past and current policies.

When interviewing a client on a real estate dispute, whether the client is a real estate licensee, a contractor, an architect, a seller, a landlord, or a witness, the attorney should inquire about various insurance issues (*e.g.,* against whom is the claim being made, and does that party have a policy of insurance; were insurance policies issued in a different name in prior years; are there additional insured endorsements that cover the party or situation; are there partners, subsidiaries, or other third parties who may have insurance that would cover the claim; are there any gaps in insurance about which there should be a concern; is there a policy limit exhaustion about which there should be a concern; what exclusions might be claimed by the carrier to apply to the claim; is there a contractual statute of limitations that must be met (see *Michelson v Mid-Century Ins. Co.* (2000) 83 CA4th 450, 99 CR2d 804)) and ask to examine the policies. Examples of insurance that counsel may wish to examine at the opening of a new file, or at later points during the progress of the case, are the following:

- Real estate professional errors and omissions coverage.
- Homeowner property and liability policies (see California Real Property Sales Transactions, chap 13 (4th ed Cal CEB 2007)).
- Design professional errors and omissions coverage.
- Contractor/subcontractor builder risk, course of construction, and commercial general liability policies (see California Construction Contracts, Defects, and Litigation, chaps 10, 12 (Cal CEB 2008); California Liability Insurance Practice: Claims & Litigation (Cal CEB 1991)).
- Surety bonds (see California Mechanics' Liens and Related Construction Remedies, chaps 2, 10 (3d ed Cal CEB 1998)).
- Title insurance policies (see California Title Insurance Practice (2d ed Cal CEB 1997)).
- Excess coverage (see Liability Ins Prac, chap 17).

Although some policies may not mandate ADR for the basic first party or third party claim dispute handling, issues of loss allocation, claims adjusting, bad faith file handling, or coverage disputes may be the subject of policy provisions requiring arbitration or mediation. Insurance Code §2071 provides an arbitration-like "appraisal" process to settle disagreements over the amount of claimed fire losses. These awards are subject to statutory contractual arbitration law and cannot be avoided by appeal if a timely motion to vacate the award has not been filed. See *Louise Gardens of Encino Homeowners' Ass'n v Truck Ins. Exch.* (2000) 82 CA4th 648, 98 CR2d 378.

PRACTICE TIP: If representing a real estate licensee whose carrier does not want to provide sufficient funds to settle a third party claim after the defense was properly tendered, counsel might consider bringing a bad faith action if the broker is ultimately found liable for fraud and loses his or her license.

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.14 b. Submediations of Insurance Disputes

§14.14 b. Submediations of Insurance Disputes

In a mediation (or a special master proceeding) in the primary real estate action, typically in complex matters such as construction defect litigation, class action suits over construction or product claims, or common interest development litigation, submediations may be necessary to deal with disputes among an insured party to the main action, the insurer, the insurance defense counsel, coverage counsel, or private counsel for the party. Subjects of a submediation can be any of the following: (1) coverage; (2) independent *Cumis* counsel (see *San Diego Navy Fed. Credit Union v Cumis Ins. Soc'y* (1984) 162 CA3d 358, 361, 208 CR 494, superseded by CC §2860; see also *Gulf Ins. Co. v Berger, Kahn, et al.* (2000) 79 CA4th 114, 132, 93 CR2d 534); (3) exhaustion of policy limits; (4) self-insured retention exhaustion; (5) allocation between carriers on the risk and determination among carriers of issues relating to "time on the risk"; (6) claims against other insurers or parties not in the case; (7) rights of the carrier or the insured to control the settlement decision or decisions on defense or motion practice in the main case; (8) reimbursement of defense costs; (9) contractor/subcontractor indemnity, coverage, and additional insured issues; or (10) the applicability of exclusions asserted by the insurer.

PRACTICE TIP: The difficulties created by these insurance issues are important. Counsel should carefully prepare prior to a mediation or special master proceeding to prevent these issues from creating a stalemate that will prevent resolution in the main case. If necessary, schedule the submediation before the actual mediation or special master setting, so that any conflict between the insurance players on one party's "team" does not reflect badly on that party's position in the main case.

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§14.15 4. Bank Loan Documents

More often than not, loan documents require that matters between the bank and customers must be mediated, arbitrated, or both. Arbitration is usually mandatory in most bank documentation, from opening a checking account (see *Badie v Bank of America* (1998) 67 CA4th 779, 79 CR2d 273) to all types of lending documents. Mediation may be less frequently mandated, but it is often the subject of a prearbitration condition in bank documentation. Lending institutions are on a dedicated and unrelenting fast-track policy of not litigating disputes with customers, particularly not in front of a jury. As long as the jury trial waiver is implicitly part of a judicial reference or arbitration provision, it generally will be upheld. See *Grafton Partners v Superior Court* (2005) 36 C4th 944, 32 CR3d 5, discussed in §14.25. For discussion of contractual binding arbitration in lending documents, see §14.25. For a thorough discussion of mediation and arbitration in lending institution matters, see Smith, ADR for Financial Institutions (2d ed 1998).

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§14.16 B. Contractual Binding Arbitration

Many real-estate-related contracts contain binding arbitration provisions, which are regulated by CCP §§1298-1298.8. Specific warning language must be used with binding arbitration clauses in "any contract to convey real property, or contemplated to convey real property in the future, including marketing contracts, deposit receipts, real property sales contracts as defined in [CC §2985], leases together with options to purchase, or ground leases coupled with improvements, but not including powers of sale contained in deeds of trust or mortgages." CCP §1298(a). This mandate applies to principals and real estate agents in real property sales transactions. CCP §1298(b). The statute sets forth the language of the notice and the format requirements for typeface, size, and color for both typed and preprinted forms. See CCP §1298(a)-(c).

A California court of appeal ruled that CCP §1298 is preempted by federal law in transactions involving interstate commerce. In *Hedges v Carrigan* (2004) 117 CA4th 578, 11 CR3d 787, a defendant real estate broker appealed from an order denying his petition to compel plaintiff buyers to arbitrate a dispute arising from the buyers' purchase of a residence from defendant sellers. The buyers contended that there was no valid contract to arbitrate or, in the alternative, that the arbitration clause was unenforceable because it did not comply with the notice and format provisions regarding font and point size, notification, and warning requirements of CCP §1298. The court concluded that the Federal Arbitration Act (FAA) (9 USC §§1-16) preempted any requirement that compliance with §1298 was a condition precedent to enforcement of the arbitration clause. See 9 USC §2.

The court in *Hedges* reasoned that while an arbitration contract remains subject to state law defenses based on general contract principles, such as fraud, duress, or unconscionability (see §§14.42-14.42D), a court may not invalidate an agreement to arbitrate under state law that applies only to arbitration clauses in contracts involving interstate commerce. The court ruled that a standard residential purchase agreement, joint escrow instructions, and deposit receipt constitute a contract "involving commerce" within the meaning of 9 USC §2. The court based its ruling on the finding that the anticipated financing involved the use of a Federal Housing Administration (FHA) home loan subject to the jurisdiction of the federal Department of Housing and Urban Development (HUD) and that various copyrighted forms used by the parties and their brokers could be utilized only by members of the National Association of Realtors. See also *Doctors Assocs., Inc. v Casarotto* (1996) 517 US 681, 134 L Ed 2d 902, 116 S Ct 1652. One wonders whether the result in *Hedges* would have been different if a standard California Association of Realtors' form of contract (see §§14.17, 14.38) had been used and if the financing had originated from either a local California lender or even a California resident. See, *e.g., Woolls v Superior Court* (2005) 127 CA4th 197, 25 CR3d 426 (ruled that Bus & P C §7191(c), which is similar to CCP §1298, is not preempted by the FAA).

For ADR binding contract provisions, see California Real Property Practice Forms Manual §§4.111 (sales agreement—arbitration), 4.111A (sales agreement—mediation), 4.111B (sales agreement—mediation followed by arbitration), 4.111C (sales agreement—judicial reference), 40.13 (real property exchange) (Cal CEB 1988).

On enforcing binding arbitration contracts, see the California Arbitration Act, CCP §§1280-1294.2.

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§14.17 1. Residential Real Estate Purchase Contracts

The California Association of Realtors has included arbitration provisions in residential purchase contract documents since 1989. See http://www.car.org under "Product Mall," available to subscribers. See, *e.g.,* paragraph 26.B in California Residential Purchase Agreement and Joint Escrow Instructions (CAR form RPA-CA, rev 4/10), reprinted with permission in California Real Property Sales Transactions §6.24 (4th ed Cal CEB 2007). On the dual forum issues in litigation created by these forms, see §§14.26, 14.38-14.38D.

Other residential real estate companies or local real estate boards, which may develop their own forms, typically insert arbitration provisions. See also §14.11. For other sample forms, see California Real Property Practice Forms Manual §§4.111 (sales agreement—arbitration), 4.111B (sales agreement—mediation followed by arbitration) (Cal CEB 1988). For a cautionary tale of an incomplete and ambiguous arbitration clause giving no guidance on the scope of the disputes to be arbitrated, see *Villacreses v Molinari* (2005) 132 CA4th 1223, 34 CR3d 281, discussed in §§14.11, 14.42D.

The remedy of specific performance in a dispute over a residential real property purchase contract (see chap 5) may involve provisional remedies that appear to conflict with arbitration clauses. On the interplay of lis pendens procedures and arbitration or mediation procedures, see §§14.11, 14.28, 14.56.

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.18 2. Real Estate Licensee Commission Disputes

§14.18 2. Real Estate Licensee Commission Disputes

Most local boards of realtors have rules and procedures that require mandatory arbitration for commission disputes between licensees, or between the board and the public. See, *e.g., Gear v Webster* (1968) 258 CA2d 57, 59, 65 CR 255 (bylaws of Bakersfield Board of Realtors required members to submit to arbitration all disputes with any other member).

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§14.19 3. Commercial Real Estate

Parties have been more reluctant to accept ADR in commercial real estate transactions than in residential transactions. Commercial leases may contain mediation provisions, but arbitration of landlord-tenant disputes is disfavored because of the need for a speedy process and a sound judgment to evict in the event of a default. In commercial leases, however, ADR is useful when the parties have a continuing relationship that can be better maintained and preserved in arbitration or mediation rather than in litigation.

Typical ADR situations in commercial leases involve disputes over lending or rent formulas.

EXAMPLE 1: Many owners of commercial buildings obtained loans using as security the leases of "dot-com" companies, and landlords have accepted letters of credit as security deposits for these leases. When the dot-com company is no longer viable, the lenders may have to foreclose on the letter of credit instead of cash security deposits. A lender-landlord relationship may warrant protecting, leading to an opening to ADR rather than to litigation provisions in the lending documents.

EXAMPLE 2: On the formulas for commercial rent increases, commercial tenants may begin to question common area maintenance allocations or rent increases. When a tenant disputes a rent increase of 25 percent to "fair market value," the parties may need to resolve it quickly and economically to maintain a positive relationship or to keep the dispute confidential and private. ADR provides better tools than litigation for these sensitive, albeit business-driven, issues.

The supreme court endorses arbitration in commercial situations and recognizes that private contractual arbitration must serve a function "analogous to—*and typically to eliminate the need to resort to*—the court system." *Brennan v Tremco, Inc.* (2001) 25 C4th 310, 317, 105 CR2d 790 (emphasis added, quoting *Moore v Conliffe* (1994) 7 C4th 634, 643, 29 CR2d 152). The court reasoned that contractual arbitration "should not itself create new arenas for litigation." 25 C4th at 318.

On an issue of first impression in California, the court in *Sagonowsky v More* (1998) 64 CA4th 122, 125, 75 CR2d 118, held that an award made in a private commercial contractual arbitration cannot form the basis for a subsequent action for malicious prosecution. More recently, two courts of appeal have taken narrower positions than did the *Sagonowsky* court. In *Rogers v Peinado* (2000) 85 CA4th 1, 101 CR2d 817, disapproved in *Brennan v Tremco, Inc.*, 25 C4th 310, 317, the First District basically ignored *Sagonowsky* and held that an attorney who represented a party in private contractual arbitration could be sued for malicious prosecution because the arbitration clause applied only to the contracting parties and not to their attorneys. Although *Sagonowsky* also involved an attorney, the *Rogers* court dismissed the action against the parties to the arbitration agreement and left the matter stand as to the nonsignatory attorney. The supreme court disapproved *Rogers* to the extent that it is inconsistent with its decision in *Brennan v Tremco, Inc., supra*. The *Brennan* court (on an employer-employee dispute) held that, because private arbitration does not always allow for immediate assessment of "whether or why the prior action terminated in the malicious prosecution plaintiff's favor," and because an arbitrator's decision is generally not reviewable, "an action terminated in contractual arbitration, like a small claims action, should not give rise to a malicious prosecution action." 25 C4th at 317.

For discussion of arbitration in commercial leases, see Office Leasing: Drafting and Negotiating the Lease, chap 33 (Cal CEB 1996).

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.20 4. Real Estate Listing Contracts

§14.20 4. Real Estate Listing Contracts

The real estate listing contract is an important document for several reasons. For one, it establishes contractual obligations of the listing broker to the seller of real property, which may differ from the statutory or common law obligations of a fiduciary relationship or those arising from negligence. More recent forms used by the California Association of Realtors (CAR) have a provision for mediation and arbitration of all disputes that arise between a seller and the listing broker. Typically, other listing agreements provide for mandatory arbitration between the seller and the listing broker. Often, listing agreements provide that only disputes over the commission are required to be arbitrated. Hence, it is important to review each listing agreement for the actual language. In many instances, this review will serve more than one purpose.

When a dispute between a buyer and the seller of real property arises, the real estate contract documents typically mandate arbitration, and often mediation, as a condition precedent. Most real estate contracts do not require the brokers to participate in either mediation or arbitration between buyer and seller. Some brokers prefer to avoid participation in disputes between buyer and seller, especially if a party asserts a claim of responsibility against the listing broker.

PRACTICE TIP: To make an arbitration or mediation meaningful, all potentially liable parties should be present. But if the real estate purchase contract does not require the brokers to participate, and if the listing agreement contains a binding arbitration or mediation provision, it is often possible to encourage the broker to attend the ADR between buyer and seller because the broker may soon be involved in an ADR process with the seller, in any event.

For discussion of the statutory requirements for arbitration notices applicable between principals and real estate agents, see §14.16. For forms and discussion of arbitration in listing agreements, see California Real Property Sales Transactions §§2.60, 2.85 (4th ed Cal CEB 2007). For further discussion of real estate professionals and their participation or nonparticipation in mediation and arbitration with the buyers and sellers, see §§14.38-14.38D.

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§14.21 5. Residential Home Building and Improvement Contracts

Residential home builders often insert reference provisions (see §§14.35-14.36) in their building or sale contracts and attempt to eliminate litigation by including contractual provisions for arbitration of disputes. Similarly a builder of a condominium project may insert an arbitration clause in the recorded declaration of covenants, conditions, and restrictions (CC&Rs), which may require a homeowners' association to arbitrate any claims the association might have against the builder. At least one court of appeal held that CC&Rs are not an effective means of obtaining an enforceable agreement to arbitrate the homeowners' association's construction defect claims against the builder. See *Villa Vicenza Homeowners Ass'n v Nobel Court Dev., LLC* (2010) ___ CA4th ___, 2010 Cal App Lexis 774.

In some instances, the builder may attempt to incorporate by reference the arbitration provision in the buyer's application for warranty protection by making only a summary reference to that provision in the application, when the actual provision is in the warranty document that is delivered after the application is accepted. Caution should be exercised in examining these provisions because the buyer's knowledge and consent and the time of delivery of the document actually containing the arbitration provision are crucial. See *Bruni v Didion* (2008) 160 CA4th 1272, 73 CR3d 395 (buyers did not knowingly agree to arbitration provisions, which were unconscionable because they were contained in a contract of adhesion and violated buyers' reasonable expectations); *Adajar v RWR Homes, Inc.* (2008) 160 CA4th 563, 73 CR3d 17. As with reference provisions, any waiver of a buyer's right to trial proceedings must be visible and clear and comply with statutory prescriptions for validity. See §§14.16, 14.35-14.37.

Currently there is conflicting law on the issue of whether judicial reference provisions in large homebuilder purchase agreements are enforceable. Compare *Pardee Constr. Co. v Superior Court* (2002) 100 CA4th 1081, 123 CR2d 288 (reference provision found unconscionable because language in entry level housing contracts buried in fine print and hard to read) with *Woodside Homes of Cal., Inc. v Superior Court* (2003) 107 CA4th 723, 132 CR2d 35 (reference provisions held enforceable; language not hard to read and jury waiver conspicuously set forth). The *Woodside* decision concluded that although one portion of a reference provision may be unenforceable, severability could save the remainder of the agreement. On fraud, duress, and unconscionability as defenses, see §§14.42-14.42D.

A court of appeal considered who may be subject to judicial reference and concluded that only signatories to the purchase contract (and not subsequent purchasers) could be bound. *Greenbriar Homes Communities, Inc. v Superior Court* (2004) 117 CA4th 337, 11 CR3d 371. The court of appeal in *Tarrant Bell Prop. v Superior Court* (review granted Feb. 18, 2010, S179378; superseded opinion at 179 CA4th 1283, 102 CR3d 235) recognized that the trial court had discretion to deny enforcement of a judicial reference agreement if there was a possibility of conflicting rulings or other circumstances related to judicial economy, similar to the discretion to deny enforcement of an arbitration agreement.

NOTE: If the reference requirement had been included in the covenants referred to in the original purchasers' deeds and ran with the land, later, nonoriginal purchasers would be bound too, even if they had not personally consented.

PRACTICE TIP: Counsel should always consider invoking CCP §1281.2, which applies specifically to arbitration agreements. Under this statute, the court has power to consider refusing to enforce an arbitration agreement so as to allow intervention or joinder of nonparties to the arbitration provision in a single action or special proceeding in order to avoid a multiplicity of actions and inconsistent results.

A homebuyer may choose to litigate construction defect claims in a court action, even if the buyer accepted an arbitration clause in the purchase agreement. See CCP §1298.7; *Villa Milano Homeowners Ass'n v Il Davorge* (2000) 84 CA4th 819, 102 CR2d 1. But SB 800 (Right to Repair Act; see §14.4B) affects §1298.7 in that Senate Bill 800 requires mandatory prelitigation mediation for residential construction defect claims. In any event, several California courts of appeal held that §1298.7 is preempted by the Federal Arbitration Act (9 USC §§1-16) (see *Shepard v Edward Mackay Enters.* (2007) 148 CA4th 1092, 56 CR3d 326; *Basura v U.S. Home Corp.* (2002) 98 CA4th 1205, 120 CR2d 328), but whether a federal law preempts a specific state law in a given situation is a federal constitutional question, analyzed under US Const art VI, cl 2 (the supremacy clause), and must often be decided case by case on the specific

facts. For additional discussion about federal choice of law issues, see §14.38C.

A home improvement contract may contain mandatory arbitration provisions. In *Harper v Ultimo* (2003) 113 CA4th 1402, 7 CR3d 418, a consumer contract between a swimming pool contractor and a homeowner required arbitration under the rules of the Better Business Bureau. The rules were not attached to the agreement, so that before signing, the consumer was required to go to another source to find out the full impact of what he was about to sign. Moreover, the rules imposed limited remedies and prohibited other tort damages and punitive damages. The court found the provisions to be both substantively and procedurally unconscionable. See §14.42B.

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§14.22 6. Construction Contracts

Binding arbitration provisions are often included in construction contracts. For an extensive discussion of arbitration clauses in construction contracts, including arbitration procedures, see California Construction Contracts, Defects, and Litigation, chaps 2, 7 (Cal CEB 2008).

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§14.23 7. Title Policy Documents

Most title insurance policies contain provisions for either mandatory or voluntary arbitration to resolve policy claims using American Arbitration Association (AAA) Title Insurance Rules (superseded by commercial ADR rules in 2003). See *e.g.*, *Kleveland v Chicago Title Ins. Co.* (2006) 141 CA4th 761, 46 CR3d 314. These and other AAA real-estate-related mediation and arbitration rules can be downloaded at http://www.adr.org, under "Rules Updates," "Commercial Arbitration Rules and Mediation Procedures." For discussion of enforcing arbitration clauses in title policies and arbitrating title policy claims, see California Title Insurance Practice, chap 14 (2d ed Cal CEB 1997).

Mediation in title policy disputes under AAA rules is not mandatory. To facilitate settlement, the parties may agree at any stage of the arbitration proceedings to conduct a mediation conference under the AAA Commercial Mediation Rules. The mediator must not be an arbitrator appointed to the case. If the parties to a pending arbitration agree to mediate under AAA rules, no additional administrative fee is required to initiate the mediation. AAA Commercial Arbitration Rules and Mediation Procedures, Rule R-8.

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§14.24 8. Insurance Policies

It is wise to look at all relevant insurance policies for mandatory arbitration provisions. For persuasive authority using non-real-estate-related cases that deal with mandatory arbitration provisions in insurance contracts, see *Davenport v Blue Cross* (1997) 52 CA4th 435, 60 CR2d 641 (action for tortious breach of insurance contract; provisional relief pending contractual arbitration is permitted only when necessary to preserve effectiveness of arbitration).

There are a few statutory schemes providing for elective arbitration in insurance disputes. See, *e.g.,* the earthquake insurance mediation program (Ins C §§10089.70-10089.84) and the Fair Insurance Responsibility Act (CCP §§1776-1784).

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§14.25 9. Bank Lending Documents

Contractual binding arbitration, waiver of class actions, and waiver of trial provisions are often included in bank lending documents. Although ADR, either through mediation or arbitration, is often the more economical or preferred method of resolving disputes with lending institutions (*e.g.,* in maintaining business relationships), disputes often arise that must be litigated. In those situations, counsel should closely examine the lending documents containing mandatory ADR requirements to ascertain if they are one-sided or otherwise unenforceable. See, *e.g., Flores v Transamerica HomeFirst, Inc.* (2001) 93 CA4th 846, 113 CR2d 376 (arbitration clause in reverse mortgage unconscionable; see §§14.38B-14.38C, 14.42B), reported in 25 CEB Real Prop L Rep 42 (Jan. 2002).

Judicial economy may justify a refusal to force an individual into arbitration if a class arbitration or court action would be a significantly more effective and practical means of vindicating unwaivable statutory rights. See *Arguelles-Romero v Superior Court* (2010) 184 CA4th 825, ___ CR3d ___ (remanding case to trial court to determine enforceability of arbitration clause against individual in automobile loan agreement).

Provisions purporting to waive the right to a jury trial in advance are unenforceable. *Grafton Partners v Superior Court* (2005) 36 C4th 944, 32 CR3d 5. In *Grafton Partners,* the supreme court resolved a split of authority among the appellate courts on the enforceability of predispute jury trial waivers. The court held that only the legislature may prescribe methods by which the right to jury trial could be waived. Since CCP §631 (which expressly codifies the right to trial by jury contained in Cal Const art I, §16) does not authorize predispute waivers of the right to jury trial, the legislature did not mean to authorize such waivers. Thus, all contractual attempts to waive the right to a jury trial in a predispute agreement are unenforceable, except for judicial reference and arbitration clauses, which the court specifically endorsed. But see *Treo @ Kettner Homeowners Ass'n v Superior Court* (2008) 166 CA4th 1055, 83 CR3d 318, cited in §14.3 (court did not enforce CC&R provision requiring submission of disputes to judicial reference because developer-drafted provision was not sufficient to waive right to trial by jury). If the legislature were to amend CCP §631 to include authorization of predispute jury waivers, the following discussion of the pre-*Grafton Partners* cases may prove useful in the future.

For a waiver of constitutional rights to be effective, it must be deliberately and understandingly made and can be established only by clear, unequivocal, unambiguous language. See *Johnson v Zerbst* (1938) 304 US 458, 464, 82 L Ed 1461, 58 S Ct 1019. Prior to *Grafton Partners v Superior Court, supra,* California cases made clear that the right to select a judicial forum, whether jury trial or court trial, was a substantial right and not easily waived. *Badie v Bank of America* (1998) 67 CA4th 779, 806, 79 CR2d 273. When it was unclear whether a party had waived their constitutionally protected right to a jury trial, the question was resolved in favor of preserving that right. See *Titan Group, Inc. v Sonoma Valley County Sanitation Dist.* (1985) 164 CA3d 1122, 1127, 211 CR 62. Without a definite showing that the party recognized a clear and conspicuous provision in which a jury trial was waived, a court could not infer that the right was waived. *Badie v Bank of America, supra*. Therefore, even if a waiver of the right to a jury trial was found acceptable, a court could in its discretion still allow the case to be heard by a jury. *Johnson-Stovall v Superior Court* (1993) 17 CA4th 808, 810, 21 CR2d 494.

In the reported cases that permitted predispute jury trial waivers, there were multiple standards on the conditions under which the waiver was acceptable. Any written waiver of trial had to be in clear and unmistakable form. *Titan Group, Inc. v Sonoma Valley County Sanitation Dist., supra*. The party waiving a jury trial had to show that the waiver met all requirements of law, was knowing and consensual, and did not result from fraud, subterfuge, or any other act vitiating consent. The party opposing a request by a party not at arm's length to set aside the asserted waiver of a jury trial had to demonstrate how it would be prejudiced if the court were to allow a jury trial. *Johnson-Stovall v Superior Court*, *supra.*

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/ IV. PROCEDURAL OPTIONS AFTER DISPUTE ARISES/§14.26 A. Arbitration; Avoiding Piecemeal Conflict Resolution

IV. PROCEDURAL OPTIONS AFTER DISPUTE ARISES

§14.26 A. Arbitration; Avoiding Piecemeal Conflict Resolution

A successful arbitration or mediation nearly always requires the participation of all parties to the dispute. See §14.20. If some parties to the dispute are not required by the underlying transactional contracts to submit the dispute to binding arbitration (see §§14.16-14.25), their consent may be obtained by stipulation. On binding third parties to a prelitigation arbitration proceeding if they are not contractually bound to arbitrate, see §14.50. See also *Westra v Marcus & Millichap Real Estate Inv. Brokerage Co.* (2005) 129 CA4th 759, 28 CR3d 752 (broker could compel arbitration as agent of signatory to agreement), discussed in §14.38B.

WARNING: It is crucial to get all parties to sign a stipulation to arbitrate. See *Toal v Tardif* (2009) 178 CA4th 1208, 101 CR3d 97 (stipulation signed only by attorneys for parties not sufficient to obligate parties without evidence beyond agreement showing that objecting party expressly authorized attorney to sign). When stipulating to binding arbitration, counsel should communicate the clients' acceptance or withdrawal to the arbitrator and the other parties promptly. See *CPI Builders, Inc. v Impco Technols, Inc.* (2001) 94 CA4th 1167, 114 CR2d 851.

If some parties to a dispute refuse to stipulate to arbitration and others are bound, the dispute must be resolved piecemeal. Multiple problems are inherent in piecemeal arbitration, which can be caused by a narrow drafting of arbitration clauses or by the complexity of a transaction or dispute. The most common problems are the expense of litigating in more than one forum and the burden of inconsistent rulings of law and fact. See, *e.g.,* CCP §1281.2(c); *Mount Diablo Med. Ctr. v Health Net* (2002) 101 CA4th 711, 124 CR2d 607. However, a trial court has discretionary power under §1281.2(c) to order a stay of the arbitration pending the outcome of an existing court action, to order a stay of the existing court action pending the outcome of an arbitration, or to order the joinder of one or more issues involving some or all parties in the court action regardless of the arbitration agreement. Under CCP §1281.8, the court also has the power to issue a provisional remedy, such as a preliminary injunction, after commencement of the arbitration proceedings. See *Jay Bharat Developers, Inc. v Minidis* (2008) 167 CA4th 437, 84 CR3d 267. On the interplay of lis pendens procedures and arbitration or mediation procedures, see §§14.11, 14.28, 14.56.

NOTE: It is usually the best strategy to address all related disputes or claims during a single arbitration, judicial reference, or court action. At other times bifurcation or piecemeal resolution is more beneficial. See §14.33.

The failure to raise a claim or dispute during the arbitration can result in a waiver of the claim. In *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 31, 10 CR2d 183, the court held that when a party claims that the entire contract is illegal, or that the arbitration provision itself is illegal, the party does not need to raise the illegality question prior to participating in the arbitration process, so long as the issue is raised before the arbitrator. Failure to raise the issue during the arbitration results in a waiver of the claim. See also *Cummings v Future Nissan* (2005) 128 CA4th 321, 27 CR3d 10 (challenge to arbitration provision in employment agreement not raised in opposition to motion to compel arbitration nor during arbitration could not be raised in court of appeal).

Choice of law and preemption issues increasingly complicate parties' attempts to resolve disputes in a single forum. See §§14.38C-14.38D.

Piecemeal conflict resolution, which is very expensive, is especially problematic in boilerplate form contracts prepared by a major player in the industry but not explained to an inexperienced consumer. See, *e.g.,* §§14.38-14.38D, discussing the dual-forum issues in residential purchase contracts. The irony is that a foundational public policy argument for enforcement of arbitration agreements has been the assumption that arbitration is always less expensive than court litigation. See *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 9, 10 CR2d 183. A dual-forum approach to dispute resolution frequently defeats rather than serves this policy. See *Tarrant Bell Prop. v Superior Court* (review granted Feb. 18, 2010, S179378; superseded opinion at 179 CA4th 1283, 102 CR3d 235) in which the court of appeal quoted the trial court's finding that sending some plaintiffs to a referee while others litigated in superior court "risked

inconsistent rulings on common issues of law or fact and would require the parties 'to conduct the same discovery, litigate and ultimately try the same issues in separate but parallel forums,' resulting in 'duplication of effort, increased costs, and potentially, delays in resolution.'" 179 CA4th at 1295.

For detailed discussion of procedural options and strategies for avoiding the dual forum relating to construction disputes, see California Mechanics' Liens and Related Construction Remedies §§3.77, 7.59-7.60 (3d ed Cal CEB 1998), and relating to title insurance claims, see California Title Insurance Practice §§14.12, 14.24-14.25 (2d ed Cal CEB 1997). On resisting binding, contractual arbitration, see Title Ins §§14.6-14.12; California Construction Contracts, Defects, and Litigation, chap 7 (Cal CEB 2008).

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§14.27 B. Mediation

Mediation is available either before or after litigation has commenced. See §14.32. When a statute or a contract requires that a dispute first be mediated, however, mediation should be seriously pursued before filing a court action, because participation in mediation is typically a condition precedent to an award of attorney fees in a subsequent arbitration or lawsuit. See §14.56.

Some risks are inherent in using the mediation process prior to litigation:

- Not all parties necessary for full resolution may be present. See §§14.20, 14.50.
- Consent requirements for full settlement and confidentiality of mediation proceedings present sticky issues in the enforcement of postmediation settlement agreements. See §§14.32A-14.32B.
- The settlement may not be properly memorialized to be enforceable. See, *e.g., Fair v Bakhtiari* (2006) 40 C4th 189, 51 CR3d 871, and other authorities discussed in §14.87.
- Oral stipulations can be problematic. Compare *Marriage of Assemi* (1994) 7 C4th 896, 30 CR2d 265 (oral stipulation of settlement to retired judge appointed by court as arbitrator is "before the court") with *Murphy v Padilla* (1996) 42 CA4th 707, 715, 49 CR2d 722 (oral stipulation to mediator in voluntary mediation is not "before the court"; mediators do not possess "adjudicative authority").
- The settlement may not be complete and final. See, *e.g., Weddington Prods., Inc. v Flick* (1998) 60 CA4th 793, 71 CR2d 265 (settlement agreement arising from mediation cannot provide that mediator will decide material terms that remain in dispute; CCP §664.6 motion cannot create material terms not agreed on by parties).
- Code of Civil Procedure §664.6 procedure (entry of judgment following motion to enforce stipulation for settlement) is not available when mediation occurs before the filing of litigation. *Housing Group v United Nat'l Ins. Co.* (2001) 90 CA4th 1106, 109 CR2d 497; *Kirby v Southern Cal. Edison Co.* (2000) 78 CA4th 840, 93 CR2d 223.

NOTE: After entry of judgment against a defendant, postjudgment mediation may not be enforced under §664.6, because there is no pending litigation, and such enforcement would violate the two judgment rule. See *Walton v Mueller* (2009) 180 CA4th 161, 102 CR3d 605.

However, despite these risks, many form contracts require pre-litigation mediation. See §14.11.

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§14.28 C. Litigation

Litigation in court is the ultimate remedy if all other ADR processes fail and the parties are not bound by contractual arbitration. Other court processes may also be necessary before the substantive dispute is adjudicated, such as a petition to compel contractual arbitration when a party refuses to arbitrate the dispute. See, *e.g.,* CCP §1281.2. A court action may also be necessary because the nature of the dispute is such that to fully protect its rights, a party must record a lis pendens. The filing of a lawsuit is a prerequisite to the recordation of a lis pendens. *Manhattan Loft, LLC v Mercury Liquors, Inc.* (2009) 173 CA4th 1040, 93 CR3d 457. Code of Civil Procedure §1298.5 provides that if a party to an action records a lis pendens, such activity in conjunction with the filing of a lawsuit does not constitute a waiver of any right of arbitration that the party has by contract, nor is that party prevented from petitioning the court to compel arbitration for other parties to the contract.

When the situation calls for immediate action—*e.g.,* the filing of an action and (1) the recordation of a lis pendens to prevent a sale to another party, or (2) a simultaneous motion for injunctive relief—it is crucial to review all relevant governing statutes and transactional documents to determine if the disputing parties are required to submit their disagreement to prelitigation mediation or binding arbitration or both. If so, it may be possible to file the action anyway to preserve optimum alternative remedies, but special procedures must be followed and communications with opposing parties and counsel must be weighed carefully.

WARNING: Before filing the action, determine if prelitigation mediation is required. If the contract allows an attorney fee award for the prevailing party, all conditions precedent required for a fee award, including mediation before litigation, must be met. *Leamon v Krajkiewcz* (2003) 107 CA4th 424, 132 CR2d 362. See §14.56.

Some contracts that require binding arbitration specifically exclude from the arbitration requirement certain actions, such as foreclosure, unlawful detainer, probate, small claims, and bankruptcy. For those actions, arbitration is not required. Some contracts simply state that the filing of a lawsuit, to enable the recordation of a lis pendens or to obtain injunctive relief pending adjudication on the merits, "shall not constitute a waiver of the mediation and arbitration provisions," or "shall not constitute a violation of the mediation and arbitration provisions." See, *e.g., Frei v Davey* (2004) 124 CA4th 1506, 1509, 22 CR3d 429, and discussion in §§14.11, 14.56. If so, a letter requesting arbitration (explaining that the court filing was only to preserve the right to the lis pendens or provisional remedies) can be sent to the defendant.

If the lis pendens or injunctive relief (or any other) exception does not exist or apply, and if the attorney determines that challenging the enforceability of the arbitration clause is in the client's best interest, numerous grounds and procedures for doing that exist. They include filing a joinder motion in dual forum situations or opposing a petition to arbitrate on the basis of unconscionability or noncompliance with statutory form requirements. See §§14.26-14.29, 14.38-14.42E, 14.49-14.50.

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§14.29 D. Minitrial Procedures

Any business organization or governmental agency can make use of American Arbitration Association (AAA) rules for a minitrial in a business dispute context. The informal minitrial procedures can be downloaded from http://www.adr.org under "Rules Updates," "Mini-trial Procedures." The parties can also agree to their own minitrial procedures.

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V. ADR IN CONJUNCTION WITH COURT ACTIONS

A. Special Master Appointments

§14.30 1. By Stipulation and Order in Complex Cases

Although special masters are used most often in construction defect cases, they may be useful in other complex cases, such as multiparty nuisance, trespass, or negligence cases resulting from landslides or mudflows. See chaps 11-12. Mediating complex cases requires systematic organization because of the extraordinary number of parties; overlapping issues; insurance allocation and coverage issues; and complications from personalities, carrier involvement, or hotly contested issues. See, *e.g.,* California Construction Contracts, Defects, and Litigation, chaps 10-15 (Cal CEB 2008). Use of a stipulation for, and the court's reference to, a special master is most advantageous if it employs a skilled mediator who is familiar with the nature of the litigation and relevant industry practices. It may also promote expert input on the scope of a needed repair, provide for cost allocation among the defendants, assist the parties in focusing on correction and funding of the repair scheme, and minimize costs without litigation and discovery complications.

For additional discussion of special masters and case management, see Const Contracts and Defect, chaps 10, 14. For further discussion of ADR in civil actions generally, see California Civil Procedure Before Trial, chap 45 (4th ed Cal CEB 2004).

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§14.31 2. By Agreeing to "Referee" as Special Master Under CCP §638

One of two types of general reference statutes, CCP §638 covers the situation in which the parties agree to have a referee hear and decide any controversy, with the referee's report to be binding. CCP §644(a). In this situation, typically seen in large homebuilder purchase agreements in which the developer/builder seeks to avoid both a jury trial and arbitration, the binding report of the referee (*i.e.,* statement of decision) is filed with the court where the clerk, as a ministerial act, enters judgment on the report (CCP §644(a)).

NOTE: Referees must be neutral and have a limited period in which to disclose any relationship with a party, attorney, law firm, or insurance company in the case. Cal Rules of Ct 3.904(b)(2).

These reference agreements may not be truly consented to by the parties when they are buried in preprinted, multipage, small-print forms provided to buyers in large subdivisions, which the buyers are required to sign without taking them home for review or consideration. The same rules should apply to jury trial waivers. See §14.25. By analogy, enforceability analysis should also focus on other statutory requirements for boldfaced type and separate initialing in other types of real estate contracts. See CCP §1298(b); §14.16.

PRACTICE TIP: For any reference under CCP §638 or §639, give careful attention to drafting agreements, stipulations, or orders so that the referee's duties and powers do not overlap with the mediator's. See §§14.53, 14.63. In particular, a referee must not act as a mediator at the same time, but the court may appoint a referee to serve later as a mediator or to conduct a settlement conference, and the referee assignment must be completed before the mediator appointment takes effect. See §14.21.

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§14.32 B. Mediation

Using mediation in conjunction with a pending action can be beneficial even if the mediation is ordered by the court and not voluntarily proposed by the parties. In court-ordered mediation, the selection of the mediator is particularly important. Court-ordered mediation may result in a party's change of attitude or position on the dispute. A court has discretion under CCP §§1033.5(c)(4) to award court-ordered mediation expenses to the prevailing party if the matter is ultimately litigated through trial. *Gibson v Bobroff* (1996) 49 CA4th 1202, 57 CR2d 235.

One advantage of court-ordered programs is that the Judicial Council adopted Standards of Conduct for Mediators in Court-Connected Mediation Programs for Civil Cases (Cal Rules of Ct 3.850-3.865). Private mediations are not necessarily governed by a specific set of standards for mediators, but the Rules of Court encourage mediators to abide by them. See *Travelers Cas. & Surety Co. v Superior Court* (2005) 126 CA4th 1131, 1140, 24 CR3d 751.

When an application is made to a court in pending litigation to enforce a mediated settlement under CCP §664.6, the court, in entering judgment on the granting of such motion, retains the inherent power to retroactively correct that judgment if it failed to conform to the mediated settlement agreement. *Ames v Paley* (2001) 89 CA4th 668, 674, 107 CR2d 515.

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§14.32A 1. Consent Requirements for Settlement

Generally, no case may be settled without a party's consent. *Levy v Superior Court* (1995) 10 C4th 578, 41 CR2d 878 (written settlement agreement signed by attorneys rather than litigants cannot be enforced under the summary procedure of CCP §664.6). However, in *Fiege v Cooke* (2004) 125 CA4th 1350, 23 CR3d 496, the court granted a motion to compel settlement under CCP §664.6 despite a defendant's lack of consent, because all defendants were insured under policies that gave their insurers the right to settle without the defendants' consent and to bind the defendants to the settlement. See also consent issues discussed in §§14.27, 14.87.

A party may not rescind a settlement agreement resulting from a mediation procedure on the basis that the other party did not consent in writing. See *Stewart v Preston Pipeline, Inc.* (2005) 134 CA4th 1565, 36 CR3d 901, an important case that should be read by all counsel participating in a mediation process. The opinion provides a comprehensive discussion of who must consent to a settlement reached at mediation, how that consent must be memorialized, and when settlement agreements are (or are not) confidential for the purposes of enforceability under CCP §664.6 or, alternatively, under motions for summary judgment under CCP §437c. The court in *Stewart* distinguished *Levy v Superior Court, supra* because (1) *Levy* was decided under CCP §664.6 rather than the "mediation statutes," Evid C §§1115-1128; (2) in *Levy,* the nonsigning party sought to challenge the settlement agreement, while in *Stewart,* the challenging party personally signed the agreement; and (3) in *Levy,* the attorney's signature would have given away the client's substantive rights, while in *Stewart,* the dispute involved a confidentiality waiver (see §14.32B) that was procedural in nature. The court presents a clear list of circumstances when an attorney may bind his or her client with respect to *procedural* matters by entering into stipulations or taking other actions, but may not stipulate away the client's *substantive rights*. *Stewart,* 134 CA4th at 1579.

For further discussion of finalizing settlements made in mediation, see §14.87.

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§14.32B 2. Confidentiality of Settlement; Waiver

In California, much, if not all, evidence and communications provided during (or resulting from) a mediation is granted confidentiality under Evid C §1119. *Foxgate Homeowners Ass'n v Bramalea Cal., Inc.* (2001) 26 C4th 1, 108 CR2d 642 (confidentiality essential to effective mediation, so disclosure of communications made during mediation is "unqualifiedly" barred absent express statutory exception); *Rojas v Superior Court* (2004) 33 C4th 407, 15 CR3d 643 (all documents, including photographs, prepared for the purpose of, in the course of, or pursuant to mediation, are confidential under Evid C §1119). See also discussion of *Simmons v Ghaderi* (2008) 44 C4th 570, 80 CR3d 83 in §14.53.

Statutory exceptions are provided in Evid C §§1120, 1122-1124. Thus, settlement agreements and other documents arising out of the mediation are not admissible in a later court action unless they meet one of these exceptions. See, *e.g., Fair v Bakhtiari* (2006) 40 C4th 189, 197, 51 CR3d 871 (narrowly interpreted Evid C §1123(b) and declined to enforce inadequate written memorandum).

The confidentiality requirements in Evid C §1119 may be waived. In *Stewart v Preston Pipeline, Inc.* (2005) 134 CA4th 1565, 36 CR3d 901, for example, the postmediation settlement agreement contained a waiver of §1119 confidentiality and met the exception conditions stated in Evid C §1123. The court distinguished *Foxgate* and *Rojas* and found that neither had concerned a waiver of mediation confidentiality in a settlement agreement. The fact that the challenging party had personally signed the agreement gave added weight to its admissibility. 134 CA4th at 1574. See discussion of *Stewart* in §§14.32A, 14.87 and *Foxgate* and *Rojas* in §14.53. See also *Marriage of Kieturakis* (2006) 138 CA4th 56, 41 CR3d 119.

To effectively waive the confidentiality provisions of Evid C §1119, all parties must fully execute the mediation agreement. *Rael v Davis* (2008) 166 CA4th 1608, 83 CR3d 745.

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§14.33 C. Arbitration

Judicial (nonbinding) arbitration is available in any civil action on stipulation of all parties regardless of the amount in controversy. CCP §1141.12. In complex litigation, factual disputes on particular issues can be bifurcated and resolved with binding arbitration if the affected parties agree. See §§14.26, 14.50. Doing so will shorten the trial time and may result in a settlement of the whole case. For example, issues arising from contractual indemnity clauses between the general contractors and subcontractors can be adjudicated through arbitration. After the arbitration, the resolved issues may induce the arbitrating parties into a full or partial settlement of the case among them or other parties before the main action is tried on its merits. Similarly, arbitrating declaratory relief actions on insurance coverage issues can promote the overall resolution by settlement of the underlying complex action. Even in a partition or landlord tenant case, or in a bankruptcy, probate, or family law proceeding that involves valuation of real property or determination of lease payments, arbitration can resolve the specific valuation issue or resolve disputes over offers for purchase and sale of the property.

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§14.34 D. Minitrials

Complex cases, such as nuisance, trespass, or negligence actions (or construction contract disputes or construction defect actions) involving multiple properties are best suited for this process. Once an action is filed, a minitrial, in which condensed presentations of a case or issues in a case are presented, can be held by:

- Bifurcation of issues by court order;
- Bifurcation of issues by stipulation and order;
- Advisory verdicts on specific issues or units of a case; or
- Minitrial procedures under American Arbitration Association (AAA) informal rules by written agreement. See http://www.adr.org under "Rules Updates," "Mini-Trial Procedures."

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§14.35 E. Reference by Agreement (CCP §638)

A reference by agreement may be made at any time, from the originating transactional documents to a stipulation during ongoing litigation. See CCP §638. Litigators often prefer a reference to arbitration, in which the arbitrator is not required to follow the law. In a reference proceeding, the rules of evidence apply (see Evid C §300), the same law that a judge must apply controls, and appeal is available (see CCP §645). Also, a settlement orally presented to a referee under CCP §638 or a judicial officer with equal authority can be "before the court" for enforceability purposes. See *Murphy v Padilla* (1996) 42 CA4th 707, 714, 49 CR2d 722. On procedures that must be followed to assure that the referee has statutory authority to approve a settlement, see §14.31.

Although arbitration statutes mandate enforcement of an agreement to arbitrate (see §14.38B), CCP §638 does not mandate judicial reference. There are also numerous statutory exceptions to the mandate regarding arbitration (see §§14.26, 14.38B-14.38D, 14.40-14.42E), but none are expressly provided for judicial reference. Instead, CCP §638 generally gives a court the discretionary power to enforce it "if the court finds a reference agreement exists between the parties." The court of appeal in *Tarrant Bell Prop. v Superior Court* (review granted Feb. 18, 2010, S179378; superseded opinion at 179 CA4th 1283, 102 CR3d 235) interpreted this to mean that a trial court has the discretion to deny enforcement of a judicial reference clause if it finds a possibility of conflicting rulings or a need for judicial economy exists; this power is similar to the discretion to deny enforcement of an arbitration clause.

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§14.36 F. Reference by Court Order (CCP §639)

Imposed on the parties by a court on the written motion of any party, or on the court's own motion, the referee under CCP §639 must hear and consider the matters delegated to it and recommend a resolution in a report to the court. The referee's decision is only advisory to the court and may be objected to. CCP §644(b). See CCP §639. An exception to the court's power to impose a referee under §639 is summary judgment. See *Jovine v FHP, Inc.* (1998) 64 CA4th 1506, 76 CR2d 322; *Aetna Life Ins. Co. v Superior Court* (1986) 182 CA3d 431, 436, 227 CR 460.

Because a referee typically acts as an arm for the court to resolve disputes, the referee's ability to act in a neutral capacity is questionable. One court of appeal invoked CCP §187 and broadly interpreted a discovery referee's powers to uphold a trial court's order appointing a referee to act as a mediator and declaring that all mediation sessions were deemed to be mandatory settlement conferences of the trial court. See *Lu v Superior Court* (1997) 55 CA4th 1264, 1267, 64 CR2d 561. That opinion was criticized in *Jeld-Wen, Inc. v Superior Court* (2007) 146 CA4th 536, 53 CR3d 115, which observed that the *Lu* decision blurred the distinction between mandatory settlement conferences and private mediation.

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.37 G. Discovery Referee (CCP §639; Cal Rules of Ct 3.920-3.927)

§14.37 G. Discovery Referee (CCP §639; Cal Rules of Ct 3.920-3.927)

On motion of a party, stipulation of the parties, or sua sponte, a court may appoint a discovery referee to manage and rule on the discovery aspects of a case. See CCP §639(a)(5), (b)-(d); Cal Rules of Ct 3.920-3.927. In some instances, a court in a complex case may appoint a discovery referee and add to his or her powers the authority to handle settlement conferences for the court. See *Lu v Superior Court* (1997) 55 CA4th 1264, 64 CR2d 561 (trial court has authority to appoint discovery referee before discovery dispute arises to assist attorneys in creating efficient discovery plan). This approach is particularly helpful in counties where civil cases are assigned to a particular judge for all purposes, and the judge, who will ultimately try the case, does not wish to participate in settlement discussions. In this situation, the matter is handled by the discovery referee as a special master for settlement purposes as well as to streamline or moderate discovery disputes.

WARNING: Be cautious when drafting orders for these purposes to avoid calling the referee a "mediator." See §14.31. A referee can report to the court both in the capacity of referee and as a settlement arm of the court (see Cal Rules of Ct 3.900, Advisory Comm. Comment); a mediator cannot report to the court any actions or comments about a mediation process (see Evid C §1121). See §14.53. Also, having the discovery referee conduct a settlement conference may not work in contentious cases if any party has strong emotional reactions to the referee's rulings.

A discovery reference is authorized only if "necessary" under CCP §639(a)(4)-(5), so if this is an avenue counsel wishes to explore, a motion or stipulation must include evidentiary support of necessity; otherwise, the order for the reference may be reversed. *Hood v Superior Court* (1999) 72 CA4th 446, 85 CR2d 114.

Under CCP §§645.1 and 1023 only the parties to the action (not counsel for them) may be ordered to pay fees for a discovery referee. Nor does CCP §128(a)(4)-(5) give a court the power to impose on *counsel* sanctions in the form of payment of discovery referee fees. *Andrews v Superior Court* (Parker) (2000) 82 CA4th 779, 98 CR2d 426.

NOTE: The *Andrews* court ruled on sanction power under CCP §128, but it did not address whether CCP §2023 or §2031 (discovery statutes) or §128.7 may authorize such an award against counsel.

PRACTICE TIP: When a client cannot afford the expense of a discovery referee, counsel should so inform the court in opposition papers or by objecting at the hearing on the motion to appoint the referee.

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VI. DUAL FORUM AND ENFORCEABILITY ISSUES IN RESIDENTIAL PURCHASE CONTRACTS

A. Real Estate Professional Issues

§14.38 1. Arbitration Clause Inserted by Real Estate Professionals

Most residential real estate purchase contracts have arbitration clauses binding both buyer and seller to the process, but not the brokers or other licensees. For example, the California Association of Realtors (CAR) preprinted purchase contract form makes licensee participation in arbitration between the seller and buyer purely voluntary (see paragraph 26.C.(2) in California Residential Purchase Agreement and Joint Escrow Instructions (CAR form RPA-CA, rev 4/10) (Broker clause)). On disclosure issues arising from this clause, see §14.38A. On enforceability of this clause, see §§14.38B, 14.42B.

The CAR has posted on its website definitions of "mediation" and "arbitration." See http://www.car.org (click on "For Consumers," then "Real Estate Terms" and "Multilingual Resources"). This information only generally and briefly describes the mediation and arbitration process. Nowhere does the website tell the consumer contracting parties (*i.e.,* buyer and seller) that if they both agree to participate in binding arbitration of a dispute between them arising from the contract, they might not be able to legally force any representative real estate licensee involved in the transaction (*i.e.,* a likely CAR member) into the arbitration. Although the website discusses the advantages of arbitration over litigation, it does not advise the consumer of the disadvantage of being required to arbitrate certain issues with the other contracting party, but having to separately litigate any dispute with the real estate licensee.

Moreover, in actual practice, counsel is rarely retained to negotiate, review, or explain the terms of a residential real estate purchase contract, because consumers generally rely on the real estate licensee for that function. A crucial question is what are the real estate licensees' (or their broker's) obligations, if any, to disclose and advise clients about the ADR provisions in the purchase contract documents? (It is well settled, for example, that licensees must disclose in writing their agency status, including dual agency, in a residential real estate transaction. See California Real Property Sales Transactions §§2.31-2.41 (4th ed Cal CEB 2007). A specific disclosure must be made that indicates that the licensee acting as a dual agent must avoid a conflict of interest at the very least on the issue of the price a seller may be willing to accept if less than the listing and the price a buyer may be willing to pay if greater than the listing. See Real Property Sales §§2.36, 2.129. Acting as a dual agent can result in a number of problems for licensees, yet they continue the practice for economic and other reasons. See Real Property Sales §§2.35, 2.129.)

The one-sided nature of an arbitration clause as it concerns brokers can also severely disadvantage a broker. See, *e.g.*, *Nguyen v Tran* (2007) 157 CA4th 1032, 68 CR3d 906 (buyer's broker could successfully compel buyers, but not listing broker, to arbitrate).

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§14.38A 2. Potential ADR Disclosure Obligations

A licensee's disclosure obligations about ADR provisions in the purchase contract could form the basis of an entirely different treatise on fiduciary and other licensee duties to buyers or sellers. Practitioners, however, should be aware of ethical issues, *i.e.*, conflicts or potential conflicts between the buyer or seller (on one hand) and the licensee who fails to disclose and advise clients about the potential dual-forum issues (on the other hand), such as the following:

- Was the buyer or seller told of the potential expenses and inconsistent results for dispute resolution in two or more separate forums, one involving claims among the contracting parties, and another involving the licensees, and that a dual forum might cost more than a single forum resolution? See, *e.g*., *Timmsen v Forest E. Olson, Inc.* (1970) 6 CA3d 860, 871, 86 CR 359 (motion for nonsuit denied; issue of whether broker breached fiduciary duty in failing to explain nature and effect of subordination agreement submitted to jury).
- Was the buyer or seller advised of any other effects of the ADR provisions and that, if they choose to do so, they can cross them out or refuse to initial them?
- Was the buyer or seller adequately advised of the need to consult counsel about the effects of boilerplate ADR clauses and choice of law clauses if the real estate licensee believes that it is not the licensee's duty to disclose the effects of such clauses?
- Is the licensee in breach of the "fiduciary duty of utmost care, integrity, honesty, and loyalty in dealings" with the buyer or seller, including the duty of full disclosure, when no advice is given about a possible dual forum situation? See CC §2079.16; *Field v Century 21 Klowden-Forness Realty* (1998) 63 CA4th 18, 25, 73 CR2d 784 (licensee owes principal "highest good faith and undivided service and loyalty"). See also Weinman, Agency Ethics, Trust Funds and Fair Housing, p 40 (Dearborn Fin 1997); California Real Property Sales Transactions, chap 2 (4th ed Cal CEB 2007).
- Did the licensee breach its fiduciary obligation that requires full disclosure of secret profits, gratuities, or other benefits gained in the transaction? See Bus & P C §10176. See also *Menzel v Salka* (1960) 179 CA2d 612, 4 CR 78. It is immaterial whether the transaction is otherwise fair to the principal or that the principal receives exactly the desired price for the property or pays no more for it than intended. *Menzel v Salka, supra; Thompson v Stoakes* (1941) 46 CA2d 285, 115 P2d 830. See also §§3.21-3.28, 3.32-3.35; Real Property Sales, chap 2; Weinman, Agency Ethics, p 40.

The Weinman text is used in numerous classes that real estate licensees take to obtain and renew their licenses. It quotes the old real estate case of *Thomas v Snyder* (1931) 114 CA 397, 404, 300 P 117, itself quoting Cal Jur, as follows:

> [A]n agent is charged in full measure with the duty of good faith in his dealings with his principal, touching the subject of his authority. The animating principle in this proposition is that no one should, nor will be permitted to enjoy the fruits of an advantage taken of a fiduciary relation whose dominant characteristic is the confidence reposed in one person by another. The law requires perfect good faith on the part of agents not only in form but in substance.

Applying this obligation, one could argue that the clause of the CAR form contracts that makes licensee participation in arbitration between the seller and buyer purely voluntary (see paragraph 26.C.(2) in California Residential Purchase Agreement and Joint Escrow Instructions (CAR form RPA-CA, rev 4/10) (Broker clause)) is in and of itself a breach of duty, even if the clause is disclosed. See, *e.g., Stirlen v Supercuts, Inc.* (1997) 51 CA4th 1519, 60 CR2d 138; *Saika v Gold* (1996) 49 CA4th 1074, 56 CR2d 922; *Beynon v Garden Grove Med. Group* (1980) 100 CA3d 698, 161 CR 146. See also §§14.40-14.42D. Because the Broker clause is typically in violation of CCP §1298(b) (*i.e.,* not all capitals or bolded and not separately initialed), arguably the clause could not withstand statutory scrutiny, since it exempts the real estate professional without bringing to the attention of the buyer or seller either its actual inclusion in the contract or the significant advantages and benefits that the licensee gets by the clause. Among these benefits are the following:

- The licensee cannot be forced to mediate or arbitrate even if it is a party to a dispute between the buyer and the

seller; thus the licensees in the transaction have reserved (for no consideration) legal rights superior to that of the principals (*e.g.,* jury trial, discovery, and appeal rights that the principals do not have);

- The licensees reserve for themselves the benefit of not likely being a party to any action at all, because the expense of litigating a cause in dual forums (*e.g.,* arbitration between the principals and court action against the licensees) discourages the principals from filing court actions against the licensees; and
- If the licensees are ultimately sued in court after the arbitration is completed, they may benefit from the dual-forum situation by (1) riding on evidence generated by the arbitration without having the discovery expense, (2) not wasting or depleting their errors and omissions policy limits while the principals are disputing liability and damages, (3) benefiting from offsets in the form of litigation judgments or settlements between the buyer and seller, or others (*e.g.,* title companies, home inspectors, other licensees who do participate in earlier arbitration or mediation), which they can argue decrease their monetary responsibility for damages for which they are actually responsible.

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§14.38B 3. Enforceability of Arbitration Clause

Because the CAR form arbitration clause (see §§14.38-14.38A) is one-sided (in that it requires arbitration for the principals (buyers and sellers) but not the real estate professionals), arguably the agreement is unconscionable and therefore unenforceable. See *Flores v Transamerica HomeFirst, Inc.* (2001) 93 CA4th 846, 113 CR2d 376 (discussed in §§14.25, 14.38C, 14.42B). This particular argument does not apply if the arbitration clause, *e.g.,* clearly states that buyer, seller, and agent all agree that disputes under the agreement "shall be settled by final, binding arbitration." See *Westra v Marcus & Millichap Real Estate Inv. Brokerage Co.* (2005) 129 CA4th 759, 766, 28 CR3d 752 (cited in §14.50).

The transaction in *Westra* involved a non-CAR commercial sales form that required initialing of the arbitration clause by the buyer and seller, but not by the real estate agent. Nor did the agent sign the purchase agreement, despite the signature line and the words, "Agent accepts and agrees to the foregoing." Even with these omissions, the agent petitioned to compel arbitration of the buyers' fraud claim and the court of appeal ordered arbitration. The court relied on the language in the arbitration clause and a line of cases that developed exceptions to the general rule that a nonsignatory cannot invoke the arbitration clause. One such exception occurred in *Westra* because the agent acted on behalf of both parties, *i.e.,* as a dual agent. However, despite the *Westra* ruling, other grounds for unconscionability may exist even if all parties appear to have signed the arbitration clause. See, *e.g.,* cases cited in §§14.38C, 14.42B.

Although not a real estate case, *Wheeler v St. Joseph Hosp.* (1976) 63 CA3d 345, 133 CR 775, is illuminating on the enforceability of the CAR arbitration clause. In *Wheeler,* the court voided an arbitration agreement in a hospital Conditions of Admission form that was not explained to a patient, declaring it to be adhesionary. Beginning with the basic premise that arbitration of disputes is consensual in nature, requiring the acceptance of all parties to the contract, the court weighed the public policy favoring arbitration against the "equally strong judicial concern for the rights of consumers of goods and *services* against whom unexpected or oppressive provisions of standardized contracts are sought to be enforced." (Emphasis added). 63 CA3d at 355.

While recognizing that a patient could be held to an arbitration provision if the patient exercises a "real choice" when he or she signs away the right to the court system, the *Wheeler* decision turned on the fact that, although the admission form gave the patient the option of not agreeing to arbitration, "the existence of that option was neither called to [the patient's or his wife's] attention, nor were they told that an exercise of that option would not preclude admission to the hospital." 63 CA3d at 362.

It is probably rare that a real estate licensee advises a buyer or seller that the buyer and seller can each strike out or modify by addendum, interlineation, or supplement, any provision in a standard CAR or other real estate purchase contract that effectively allows the real estate licensees the option to avoid participation in mediation or arbitration after a dispute arises, even if the buyer and seller choose in executing the document to resolve disputes with one another exclusively in ADR. It is equally rare that the licensee will highlight these provisions for a buyer or seller in the throes of purchase or sale of residential property. Therefore, very few buyers and sellers understand that if they cross out or modify the provisions to include the licensees in the mediation and/or arbitration, the deal for the purchase and sale of property will not necessarily fall apart. As a result, the consumer receiving the services of a real estate licensee does not exercise a choice.

To this author's knowledge, no reported California case addresses these ethical issues. *Wheeler* may not be controlling, but invoking it as persuasive authority one could make a credible argument that relieving the real estate licensee from the obligations of ADR is not the knowing choice of a buyer/seller under a purchase agreement unless it can be proved that full disclosures were made by the fiduciaries who clearly benefit from not having to participate in ADR proceedings with the buyer and seller. Even if disclosed, the arbitration clause or part of it may not be enforceable if it violates CC §1668, under which a court may refuse to enforce a contract that directly or indirectly exempts a party "from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent." See *Discover Bank v Superior Court* (2005) 36 C4th 148, 161, 30 CR3d 76.

The procedures for raising these problematic ethical and contract enforcement issues are in opposing motions to

compel arbitration under CCP §1281.2 and in bringing motions to stay the arbitration under CCP §§1281.2(c), 1281.4, or to disregard the arbitration agreement under CCP §1281.2(c). See reported cases cited in §§14.26, 14.38C-14.42E. See also discussion of problems inherent in piecemeal resolution of disputes in more than one forum, and references for detailed strategies to avoid the dual forum in §14.26. Ethical violations can also be reported to the California Department of Real Estate for disciplinary action under Bus & P C §§10086-10087, 10176-10177.5.

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.38C a. Choice of Law and Preemption Issues

§14.38C a. Choice of Law and Preemption Issues

The preprinted California Association of Realtors (CAR) form purchase and sale agreement for residential property currently in use (see §§14.17, 14.38) contains an arbitration clause in section 26.B that refers to both California law (in several places) and the Federal Arbitration Act (FAA) (9 USC §§1-16). That clause contains the following choice-of-law language: "Enforcement of this agreement to arbitrate shall be governed by the Federal Arbitration Act." This appears to have been revised in response to dicta in *Cronus Invs., Inc. v Concierge Servs.* (2005) 35 C4th 376, 394, 25 CR3d 540, that parties may expressly provide in a contract that federal law will govern enforcement of the arbitration agreement procedurally. 35 C4th at 394. That CAR clause formerly read: "Interpretation of this agreement to arbitrate shall be governed by the Federal Arbitration Act." (Note that this latter sentence was added to the former Form RPA-CA, rev 10/02, shortly after the decisions of *Mount Diablo Med. Ctr. v Health Net* (2002) 101 CA4th 711, 124 CR2d 607 and *Basura v U.S. Home Corp.* (2002) 98 CA4th 1205, 120 CR2d 328.)

CAUTION: The CAR form RPA-CA, rev 4/10 reprinted with permission in California Real Property Sales Transactions §6.24 (4th ed Cal CEB 2007) also has this language, but it may not be the most current version of this form in use. Review the arbitration clause carefully.

It is unclear how the language of the CAR form (requiring the arbitration clause to be enforced under the FAA) will affect the remaining choice-of-law terms in the same section (26.B), which expressly refer to California law. In one instance, a court of appeal focused primarily on the specific reference in the form to the California Code of Civil Procedure (CCP) in concluding that the FAA did not procedurally govern a motion to compel arbitration. See *Gravillis v Coldwell Banker Residential Brokerage Co.* (2006) 143 CA4th 761, 784, 49 CR3d 531. See also *Valencia v Smyth* (2010) ___ CA4th ___, ___ CR3d ___, 2010 Cal App Lexis 789 (concluded that by adding sentence adopting FAA for purposes of contract interpretation in CAR form, parties did not displace procedural rules of CCP; both FAA and California law employ same principles of contract interpretation; thus, trial court had authority under CCP to deny arbitration and order all parties joined in single court action); *Parada v Superior Court* (2009) 176 CA4th 1554, 98 CR3d 743 (declined to apply FAA in interpreting arbitration clause); *Sanchez v Western Pizza Enters., Inc*. (2009) 172 CA4th 154, 90 CR3d 818 (FAA did not conflict with or preempt California law as applied in employee wage and hour action).

Because the CAR form is prepared (and undergoes frequent revision) by a major player in the real estate industry in California, the effect of the attempted choice-of-law revisions regarding the application of federal law is questionable, especially in light of the conflicting provisions in the CAR form that the arbitrator shall conduct the arbitration "in accordance with Title 9 of Part 3 of the [California] Code of Civil Procedure" (California Arbitration Act, CCP §§1280-1294.2). (Although the following language appeared in earlier versions, the form no longer requires the arbitrator to "render an award in accordance with substantive California Law." This, too, will be problematic for parties bound by the arbitration agreement.)

Because the arbitration agreement is one-sided (in that it requires arbitration for the principals (buyers and sellers) but not the real estate professionals), arguably the agreement is unconscionable under *Flores v Transamerica HomeFirst, Inc.* (2001) 93 CA4th 846, 113 CR2d 376 (cited in §§14.25, 14.38B, 14.42B). Moreover, this clause will frequently make resolving dual-forum disputes more expensive for both the buyer and the seller and may not serve the goals of either the federal or the state arbitration laws to reduce litigation time and expense.

Courts have been grappling with the enforceability of choice-of-law clauses in arbitration agreements for over two decades. The reported cases are sometimes hard to apply because of the variety among individually drafted arbitration agreements and the circumstances in which they arise. A major issue is whether the FAA generally preempts California law (CCP §§1280-1294.2) on governing arbitration procedures. See 9 USC §2 (stating that FAA applies when party seeks to enforce arbitration clause in transaction involving interstate commerce). The standard for "involving interstate commerce" is as broad as the commerce clause. *Southland Corp. v Keating* (1984) 465 US 1, 79 L Ed 2d 1, 104 S Ct 852. See *Hedges v Carrigan* (2004) 117 CA4th 578, 11 CR3d 787.

Despite the commerce clause, the FAA will not apply if the arbitration clause designates California as the parties'

choice of law. Compare *Mount Diablo Med. Ctr. v Health Net, supra* (held CCP §1281.2(c) was not preempted by FAA; when choice-of-law clause requires issues of contract validity, interpretation, and enforcement to be governed by California law, court's decision not to compel arbitration is enforcement issue governed by California procedure), with *Shepard v Edward Mackay Enters.* (2007) 148 CA4th 1092, 56 CR3d 326, and *Basura v U.S. Home Corp., supra* (both cases held CCP §1298.7 preempted by federal arbitration law; see §14.21).

Another issue is the effect of the choice-of-law clause on substantive law defenses to enforcing the arbitration agreement. In *Flores, e.g.,* the court invalidated the arbitration agreement by applying the generally applicable defense of unconscionability (see CC §1670.5 and CCP §1281.2), and held that the defense was not preempted by the FAA. The California Supreme Court agreed in *Discover Bank v Superior Court* (2005) 36 C4th 148, 165, 30 CR3d 76. See also *Valden v Discover Bank* (2009) ___ US ___, 173 L Ed 2d 206, 129 S Ct 1262, discussed in §14.38D. Note, however, that when the parties expressly provide in their agreement that the FAA will control arbitration of their disputes, state procedural law will not apply. See *Rodriguez v American Technols., Inc.* (2006) 136 CA4th 1110, 39 CR3d 437. See also preemption issues arising in other arbitration agreement enforcement issues, cited in §§14.16, 14.21, 14.38C.

Numerous cases have focused on whether the FAA preempts CCP §1281.2(c), which allows a trial court in certain situations, such as multiple forum disputes, to order a stay of the arbitration pending the outcome of an existing court action, to order a stay of the existing court action pending the outcome of an arbitration, or to order the joinder all parties in a single court action. See §§14.26, 14.38B-14.38D, 14.39A. In *Volt Info. Sciences Inc. v Board of Trustees of Leland Stanford Junior Univ.* (1989) 489 US 468, 479, 103 L Ed 2d 488, 500, 109 S Ct 1248, the Supreme Court upheld the validity of CCP §1281.2(c), ruling that if the property is located in California and the contract at issue calls for arbitration under the state rules, California law, including §1281.2(c), is not preempted by the FAA. The same result was reached in *Cronus Invs., Inc. v Concierge Servs.* (2005) 35 C4th 376, 25 CR3d 540.

In *Cronus*, the California Supreme Court clarified the effect of the FAA on §1281.2(c), concerning a choice-of-law clause similar to the one in *Mount Diablo Med. Ctr. v Health Net, supra*. The clause provided that the agreement would be "construed and enforced" under California law, but the arbitration clause stated that the designation of California law "shall not be deemed an election to preclude application of the [FAA], if it would be applicable." 35 C4th at 381. The court held that this language in the arbitration clause should not be read to preclude the application of §1281.2(c), because §1281.2(c) "does not conflict with the applicable provisions of the FAA and does not undermine or frustrate the FAA's substantive policy favoring arbitration." 35 C4th at 394. The court also ruled that the FAA did not preempt §1281.2(c), because the language of the FAA and its legislative history suggest that the enforcement provisions of the FAA apply only in cases filed in federal court.

The court cautioned, however, that parties may expressly designate in their contracts that federal law rather than state law will govern the enforcement of the arbitration agreement procedurally. 35 C4th at 394. In that event, the FAA would apply in a state court hearing on whether to compel arbitration. Following this dicta, the court in *Rodriguez v American Technols., Inc., supra* declined to apply §1281.2(c) (thereby rejecting the motion to stay the arbitration pending a court action) and ordered the parties to arbitration on a motion to compel under an arbitration clause in a home improvement agreement that expressly referenced the FAA.

In subsequent cases specifically interpreting the CAR purchase and sale form, the court in *Gravillis v Coldwell Banker Residential Brokerage Co., supra,* did not consider the sentence in the CAR form requiring the arbitration clause to be interpreted under the FAA; rather, the court (1) observed that the form expressly made the California Code of Civil Procedure applicable to a motion to compel arbitration, and (2) reiterated the rule in *Volt* that when a choice-of-law clause states that California law will apply, a trial court may exercise its discretion under CCP §1281.2(c) even if the underlying transaction involves interstate commerce. See also *Valencia v Smyth* (2010) ___ CA4th ___, ___ CR3d ___, 2010 Cal App Lexis 789 (concluded that by adopting FAA for purposes of contract interpretation, parties did not displace procedural provisions of California CCP; both FAA and California law employ same principles of contract interpretation; thus, trial court had authority under CCP §1281.2(c) to deny arbitration and to order joinder of all parties in single court action).

Neither *Volt* nor *Cronus* considered whether the FAA preempts California law governing contract formation issues, such as notice and format provisions of arbitration agreements, when the transaction affects interstate commerce. This issue was addressed in *Hedges v Carrigan* (2004) 117 CA4th 578, 11 CR3d 787, in which the court of appeal affirmed the denial of a real estate broker's petition to compel arbitration primarily because there was no enforceable arbitration

agreement. However, the court rendered an opinion on another issue not essential to its decision—whether the arbitration clause in question was unenforceable because it did not comply with the notice and format provisions of CCP §1298. The court concluded that the FAA preempted any statutory requirement or judicial holding that compliance with §1298 is mandatory for the enforcement of an arbitration clause contained in a contract "evidencing a transaction involving commerce." But see *Woolls v Superior Court* (2005) 127 CA4th 197, 25 CR3d 426, cited in §14.16.

NOTE: The courts clearly distinguish procedural enforcement of arbitration agreements under the FAA from "generally applicable contract defenses," such as unconscionability. See, *e.g., Discover Bank v Superior Court* (2005) 36 C4th 148, 165, 30 CR3d 76, quoting *Little v Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1079, 130 CR2d 892; §§14.42-14.42D. Consequently, even if the agreement is partially governed by the FAA, whether by preemption or a choice-of-law provision, the court may apply state law to adjudicate the issue of unconscionability.

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§14.38D b. Policy Considerations

Historically, case law makes clear that the intent of Congress in enacting the Federal Arbitration Act (FAA) was to move an arbitrable dispute of the parties into arbitration as quickly, inexpensively, and easily as possible. See, *e.g., Moses H. Cone Memorial Hosp. v Mercury Constr. Corp.* (1983) 460 US 1, 74 L Ed 2d 765, 103 S Ct 927. Any doubts, the Supreme Court ruled, should be resolved in favor of arbitration. See also *Preston v Ferrer* (2008) 552 US 346, 169 L Ed 2d 917, 128 S Ct 978 (compelling arbitration is proper when arbitration clause extends to all disputes even though state laws vest primary jurisdiction of some disputes in administrative agency). But the Supreme Court will not allow a lower court to apply the FAA as a piecemeal procedure by focusing on only part of a controversy that is federally preempted and ignoring an entirely state-based cause of action. See *Valden v Discover Bank* (2009) ___ US ___, 173 L Ed 2d 206, 129 S Ct 1262 (reversed order compelling arbitration of counterclaim, because complaint for debt collection was entirely state-based and federal-court jurisdiction cannot be invoked on basis of defense or counterclaim; controversy did not qualify for federal-court adjudication or arbitration under FAA).

Brokers and agents are often defendant parties to complaints or cross-complaints in actions between buyers and sellers. As discussed in §§14.38-14.38C, brokers and agents are not obligated to arbitrate disputes with buyers and sellers under the CAR form purchase and sale agreement. The most current version of the CAR form, as well as prior versions using only slightly different language, allows broker/agent participation in arbitration to be purely voluntary. This is what makes the dual-forum and ethical issues discussed in §§14.26, 14.38-14.38C so prominent in real estate disputes. By attempting to force preemption under the FAA, the motivation of the California Association of Realtors is arguably to avoid the application of CCP §1281.2(c), or any other procedural protections for consumers stated in California arbitration law, forcing the buyer and seller to arbitrate their disputes without the real estate professionals being involved.

Two questions arise, neither of which can be clearly answered:

(1) If it is true that the CAR form is drafted "for the buyers and sellers," a position that the California Association of Realtors has been known to take, then why is broker/agent participation in an arbitration between the buyer and seller, which may involve the real estate professionals as integral parties, drafted to make the real estate professionals' participation only voluntary? Purchase of a home is one of the most important financial decisions individuals make. Most buyers and sellers never meet each other; their dealings are made almost exclusively through their respective brokers. Why would they knowingly agree to a provision that forces them to arbitrate with each other and then litigate in a different forum if there are broker/agent issues? Certainly this does not aid the buyer or seller, but it does aid the broker/agent. See §§14.38-14.38B.

(2) If it is true that the CAR form is drafted "for the buyers and sellers," then why not permit state law to apply to arbitrations, including CCP §1281.2(c), with which a court can either (a) stay an arbitration, or (b) join all parties in the court action, if other parties who are not subject to the arbitration agreement are already involved in a court action over the same issues? Does forcing the buyer and seller into a dual-forum situation, in which arbitration does not include the real estate professionals, not create more harm to the buyers and sellers and more of an ethical dilemma for the real estate professionals? Or does it simply protect the real estate professionals?

The sentence referencing federal arbitration law in the CAR form purchase and sale agreement (see discussion above and §14.38C) is making its way though the legal system. Who is benefited? The buyer and seller for whom the form is assertedly drafted? Whether this language results in unintended or intended consequences for the buyers and sellers of real estate in California is being answered on a case-by-case basis by the trial and appellate courts of this state at the expense of the parties to those contracts, the buyers and sellers, not the real estate professionals.

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§14.39 B. Developer/Homebuilder Issues

The common use of reference provisions in new home purchase documents creates another dual forum dilemma. If the provision is found by a court to be consensual, the developer/homebuilders and the buyer will be in a reference process, while others, such as the general contractor, subcontractors, design professionals, or real estate licensees, may find themselves in some other process. On consent to reference processes, see §14.35. On construction defect litigation case management procedures, see California Construction Contracts, Defects, and Litigation, chap 14 (Cal CEB 2008).

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.39A C. Leases

§14.39A C. Leases

The supreme court accepted for review a decision interpreting the law governing ADR clauses in a mobilehome park lease on a dispute involving multiple parties. The court of appeal in *Tarrant Bell Prop. v Superior Court* (review granted Feb. 18, 2010, S179378; superseded opinion at 179 CA4th 1283, 102 CR3d 235) ruled that the trial court had discretion to deny enforcement of a judicial reference clause if there was a possibility of conflicting rulings or need for judicial economy, similar to that given to trial courts under CCP §§1281.2(c) to deny enforcement of an arbitration agreement.

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VII. ARBITRATION PRACTICE POINTS: OBTAINING AND PROTECTING YOUR AWARD

A. Ascertain How Parties Arrived at Arbitration

§14.40 1. Is There a Contract? What Rules Apply?

First, ascertain whether a contract to arbitrate exists and, if so, what arbitration rules the parties must follow. For contractual mandatory mediation, see §§14.11-14.15, 14.54, 14.57. For contractual binding arbitration, see §§14.16-14.25, 14.41-14.52. A party to a contract that calls for arbitration before the American Arbitration Association (AAA) may not seek to compel arbitration before another provider not named in the agreement. *Maggio v Windward Capital Mgmt. Co.* (2000) 80 CA4th 1210, 96 CR2d 168.

PRACTICE TIP: Although some may argue that *Maggio* is all encompassing and no deviation from the contract-delineated provider can occur, this case may be limited by its facts. It was on appeal from the denial of a contested petition to compel arbitration through a provider other than the AAA. No arbitration had occurred. In an arbitration that has been fully heard and in which an award has been rendered, if the contract provision calls for the AAA but the parties proceeded to arbitration with another provider without objection, issues of waiver or estoppel will likely prevent vacation of the award. See, *e.g., Platt Pac., Inc. v Andelson* (1993) 6 C4th 307, 318, 24 CR2d 597.

Second, determine the extent of the contract terms. In *Winter v Window Fashions Professionals, Inc.* (2008) 166 CA4th 943, 83 CR3d 89, for example, the arbitration provision in a uniform franchise agreement specified that the provision might not be enforceable in California. This uncertainty in the agreement indicated that there was no meeting of the minds regarding the agreement to arbitrate. A modification of a written agreement to arbitrate must be in writing. *Magness Petroleum Co. v Warren Resources of Cal. Inc.* (2002) 103 CA4th 901, 127 CR2d 159 (oral modification to arbitrate before JAMS rather than AAA as provided in the written agreement is not enforceable).

Even if the arbitration award finds that the parties to a contract terminated the contract before the rendering of the award, the arbitration clause in the contract may be enforced. *Ajida Technol., Inc. v Roos Instruments* (2001) 87 CA4th 534, 104 CR2d 686. The contract in *Ajida* had a provision for arbitration, giving the arbitrators the power to award attorney fees and costs. The court held that the parties' duty to arbitrate survived contract termination and that the arbitrators had the authority to award attorney fees not only incurred in the arbitration proceeding but also on appeal.

If a party refuses to arbitrate under a binding contractual provision, the other parties to the contract can enforce the agreement by filing a petition for an order compelling that party to arbitrate. See California Arbitration Act, CCP §§1280-1294.2. To support the petition, the arbitration agreement must be attached or set forth in the petition. Cal Rules of Ct 3.1330. Rule 3.1330 does not require the petitioner to introduce the agreement into evidence or to provide the court with more than the recitation or a copy. Once the existence of the agreement is alleged, the burden shifts to the respondent to prove the falsity or flaw in enforceability of the alleged agreement. *Condee v Longwood Mgmt. Corp.* (2001) 88 CA4th 215, 219, 105 CR2d 597. As an example, the court in *Toal v Tardif* (2009) 178 CA4th 1208, 101 CR3d 97 held that a stipulation to arbitrate signed by the attorneys for the parties was not sufficient to obligate the parties to arbitrate without substantial evidence beyond the agreement itself showing that the objecting party had expressly authorized the attorney to sign on his or her behalf. The denial of a petition to compel arbitration is appealable under CCP §1294(a). *Porter v United Servs. Auto. Ass'n* (2001) 90 CA4th 837, 108 CR2d 860.

Third, determine whether there is a enforceable rationale to avoid directly proceeding to arbitration that can be used by any party to avoid the arbitration process. For example, does a party have a valid basis to seek to avoid the arbitration agreement by court intervention. In one case, the court of appeal refused to "impose a litigation 'death penalty' merely because a party chose an improper forum or otherwise committed a curable procedural faux pas." The party filed suit to contest the enforceability of an arbitration agreement and the trial court ruled that he had forever waived his right to arbitrate by proceeding to court rather than arbitration. The decision found that a party has not

waived their right to arbitrate by suing to contest the arbitration provision. *Kalai v Gray* (2003) 109 CA4th 768, 135 CR2d 449. The court however noted that if the party had made this litigation claim, rather than arbitrating, frivolously or in bad faith, he could be subject to monetary sanctions, but he would not be precluded from thereafter arbitrating the matter. Another appellate court has held that there was no waiver of the right to arbitrate by filing a lawsuit and seeking a restraining order against the opposing party. *Simms v NPCK Enterprises, Inc.* (2003) 109 CA4th 233, 134 CR2d 557.

On enforcing arbitration agreements in specific types of real property disputes, see California Construction Contracts, Defects, and Litigation, chap 7 (Cal CEB 2008); California Title Insurance Practice, chap 14 (2d ed Cal CEB 1997).

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§14.40A 2. What Is Part of Contract and What Is Not?

Another important item to resolve is, if there is a contract, what is part of the contract and what is not. If a Real Estate Transfer Disclosure Statement is involved, counsel should consider the following points:

- The Real Estate Transfer Disclosure Statement (TDS) is not part of the contract. *Brasier v Sparks* (1993) 17 CA4th 1756, 1760, 22 CR2d 1; CC §1102.6 (see the capitalized language in the second paragraph under SELLER'S INFORMATION). If the arbitration clause is broad, requiring the parties to arbitrate any or all disputes arising from or related to "the contract," "the purchase and sale of the property," or "the resulting transaction," issues relating to the TDS would be arbitrable. See *Johnson v Siegel* (2000) 84 CA4th 1087, 101 CR2d 412. Whether, ultimately, those issues would carry with them the right to obtain prevailing party attorney fees will be another issue to be determined from the language of the arbitration clause. 84 CA4th at 1101. If the contract allows the prevailing party to recover attorney fees in an action "on the contract," arguably the TDS claim of fraud or nondisclosure would not support an award of attorney fees to a party prevailing on that claim. If, however, the attorney fees clause provides for prevailing party fees in actions arising from or related to "the contract," the arbitrator could have the jurisdiction, then, to award fees and costs if the finding of fraud or nondisclosure is the basis of the award. 84 CA4th at 1101. See discussion of *Leamon v Krajkiewcz* (2003) 107 CA4th 424, 132 CR2d 362, in §§14.55-14.57.
- Although the Real Estate Transfer Disclosure Statement (TDS) is not part of the contract, it is a nonwaivable condition precedent to the buyer's duty of performance. *Realmuto v Gagnard* (2003) 110 CA4th 193, 1 CR3d 569. See chap 4.
- The statute (CC §1102.6) relating to disclosure by the seller does not say "knows or should have known." It states "to the best of [seller's] knowledge," and requires disclosure of things that the seller is "aware" of. Counsel often rely on an inference that "should have known" is the standard. Based on the statutory language and language of the TDS itself, reliance on a "should have known" standard is misplaced.
- Civil Code §1102.4 provides that the seller is not liable for any error, inaccuracy, or omission of any information delivered via TDS "if the error, inaccuracy, or omission was not within the personal knowledge of the transferor," or was "timely provided by public agencies" or certain types of expert.
- Check the date of signing on the TDS—representation in the document is as of the date of the document. CC §1102.6 (see seller certification at end of Section II of the TDS).

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.41 3. Is It Court Ordered? What Statutes Apply?

§14.41 3. Is It Court Ordered? What Statutes Apply?

Alternatively, ascertain whether the arbitration is court ordered and, if so, which statutes might apply. See, *e.g.:*

- California judicial arbitration. CCP §§1141.10-1141.31; Cal Rules of Ct 3.221, 3.800, 3.810-3.829, 10.781-10.783; see California Civil Procedure Before Trial, chap 37 (4th ed Cal CEB 2004).
- California contractual arbitration. CCP §§1280-1294.2; see Civ Proc Before Trial §§45.12-45.46.
- Mandatory arbitration of attorney fee/cost disputes. Bus & P C §§6200-6206; see Civ Proc Before Trial, chap 5.
- Federal Arbitration Act (9 USC §§1-16).

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§14.42 4. Is It Voluntary and Binding? to What Have the Parties Agreed?

When making or opposing a demand or petition for arbitration based on a contractual arbitration provision, it is important to examine whether the parties consented to the arbitration voluntarily and, if so, to define the scope of the arbitration. See §§14.42A-14.42E. It is also necessary to analyze whether the agreement is legally binding. See, *e.g*., *Fair v Bakhtiari* (2006) 40 C4th 189, 197, 51 CR3d 871 (declined to enforce arbitration clause in written memorandum arising from mediation that did not satisfy requirements of Evid C §1123(b)).

PRACTICE TIP: Even though an arbitration agreement may be valid and enforceable between two parties (*e.g.,* seller and buyer in a real estate sales contract), if their dispute involves third parties (*e.g.,* one or more real estate agents in the sale, or the escrow company), the dispute may have to be resolved in more than one forum. See discussion of problems inherent in piecemeal adjudication and references for detailed strategies for avoiding them in §§14.26, 14.38-14.39A.

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§14.42A a. Was the Party Aware of the Arbitration Clause in the Contract?

Consent may be an issue if the consumer is not aware that the contract requires arbitration of disputes. See, *e.g., Kleveland v Chicago Title Ins. Co.* (2006) 141 CA4th 761, 46 CR3d 314 (arbitration clause in title insurance policy referenced in preliminary report was not enforceable, because arbitration was not mentioned in report and company issued different title policy than referenced in report); *Chan v Drexel Burnham Lambert, Inc.* (1986) 178 CA3d 632, 641, 223 CR 838. But a disclosure in a preliminary report (stating that the title insurance policy provisions were available for review by the insured at the insurer's office and incorporating the provisions by reference) was sufficiently conspicuous to enforce the arbitration clause against the insured. See *Wolschlager v Fidelity Nat'l Title Ins. Co.* (2003) 111 CA4th 784, 4 CR3d 179. But see *Harper v Ultimo* (2003) 113 CA4th 1402, 7 CR3d 418, cited in §14.42B. To incorporate another document by reference, the subject document must contain a clear and unequivocal reference to the fact that the terms of the document are incorporated. *Amtower v Photon Dynamics, Inc.* (2008) 158 CA4th 1582, 71 CR3d 361. When making a motion to compel arbitration, the moving party has the burden of proving the existence of an arbitration provision in a document incorporated by reference by introducing it properly into evidence. *Adajar v RWR Homes, Inc.* (2008) 160 CA4th 563, 73 CR3d 17.

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.42B b. Is the Arbitration Clause Adhesionary or Unconscionable?

§14.42B b. Is the Arbitration Clause Adhesionary or Unconscionable?

In some instances an agreement for binding arbitration may be unenforceable because it was executed by someone (possibly an agent) other than the party bound to arbitrate, was adhesionary, or for other reasons was not voluntary. See, *e.g., Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 99 CR2d 745 (held entire arbitration agreement unenforceable because of several unconscionable provisions; agreement was unilateral and it contained damages limitation contrary to public policy); *Sanchez v Western Pizza Enters., Inc.* (2009) 172 CA4th 154, 90 CR3d 818 (arbitration agreement permeated with unlawful purpose and therefore unenforceable, because class action arbitration waiver is against public policy and arbitrator selection clause is unconscionable); *Thompson v Toll Dublin, LLC* (2008) 165 CA4th 1360, 81 CR3d 736 (arbitration provisions were part of preprinted form contract, presented on take-it-or-leave-it basis, and were buried in almost 800 pages of documents given to plaintiffs as part of condominium purchase agreement); *Ontiveros v DHL Express (USA), Inc.* (2008) 164 CA4th 494, 79 CR3d 471 (employment arbitration clause substantively unconscionable because it allowed arbitrator to decide enforceability issues, required employee to pay portion of costs, and severely limited discovery); *Bruni v Didion* (2008) 160 CA4th 1272, 73 CR3d 395 (arbitration provision in homebuilder's warranty held unenforceable because it was both unconscionable and adhesionary); *Martinez v Master Protection Corp.* (2004) 118 CA4th 107, 12 CR3d 663 (award vacated because arbitration clause was unconscionable and trial court lacked authority to appoint another arbitrator after designated arbitration forum refused to hear dispute); *Mercuro v Superior Court* (2002) 96 CA4th 167, 116 CR2d 671 (arbitration clause unenforceable if induced by use of oppressive tactics); *Flores v Transamerica HomeFirst, Inc.* (2001) 93 CA4th 846, 113 CR2d 376 (applied generally applicable defense of unconscionability under CCP §1281.2; see §14.38C); *Stirlen v Supercuts, Inc.* (1997) 51 CA4th 1519, 60 CR2d 138 (arbitration clause held unconscionable because it contained unilateral right to litigate rather than to arbitrate, unilateral right to appeal, and provided employer more rights and greater remedies than employees). See also *Wheeler v St. Joseph Hosp.* (1976) 63 CA3d 345, 133 CR 775 (declaring arbitration clause in hospital admission form that was not explained to patient to be adhesionary; see §14.38B).

Most case law interpreting the enforceability of arbitration agreements has developed in the context of employment agreements. See, *e.g*., *Pearson Dental Supplies v Superior Court* (2010) 48 C4th 665, ___ CR3d ___ (rejected employee's argument that arbitration agreement relinquishing employee's right to court action and access to administrative remedies rendered agreement unconscionable); *Roman v Superior Court* (2009) 172 CA4th 1462, 92 CR3d 153. However, the same issue continues to arise in consumer cases and real estate cases. See, *e.g*., *Thompson v Toll Dublin, LLC* (2008) 165 CA4th 1360, 81 CR3d 736. Civil Code §1670.5 permits a court to refuse to specifically enforce a contract or any clause of a contract that is found to be unconscionable at the time it is made. See also CC §1668, the basis for the decision in *Discover Bank v Superior Court* (2005) 36 C4th 148, 30 CR3d 76. For a discussion of the adequacy of consideration and reasonableness of contract provisions, see §5.8.

A party defending a motion to compel arbitration and seeking to avoid an arbitration provision must show that the arbitration agreement is *both* procedurally and substantively unconscionable. *Armendariz v Foundation Health Psychcare Servs., Inc.* (2000) 24 C4th 83, 114, 99 CR2d 745. The procedural element of the doctrine focuses on oppression or surprise resulting from unequal bargaining power; the substantive element is characterized by overly harsh or one-sided terms. A finding of procedural unconscionability is a prerequisite to determining that the arbitration agreement as a whole is unconscionable; after making that finding, the court will scrutinize the substantive terms of the contract to ensure they are not unfair or one-sided. *Gentry v Superior Court* (2007) 42 C4th 443, 469, 64 CR3d 773.

An example of unsuccessful proof of procedural unconscionability is the evidence in *Crippen v Central Valley RV Outlet* (2004) 124 CA4th 1159, 1165, 22 CR3d 189, in which the court held that the plaintiff "did not introduce or rely on any evidence of the circumstances surrounding the execution of the agreement, so he could not show inequality of bargaining power, lack of negotiation, or lack of meaningful choice." Further, the plaintiff did not establish that he had substantially unequal bargaining power in his relationship with the seller. Nor did the form of the agreement demonstrate procedural unconscionability. The court factually distinguished *Harper v Ultimo* (2003) 113 CA4th 1402, 7

CR3d 418, in which a consumer contract between a building contractor and a homeowner required arbitration under the rules of the Better Business Bureau. The rules were not attached to the agreement, so that before signing, the consumer was required to go to another source to find out the full impact of what he was about to sign. Moreover, the rules imposed limited remedies and prohibited other tort damages and punitive damages.

Conversely, unconscionability was shown in *Lhotka v Geographic Expeditions, Inc.* (2010) 181 CA4th 816, 104 CR3d 844, a wrongful death action brought by survivors of a client on a hiking expedition. The release form limited recovery to the amount paid for the trip, required survivors to pay for legal costs if they pursued released claims, and required them to pay half of the mediation fees and mediate at a location far from their home. The court found the provisions to be substantively and procedurally unconscionable. The participants had no meaningful choice but to sign the release. 181 CA4th at 823.

In *Parada v Superior Court* (2009) 176 CA4th 1554, 98 CR3d 743, the court found the arbitration provision to be both substantively and procedurally unconscionable. The provision required investors to arbitrate all disputes before a panel of three arbitrators and prohibited consolidation or joinder of claims. The court recognized that the process was unreasonably expensive and that the defendant intended to discourage any dispute resolution procedures. The court also refused to modify the contract to impose the fee-shifting outlined in *Armendariz, supra*, on the grounds that the matter arose under California law and was not subject to federal arbitration rules. 176 CA4th at 1579.

PRACTICE TIP: Counsel litigating residential, commercial, or industrial contracts with arbitration clauses should carefully review *Gentry*, *Crippen*, *Pearson*, and *Armendariz,* paying particular attention to the nature and scope of "extrinsic evidence" that the party challenging the arbitration provision will be required to produce.

When it is possible to sever the unconscionable clause of a binding arbitration provision, the clause should be severed and the rest of the arbitration provision should be enforced. *Little v Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1076, 130 CR2d 892 (declared appeal-of-arbitration clause unconscionable and severed it from remaining arbitration provision in employment contract because $50,000 threshold inordinately benefited employer). Despite *Little*, courts will not enforce completely one-sided arbitration provisions, *i.e.*, those that require the party with the least bargaining power to submit claims to arbitration while allowing the party with the most bargaining power to choose litigation. See, *e.g., Armendariz v Foundation Health Psychcare Servs., Inc., supra*; *Sanchez v Western Pizza Enters., Inc., supra; Martinez v Master Protection Corp., supra; O'Hare v Municipal Resource Consultants* (2003) 107 CA4th 267, 132 CR2d 116.

PRACTICE TIP: The courts clearly distinguish procedural enforcement of arbitration clauses from "generally applicable contract defenses, such as fraud, duress, or unconscionability." See *Discover Bank v Superior Court* (2005) 36 C4th 148, 165, 30 CR3d 76, quoting *Little v Auto Stiegler, Inc.* (2003) 29 C4th 1064, 1079, 130 CR2d 892. Consequently, even when a clause is governed by federal procedure, a court may apply state law to adjudicate the issue of unconscionability. See §14.38C.

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§14.42C c. Was the Arbitration Clause Induced by Fraud or Duress?

Before an arbitration proceeding begins, a party may oppose a court petition to compel arbitration on the basis that the arbitration clause was induced by fraud or duress. See CCP §1281.2(b). To invalidate or object to the enforcement of an arbitration provision on a basis of corruption, fraud, or undue means, *i.e.,* duress, the objection must be specifically directed at the arbitration provision, not to the contract as a whole. *Larian v Larian* (2004) 123 CA4th 751, 19 CR3d 916; *Bosinger v Phillips Plastics Corp.* (SD Cal 1999) 57 F Supp 2d 986, 992 (relying on state law to decide contract-formation issues of consent (*e.g.,* duress in obtaining it) in arbitration provisions).

It is not uncommon for a party to claim that there was fraud in the inception or execution of the arbitration clause. See, *e.g*., *Rosenthal v Great W. Fin. Secs. Corp.* (1996) 14 C4th 394, 415, 58 CR2d 875. Under *Rosenthal,* before a party may be compelled to arbitrate a claim, the petitioning party must prove the existence of a valid arbitration clause and that the dispute in question is covered by the arbitration agreement. After the petitioner meets its burden, the opponent of arbitration must prove a valid defense to the petition to compel arbitration. See, *e.g., Larian v Larian* (2004) 123 CA4th 751, 19 CR3d 916 (reversed trial court's order denying motion to compel arbitration, because party opposing arbitration lacked evidence that it was defrauded in inception or execution of arbitration agreement).

In contrast, under both federal and California law, claims of fraud in the inducement of the contract as a whole (as distinguished from claims of fraud directed to the arbitration clause itself) must be resolved by the arbitrator, not the trial judge. *Buckeye Check Cashing, Inc. v Cardegna* (2006) 546 US 440, 163 L Ed 2d 1038, 126 S Ct 1204; *Prima Paint Corp. v Flood & Conklin Mfg. Co.* (1967) 388 US 395, 18 L Ed 2d 1270, 87 S Ct 1801; *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v 100 Oak St.* (1983) 35 C3d 312, 323, 197 CR 581.

A claim of fraud in the inducement of the entire contract is distinguishable from the issue of the legality of the entire contract, for which a judicial determination is required; the arbitrator's decision on legality does not bind the court. 35 C3d at 316 n2. Consequently, when a party resisting a motion to compel arbitration disproves the legality of the underlying agreement, it is a complete defense to enforcing the arbitration clause. *Duffens v Valenti* (2008) 161 CA4th 434, 74 CR3d 311.

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§14.42D d. What Is the Scope of the Arbitration Clause?

Because arbitration agreements are privately drafted, numerous issues may arise regarding their scope. A threshold issue is whether the parties agreed to binding or nonbinding arbitration. If the parties agreed to submit their dispute only to nonbinding arbitration, the arbitrator cannot make the award binding without their consent. See *Trabuco Highlands Community Ass'n v Head* (2002) 96 CA4th 1183, 117 CR2d 842.

In *Hall v Superior Court* (1993) 18 CA4th 427, 22 CR2d 376, the court analyzed the difference between a voluntary arbitration (usually binding) and court-ordered or court-supervised arbitration (usually appealable in trial de novo). Suit was filed by the sellers of a home against the listing broker, the listing brokerage, and a neighbor of the sellers, who had procured the listing and shared the commission. During a status conference, all parties stipulated that all issues would be decided by binding arbitration. The neighbor, who did not sign the listing agreement but participated in the arbitration, challenged the award. The neighbor sought to overturn the decision on the ground that, because this was a judicially ordered arbitration, he had, over his objection, been forced to use a particular arbitrator because of the court's control of the process. The appellate court ruled that the arbitration was a private, contractual arbitration, controlled by CCP §§1280-1294.2, to which the neighbor had consented. 18 CA4th at 431 n1. But see *Badie v Bank of America* (1998) 67 CA4th 779, 790, 79 CR2d 273, which held that the threshold question is whether the parties have entered into a binding agreement to arbitrate. In *Badie,* the court held that customers of the bank did not consent to the insertion of an ADR clause in their account agreements with the bank even though they had given consent in advance to allow the bank to change the terms of the agreements. The *Badie* court distinguished *Hall v Superior Court, supra,* and a line of cases that had found consent to arbitrate existed.

WARNING: When negotiating about submitting a dispute to binding arbitration, it is crucial to communicate the clients' acceptance or withdrawal to the other side promptly. See *CPI Builders, Inc. v Impco Technols, Inc.* (2001) 94 CA4th 1167, 114 CR2d 851.

A party can be compelled only to arbitrate issues it has agreed to arbitrate. *Larkin v Williams, Woolley, Cogswell, Nakazawa & Russell* (1999) 76 CA4th 227, 90 CR2d 195 (agreement to arbitrate "any controversy or claim arising out of or relating to any provision of" the partnership contract, including "breach thereof," also encompassed a statutory claim for dissolution of partnership). 76 CA4th at 229.

When the contract includes a broad arbitration clause and both parties consent to arbitration by their conduct, the arbitrator must hear challenges to contract formation as well as disputes about the contract as a whole, such as breach of contract. In *Granite Rock Co. v International Brotherhood of Teamsters* (9th Cir 2008) 546 F3d 1169, for example, the court concluded that a party who initiated a suit on a contract containing an arbitration clause (without independently challenging the arbitration clause or its scope) could not object to a motion by the defendant to submit the formation dispute to arbitration, because that party admitted the existence of the contract and the agreement to arbitrate by asserting its cause of action. However, a party suing for other reasons or a party defending a claim may resort to the courts for determination of a dispute about the formation of the arbitration agreement itself. See §§14.42C, 14.42E.

If the arbitration agreement provides for a specified number of arbitrators, the court will uphold that portion of the agreement. *Parker v McCaw* (2005) 125 CA4th 1494, 24 CR3d 55. The court in *Parker* recognized that differing arbitration provisions concerning venue, choice of law, and number of arbitrators are substantial contract rights that a trial court may not impair. The court reasoned that court-ordered consolidation does not achieve substantial justice if it substantially alters parties' contractual rights or results in unfair prejudice. Having three arbitrators minimizes the risk of factual or legal error, which error is generally not reviewable (see §14.44) under arbitration law. See also *Vandenberg v Superior Court* (1999) 21 C4th 815, 831, 88 CR2d 366 (arbitration shall proceed "*as the parties themselves have agreed*").

Many courts have ruled that arbitration agreements are to be liberally interpreted and will order arbitration unless the agreement does not apply to the dispute. *Gravillis v Coldwell Banker Residential Brokerage Co.* (2006) 143 CA4th 761,

771, 49 CR3d 531 (emotional distress and diabetes caused by emotional distress arising from nondisclosure of home defects are arbitrable claims despite bodily injury exclusion in arbitration clause). This rule applies to interpreting the substantive scope of the arbitration agreement, not to deciding a question of arbitrability. See §14.42E.

Defenses to the dispute that do not arise from statutory exceptions to arbitration (see *e.g.* CCP §§1281, 1281.2) are for the arbitrator to decide. See *Wagner Constr. Co. v Pacific Mechanical Corp.* (2007) 41 C4th 19, 58 CR3d 434 (applicability of statute of limitations defense is for arbitrator to decide; court may not adjudicate that issue on a motion to compel arbitration).

The parties may agree to provide for discovery rights under CCP §1283.1(b) before the arbitration commences, by incorporating the rules in CCP §1283.05. If they do, the arbitrator issues the subpoenas and hears any discovery motions. CCP §§1282.6, 1283.05. Decisional law distinguishes between the rights of parties and those of nonparties to have a court review the arbitrator's discovery orders. See *Berglund v Arthroscopic & Laser Surgery Ctr.* (2008) 44 C4th 528, 79 CR3d 370, which held that discovery disputes involving a nonparty, such as whether the nonparty must comply with a subpoena, must be submitted first to the arbitrator. Nevertheless, the nonparty, unlike the parties to the arbitration agreement, has the right to full judicial review of the arbitrator's decision.

An arbitration clause may be so uncertain about its scope that it is unenforceable. In *Villacreses v Molinari* (2005) 132 CA4th 1223, 34 CR3d 281, the court reversed an arbitration award, finding that a poorly drafted arbitration clause was unenforceable because it failed to specify what kind of disputes would be arbitrated. The clause was in bold print, but contained only the warning required by CCP §1298(c), without further elucidation.

PRACTICE TIP: *Villacreses* provides what the court referred to as a "cautionary tale," the moral of which is to review the documents in the context of case law on enforceability. Here, the nonstandardized arbitration language was in a contract prepared by a company providing discount escrow services.

For additional reported cases considering the scope of arbitration clauses in real property matters, see California Construction Contracts, Defects, and Litigation, chap 7 (Cal CEB 2008); and California Title Insurance Practice, chap 14 (2d ed Cal CEB 1997).

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§14.42E 5. Who Decides Arbitrability, Court or Arbitrator?

Contractual arbitration provisions usually specify what the parties do and do not wish to arbitrate. The arbitrator may consider only the issues or disputes covered by the arbitration agreement. See §14.42D; *Mansdorf v California Physicians' Servs.* (1978) 87 CA3d 412, 151 CR 388. When the agreement is unclear about the arbitrability of an issue or dispute, the arbitrator or the court has to rule on that question before arbitration of the underlying claim commences. Ordinarily, the court decides whether a particular issue or dispute is arbitrable. See *First Options of Chicago v Kaplan* (1995) 514 US 938, 131 L Ed 2d 985, 115 S Ct 1920. But if the parties expressly agree in the arbitration agreement (or after the dispute arises) that the question of arbitrability will be subject to arbitration, then the arbitrator decides. 514 US at 944. In *First Options,* the court concluded that the appearance of a party in an arbitration for the purpose of objecting to the arbitrator's power to decide arbitrability did not, by itself, signify an agreement to submit the question of arbitrability to the arbitrator. 514 US at 946.

Arbitrability concerns the scope of the arbitration agreement itself. Therefore a court will defer to the arbitrator on substantive defenses that determine whether arbitration should proceed, like the statute of limitations. See, *e.g.*, *Wagner Constr. Co. v Pacific Mechanical Corp.* (2007) 41 C4th 19, 58 CR3d 434. See also *Howsam v Dean Witter Reynolds* (2002) 537 US 79, 123 SCt 588, 154 L Ed 2d 491 (applicability of claims' time limit rule in arbitration association's rules was presumptively for arbitrator and did not raise arbitrability question requiring judicial intervention).

When an arbitration agreement incorporates the rules of an ADR organization, those rules govern the power of the arbitrator to decide what issues are arbitrable. In *Gilbert St. Developers LLC v La Quinta Homes* (2009) 174 CA4th 1185, 1192, 94 CR3d 918, however, the arbitration agreement incorporated the rules of the American Arbitration Association (AAA), which at the time of the agreement's formation did not vest the arbitrator with the power to decide arbitrability. Between the formation of the agreement and the dispute, the AAA revised its rules to include that power. The court refused to impose on the parties a postagreement revision of the AAA rules, because the arbitration agreement was not clear enough to put the parties on notice of this departure from the ordinary rule, stated in *First Options of Chicago v Kaplan, supra*, that the court decides the scope of arbitrability.

The case of *PowerAgent Inc. v Electronic Data Sys. Corp.* (9th Cir 2004) 358 F3d 1187 involved an interrelated service agreement and two investment agreements. The service agreement contained a broad arbitration clause under which the parties agreed to arbitrate any dispute connected with the agreement. After the arbitrators were given authority to determine the arbitrability of issues and after they ruled on the merits and the award was confirmed, the losing party could not then challenge the authority of the arbitrators to hear the case. See also *Three Valleys Mun. Water Dist. v E. F. Hutton & Co.* (9th Cir 1991) 925 F2d 1136, 1139.

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B. Vacating Arbitration Award

§14.43 1. If Procured by Corruption, Fraud, or Undue Means

An arbitration award must be vacated if "the award was procured by corruption, fraud or other undue means." CCP §1286.2(a)(1). Many cases turn on these statutory grounds for vacation of private arbitration awards, particularly those that deal with arbitrators' failure to disclose business relationships or other conflicts of interest. See, *e.g., Mahnke v Superior Court* (2009) 180 CA4th 565, 103 CR3d 197; *Park Plaza, Ltd. v Pietz* (1987) 193 CA3d 1414, 239 CR 51, overruled on other grounds in *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 27, 10 CR2d 183.

The court in *Mahnke v Superior Court, supra*, recognized that while appraisers appointed pursuant to Ins C §2071 are treated statutorily as appraisers, the existence of a relationship between an appraiser unilaterally appointed by a party and that party's attorney will not by itself disqualify the appraiser. The court must evaluate whether the relationship would cause a reasonable person to doubt the impartiality of the party appointed appraiser. 180 CA4th at 580.

WARNING: It is risky to raise the issue of fraud in the inducement of the arbitration agreement itself (or other consent issues) after the arbitrator makes its award. See *Kemper v Schardt* (1983) 143 CA3d 557, 192 CR 46. Those issues should be asserted when opposing the motion to compel arbitration (or the motion to stay or dismiss court action) at the outset of the dispute. See §§14.42-14.42D. But unconscionability is a basis for challenging the award. *Martinez v Master Protection Corp.* (2004) 118 CA4th 107, 12 CR3d 663. See §14.42B.

For additional cases on vacating binding arbitration awards, see California Construction Contracts, Defects, and Litigation, chap 7 (Cal CEB 2008); California Title Insurance Practice, chap 14 (2d ed Cal CEB 1997).

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2. If Arbitrator Exceeds Powers

§14.44 a. When Appropriate; Limitations

The court must vacate the award if the arbitrator exceeds his or her powers and the award cannot be corrected without affecting the merits of the decision on the controversy submitted. CCP §1286.2(a)(4). See, *e.g.*, *San Francisco Hous. Auth. v SEIU, Local 790* (2010) 182 CA4th 933, ___ CR3d ___.

This rule, however, is frequently subordinated to the more general public policy that courts should not interfere with arbitration awards. They may not examine the merits of the controversy, the sufficiency of the evidence supporting the award, the arbitrator's reasoning, or whether the arbitrator interprets or applies the law correctly. In most cases, a reviewing court may not set aside an arbitration award if the arbitrator made an error in law or fact, even if substantial injustice occurs. *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 10 CR2d 183. However, the supreme court recognized an exception to this rule in employment cases in *Pearson Dental Supplies v Superior Court* (2010) 48 C4th 665, ___ CR3d ___ (allowed trial court to vacate award because arbitrator's clear error of law meant that employee subject to mandatory arbitration agreement would be deprived of hearing on merits of unwaivable statutory claim).

Another exception arises if the parties expressly provide in their arbitration agreement for judicial review of legal error in the arbitration award; in that event, the award may be vacated or corrected on appeal to a court of competent jurisdiction. *Cable Connection, Inc. v DIRECTV, Inc.* (2008) 44 C4th 1334, 82 CR3d 229. But see *Gravillis v Coldwell Banker Residential Brokerage Co. (Gravillis II)* (2010) 182 CA4th 503, 106 CR3d 70 (agreement did not comply with suggested language in *DIRECTV* by specifically and unambiguously providing for judicial review of arbitration award for legal error); *Christensen v Smith* (2009) 171 CA4th 931, 90 CR3d 57 (agreement providing only that arbitrator must render award in accordance with substantive California law did not permit appellate review on the merits). The Federal Arbitration Act (FAA) (9 USC §§1-16), however, does not allow the parties to contract for judicial review of legal error. See *Hall Street Assoc. v Mattel, Inc.* (2008) 552 US 576, 170 L Ed 2d 254, 128 S Ct 1396.

PRACTICE TIP: Because of the FAA, *Moncharsh,* and state law (CCP §1286.2), even substantial errors of reasoning are not grounds for vacating arbitration awards in real property cases. Even so, a number of arbitrators recoil from writing reasoned awards, fearing that the award will be judicially scrutinized or vacated. In light of the FAA, *Moncharsh,* and §1286.2, this fear may be misplaced.

Parties who are aware of a basis for finding the arbitration process invalid must raise it at the outset or as soon as they learn of it, so that prompt judicial resolution may take place before wasting the time of the adjudicator(s) and the parties. In *Cummings v Future Nissan* (2005) 128 CA4th 321, 27 CR3d 10, the court relied on *Moncharsh v Heily & Blase, supra* for the proposition that a party who believes that the entire contractual agreement, or a provision for arbitration, is illegal must oppose arbitration on this basis before participating in the process or forfeit the claim. The court then cited *Bayscene Resident Negotiators v Bayscene Mobilehome Park* (1993) 15 CA4th 119, 18 CR2d 626 in noting that the only exception might be when a party participated under protest in the arbitration under compulsion of an ordinance carrying criminal sanctions (rather than a private agreement), and was seeking to challenge the ordinance's constitutionality. The court in *Cummings* reasoned that "the 'bright line' for application of forfeiture does not lie between those who voluntarily invoke the arbitration process and those who are dragged to the table against their will. The forfeiture rule exists to avoid the waste of scarce dispute resolution resources, and to thwart game-playing litigants who would conceal an ace up their sleeves for use in the event of an adverse outcome." *Cummings,* 128 CA4th at 328.

NOTE: An arbitrator may properly amend an award after it has been issued but before it has been confirmed by the court, if, owing to an inadvertent omission, the arbitrator failed to include a party's name or rule on expressly submitted issues (*e.g.,* claims for interest, costs, or attorney fees). *Delaney v Dahl* (2002) 99 CA4th 647, 121 CR2d 663; *Century City Med. Plaza v Sperling, Isaacs & Eisenberg* (2001) 86 CA4th 865, 882, 103 CR2d 605.

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§14.45 b. Arbitrator Corruption or Misconduct

The court must vacate an arbitration award if there was corruption in any of the arbitrators or if a party's rights were substantially prejudiced by an arbitrator's misconduct. See CCP §1286.2(a)(2)-(3). In *Halligan v Piper Jaffray, Inc.* (2d Cir 1998) 148 F3d 197, it was suggested that the lack of a reasoned award can be evidence of "manifest disregard of the law." In general, manifest disregard of the law rises to a level of showing arbitrator misconduct, *e.g.,* the arbitrator is shown to know of the existence of a clearly governing principle but ignores it. *Montes v Shearson Lehman Bros.* (11th Cir 1997) 128 F3d 1456; *Advest, Inc. v McCarthy* (1st Cir 1990) 914 F2d 6; *Merrill Lynch, Pierce, Fenner & Smith v Bobker* (2d Cir 1986) 808 F2d 930.

A party who won an arbitration award that was reversed following a second-level arbitration review sought to challenge that procedure as unconscionable (see §14.42B). The court noted that the second arbitrator was mandated to act as an arbitral "court of appeal." There was nothing unconscionable about the second arbitrator's reversing the original arbitrator's award since he was empowered to "indulge in the same *standard of review* that a justice of the Court of Appeal exercises in an *ordinary* civil appeal." *Cummings v Future Nissan* (2005) 128 CA4th 321, 330, 27 CR3d 10.

PRACTICE TIP: Because one basis for vacating an award under CCP §1286.2 is arbitrator corruption, the absence of a reasoned award could lead to a California trend, as in the federal courts, to examine the award through the ground of corruption, specifically "manifest disregard of the law." Many scholars have written that *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 10 CR2d 183 (see §14.44), was a stretch of the law. In light of the federal trend, arbitrators, and counsel representing parties at an arbitration, are encouraged to write, or obtain, a reasoned award.

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§14.46 c. Conduct of Proceedings

The arbitrator's conduct may result in a necessary vacation of the award. See CCP §1286.2(a). Some examples are the following:

- **Party "no show" and ex parte conduct of proceedings.** If there is a possibility that a party may not appear at the proceeding, counsel should determine before the session whether an ex parte proceeding is permitted by rules or agreement. For example, the American Arbitration Association permits proceeding ex parte as long as certain notice procedures are strictly followed. Failure to do so could cause vacation of the award.
- **Ex parte communication with arbitrator.** An ex parte communication with an arbitrator will not support a petition to vacate the award without a showing that the arbitrator was actually improperly influenced by, or actually considered, evidence not presented at the hearing. See *A. M. Classic Constr., Inc. v Tri-Build Dev. Co.* (1999) 70 CA4th 1470, 1478, 83 CR2d 449, in which an attorney contacted the arbitrator after the award to inform him that he did not rule on a stop notice claim. Although the opinion did not condone the ex parte contact, it was not so egregious as to warrant vacating the award.

PRACTICE TIP: The American Arbitration Association's Construction Industry Arbitration Rules and Mediation Procedures (Rule R-21) and Commercial Arbitration Rules and Mediation Procedures (Rule R-18) allow certain approved ex parte communications with an arbitrator. Generally these are at the beginning of a case and allow contacts to ascertain information about the setup of the case or the arbitrator's qualification or qualifications of other arbitrators on a panel, or to provide the proposed arbitrator information relevant to checking for conflicts. There are also exceptions for communications with nonneutral, party-appointed arbitrators on multiple-arbitrator panels. The Real Estate Industry Arbitration Rules are different. See http://www.adr.org, then click on "Rules Updates." They allow direct communication between the parties and a neutral arbitrator other than at oral hearing only if the parties and the arbitrator specifically agree. Any other communication from the parties to the neutral arbitrator must be directed to the AAA for transmittal to the arbitrator. Arbitration Rule 31.

- **Evidence issues and continuances.** The award must be vacated if a party's rights were substantially prejudiced by the arbitrator's refusal to postpone the hearing, on sufficient cause shown, or refusal to hear evidence pertinent and material to the controversy. CCP §1286.2(a)(5). In an arbitration over an encroachment, the court vacated an arbitration award of $1.5 million in damages and costs, which included damages for diminution in value and the costs to move a fence and a pool. See *Burlage v Superior Court* (2009) 178 CA4th 524, 100 CR3d 531. The court found that the arbitrator's refusal to admit evidence that before the hearing a title company paid $10,950 for a lot line adjustment that provided fee simple title to the buyers so that the fence and pool could stay where they were substantially prejudiced the seller's ability to dispute damages.
- **Disclosures and disqualifications.** The award must be vacated if an arbitrator failed to disclose a ground for disqualification or refused to disqualify himself or herself after a meritorious demand to do so. CCP §1286.2(a)(6). Before this basis for vacating was added to the statute, the nondisclosure of an arbitrator's conflict of interest was evaluated under the theory of whether "the award was procured by corruption, fraud or other undue means." See §14.43.

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§14.47 d. Discovery Sanctions

Grounds to vacate the award are often raised for acts in excess of the arbitrator's powers. See CCP §1286.2(a)(4). See §14.44. A court of appeal considered a claim that an arbitrator exceeded his powers by not awarding discovery sanctions even though they were mandatory under discovery statutes governing a party's failure to respond to requests for admissions. *Alexander v Blue Cross* (2001) 88 CA4th 1082, 106 CR2d 431. Relying on *Moncharsh v Heily & Blase* (1992) 3 C4th 1, 10 CR2d 183, the *Alexander* court found that, because the issue of discovery was "within the scope of the controversy submitted to the arbitrators," and that the arbitrator's resolution of discovery issues was bargained for in the arbitration agreement, then, having submitted the discovery issue to the arbitration, a party cannot maintain that the arbitrator exceeded his powers in ruling on discovery issues. *Alexander,* 88 CA4th at 1089.

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§14.48 3. Availability of Other Remedial Relief

Parties are able to contractually limit an arbitrator's authority to arbitrate certain matters and the arbitrator's discretion in fashioning the award. See §14.44. To protect the award, be sure to review the contract to ascertain whether the arbitrator has authority to perform the following acts:

Consider additional causes of action. In commercial contract situations, especially if the agreement to arbitrate is broadly worded, many courts allow the arbitrator to consider tort actions arising from the contractual relationship. See, *e.g., Coast Plaza Doctors Hosp. v Blue Cross* (2000) 83 CA4th 677, 686, 99 CR2d 809; *Izzi v Mesquite Country Club* (1986) 186 CA3d 1309, 231 CR 315 (arbitrator may consider tort claim related to contract formation even though contract called for classwide arbitration); CCP §1281.2.

Issue sanctions. An arbitrator has no authority to award sanctions unless they are provided for in the agreement. An award of sanctions requires an application for judicial enforcement if a party does not comply with the award. *David v Abergel* (1996) 46 CA4th 1281, 54 CR2d 443.

Issue alternative remedies, such as injunctive relief. As a rule, an arbitrator does not have the statutory power to order provisional remedies, such as attachments, protective orders, writs of possession, preliminary injunctions, temporary restraining orders, or receiverships. CCP §1281.8. See also *Cruz v PacifiCare Health Sys., Inc.* (2003) 30 C4th 303, 133 CR2d 58, and *Broughton v Cigna Healthplans* (1999) 21 C4th 1066, 1084, 90 CR2d 334, which involved injunctive and damage claims under Bus & P C §§17200, 17500 and the Consumers Legal Remedies Act (CLRA) (CC §§1750-1784) and held that damage claims (including restitution, disgorgement, and unjust enrichment) under those statutes were arbitrable but that injunctive relief claims were not arbitrable. But see *Micro Devices, Inc. v Intel Corp.* (1994) 9 C4th 362, 377, 36 CR2d 581, in which the court upheld an arbitrator's equitable award in the nature of a contract reformation.

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§14.49 C. Making a Record: Documenting the Parties to Arbitration

Before the arbitrator begins to hear testimony, counsel should have documented on the record the name of each party participating in the arbitration. This step may be obvious to a seasoned real estate litigator, but it should not be overlooked. Also, even if the proceeding has no court reporter, make sure that the arbitrator has documented in the record of the proceeding the names and status (whether entity or individual) of the parties who are bound by contract to the proceeding or who have voluntarily agreed to be parties to the arbitration.

PRACTICE TIP: For example, if a business entity is named as a party defendant, and the principal of the business entity appears at the arbitration, without any further statement of which party is appearing (the entity or the individual), an award against the individual could result by mistake of the arbitrator. This precaution can be particularly crucial if the entity is no longer viable and the arbitrator assumes, incorrectly, that the individual is appearing to assume the debts of the entity.

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§14.50 D. Binding Third Parties

In real estate cases, binding third parties to arbitration is particularly difficult, yet important to effective resolution. A residential purchase contract binds the principals to arbitration either by the contract form as printed or, in some versions of residential purchase contracts, by both buyer and seller initialing the arbitration clause. See §§14.38-14.38D. But most contracts either leave out the real estate professionals from the terms of the binding arbitration provisions or they state clearly that such professionals need not participate in ADR unless they choose to do so. Many construction contracts bind the parties, but not subcontractors or other service providers. The following are some suggestions for binding third parties to the arbitration:

Use of other contracts. Look "outside the box" to get other parties to the table. If a real estate purchase contract requires the principals to arbitrate after mediation, and (a) the real estate licensees ought to be part of the process but are not required to participate (see §14.38), or (b) there are two separate actions to contend with, counsel can often bring listing brokers into the arbitration between the principals by using the listing agreement that normally contains an arbitration (or mediation, then arbitration) of disputes clause. Using this contract to persuade the listing brokers to take part in the process may provide them with greater advantages than they would otherwise have in litigating only with the seller and can result in their cooperation to give finality to an award at arbitration or settlement at mediation.

Incorporation by reference. If a document is incorporated into a contract, examine it carefully because it may have an arbitration or other ADR provision that can be used to bring other parties into an arbitration proceeding. See *Boys Club of San Fernando Valley, Inc. v Fidelity & Dep. Co.* (1992) 6 CA4th 1266, 8 CR2d 587 (contract performance bond).

Nonsignatories who are necessary to the resolution. Often necessary third party nonsignatories are brought into arbitration. Some of these third parties may be principals or agents of a party, spouses, parent corporations to subsidiaries, and children. For more detail on nonsignatories, see *Nguyen v Tran* (2007) 157 CA4th 1032, 1037, 68 CR3d 906 (buyer's broker who signed purchase agreement could be compelled to arbitrate); *Westra v Marcus & Millichap Real Estate Inv. Brokerage Co.* (2005) 129 CA4th 759, 28 CR3d 752 (broker could compel arbitration as agent of signatory to agreement), discussed in §14.38B.

Third party beneficiaries may enforce arbitration clauses in contracts entered into on their behalf, even if they are not directly named in the agreement. *City of Hope v Bryan Cave* (2002) 102 CA4th 1356, 126 CR2d 283 (enforcement depends on factual proof of contracting parties' intent). Corporate representatives, for example, who sign contracts in their representative capacity, are not third party beneficiaries of an arbitration clause simply because they signed it; they are not required to arbitrate absent clear evidence that the parties intended to confer that status on them. *Benasra v Marciano* (2001) 92 CA4th 987, 112 CR2d 358. However, in *Valley Casework, Inc. v Comfort Constr., Inc.* (Ct. App. 1999) 76 CA4th 1013, 90 CR2d 779, a court of appeal rejected a nonsignatory insurer's attempt to compel a signatory to a contract containing an arbitration clause to submit to binding arbitration on the theory that the insurer had the right, under the doctrine of equitable subrogation, to enforce its insured's contractual rights.

PRACTICE TIP: If a subcontractor or other party agrees to arbitrate but is not contractually bound to arbitration, the arbitrator should be informed so that the record of the proceeding can reflect that party's agreement to be subject to the arbitration award.

If real estate professionals or other noncontractually bound persons agree to arbitration, record this fact at the start of the proceedings. Inform the arbitrator of which persons are participating as parties, rather than as witnesses, to the arbitration. Without a clear record of those over whom the arbitrator has jurisdiction, either by contract or by voluntary submission, an award by the arbitrator against that party is subject to attack.

Some practitioners opine that, when counsel has obtained agreement to arbitrate from all but one party, a petition to the court to order that party to arbitration under CCP §1281.2 is available, but at least one court of appeal has disagreed. See *Marcus & Millichap Real Est. Inv. Brokerage Co. v Hock Inv. Co.* (1998) 68 CA4th 83, 88, 80 CR2d 147. No language in §1281.2 supports compelling arbitration in that situation, and no public policy has been created to

force arbitration on parties that have not agreed to arbitrate.

Dual forum issues frequently arise in multiparty cases. See §§14.26, 14.38-14.38D. See also procedural options and strategies for avoiding the dual forum relating to construction disputes in California Mechanics' Liens and Related Construction Remedies §§3.77, 7.59-7.60 (3d ed Cal CEB 1998) and in California Construction Contracts, Defects, and Litigation §§7.31-7.33 (Cal CEB 2008), and relating to title insurance claims in California Title Insurance Practice §§14.12, 14.24-14.25 (2d ed Cal CEB 1997). On resisting arbitration, see Title Ins §§14.6-14.12; Const Contracts and Defect §§7.25-7.30.

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§14.51 E. Availability of Punitive Damages

Because no specific federal or California statute or decision addresses whether an arbitrator may award punitive damages, the availability of punitive damages in an arbitration proceeding depends primarily on how the courts interpret the arbitration agreement.

In 1925 Congress enacted the Federal Arbitration Act (FAA) (9 USC §§1-16) and formally recognized arbitration as a valid alternative to judicial dispute resolution. The FAA provides that if the parties have agreed to arbitrate their dispute the courts will enforce the agreement. In *Moses H. Cone Memorial Hosp. v Mercury Constr. Corp.* (1983) 460 US 1, 74 L Ed 2d 765, 103 S Ct 927, the Supreme Court ruled that under the FAA any doubts about the scope of arbitrable issues should be resolved in favor of arbitration. But *Moses* was not sufficient to assure arbitrators of the authority to award punitive damages, because it did not squarely address that issue and, in purely state claims, the FAA has no effect. For example, in *Garrity v Lyle Stuart, Inc.* (1976) 353 NE2d 793, 386 NYS2d 831, 40 NY2d 354, the court held that an arbitrator had no authority to impose punitive damages even though the parties agreed to them.

An inherent conflict exists between federal and state law when a claim is made for punitive damages under federal statute, *e.g.*, Title VII (employment claims), when Congress has legislated that the complaining party is entitled to compensatory and punitive damages. If the underlying contract written by a large national corporation has a New York choice of law provision and a mandatory arbitration provision, the contract is immediately at odds with the *Garrity* rule, frustrating congressional intent. This, of course leads to courts' coming out on opposite ends; some rejecting *Garrity* and others upholding it.

An unusual approach was taken in a California decision, *J. Alexander Sec., Inc. v Mendez* (1993) 17 CA4th 1083, 21 CR2d 826, cert denied (1994) 511 US 1150, 128 L Ed 2d 901, 114 S Ct 2182, in which review and certiorari were denied. This case involved a brokerage customer claim arising from a contract with a New York choice of law provision and mandatory arbitration. The arbitrator awarded punitive damages, and the brokerage sought to have the award vacated. The state court denied the motion to vacate (which was based on *Garrity v Lyle Stuart, Inc., supra*) and affirmed the award. The court of appeal relied on the FAA's guiding principle that all doubts about the scope of arbitrable issues should be resolved in favor of arbitration, and held that the New York choice of law provision "merely designates the substantive law that the arbitrators must apply in determining whether the conduct of the parties warrants an award of punitive damages; it does not deprive the arbitrators of their authority to award punitive damages." 17 CA4th at 1091. In effect, this finding disapproved *Garrity* in California and ruled that arbitrators did not exceed their powers in awarding punitive damages.

The United States Supreme Court in 1995 expressed the same view as in *J. Alexander Sec., Inc. v Mendez, supra*: The New York choice of law provision is not, "in itself, an unequivocal exclusion of punitive damages claims." Instead, the agreement language should be examined to determine whether punitive damages are appropriate. *Mastrobuono v Shearson Lehman Hutton, Inc.* (1995) 514 US 52, 60, 131 L Ed 2d 76, 86, 115 S Ct 1212.

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§14.52 F. Attorney Fee Awards

Often a petition to vacate an arbitration award claims that the arbitrator exceeded his or her powers because the amount of attorney fees were not specified until after the arbitration was awarded. Although it is a general rule that an arbitrator's role and authority cease with the award, if the award directs that one party is entitled to attorney fees, the later designation of amounts does not render the award invalid. *Rosenquist v Haralambides* (1987) 192 CA3d 62, 237 CR 260.

The key issue is whether the decision awards fees. If it does, the decision on the amount of fees is not necessary to the decision on the merits of the dispute, and the arbitrator can add the fee amount later. If the arbitrator does not award fees, however, correction of the award is not possible. See *Moshonov v Walsh* (2000) 22 C4th 771, 94 CR2d 597.

NOTE: If provided by contract, all required conditions precedent to an attorney fee award, including attempted mediation before arbitration, must be met. See *Leamon v Krajkiewcz* (2003) 107 CA4th 424, 132 CR2d 362. See discussion about the *Leamon* decision being factually distinguishable depending on the underlying contract at issue in §14.56.

For further discussion of attorney fee awards in arbitration, see California Construction Contracts, Defects, and Litigation, chap 7 (Cal CEB 2008).

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VIII. MEDIATION POINTS

§14.53 A. Confidentiality of Proceedings

Mediators must keep communications and the conduct of the mediation proceedings in confidence. See Evid C §§1118-1122. Courts strictly enforce these sections, even if the parties and their counsel refuse to cooperate during the mediation and even if their conduct would otherwise go unpunished. For example, in *Foxgate Homeowners Ass'n v Bramalea Cal., Inc.* (2001) 26 C4th 1, 108 CR2d 642, the supreme court reversed a $30,000 award in sanctions against the defendant and defense attorney for refusing to bring experts to a mediation session, because the award was based on the mediator's written report to the court. Note that in *Foxgate* the mediator was acting not only as a neutral, but also as the discovery special master reporting directly to the court.

The subject of confidentiality of mediation has never been more fully analyzed than in the controversial case of *Rojas v Superior Court* (2004) 33 C4th 407, 15 CR3d 643. In *Rojas,* the California Supreme Court ruled that everything prepared for the mediation, including raw test data, photographs, or witness statements, and statements made by parties, witnesses, or counsel in the course of or pursuant to mediation, are protected by the mediation privilege in Evid C §1119. *Rojas* is a "must read" for all counsel representing parties in mediation and for mediators who must maintain the confidentiality of mediation proceedings if they are to maintain credibility as mediators and avoid criticism by the courts and the legal community from which they derive their business.

In *Rojas,* the owner of an apartment complex sued its builders. The case settled at mediation. Later, however, the tenants, who were not parties to the underlying case, sued both the owner and builders. They demanded production of the files of the experts and consultants in the earlier construction defect case, specifically photographs, videotapes, experts' test samples and reports, notes of their observations during inspection, their opinions and conclusions, and even documents relating to witness interviews. The supreme court agreed with the trial court, which ruled that the writings, including photographs, were not discoverable under Evid C §1119(b).

Jeff Kichaven, an independent mediator and president of Southern California Mediation Association, has written (see San Francisco Daily Journal, Mar. 12, 2004, Report, p 5) that "absolute confidentiality … may kill mediation" because, "in effect [it] suspends the operation of tort law wherever it applies." In his article, Kichaven cites four hypothetical situations that could occur at mediation and in which absolute confidentiality would result in a manifest injustice. These include situations in which an attorney's misconduct might warrant professional discipline but a client's complaint to the State Bar might render the State Bar unable to consider evidence of what was said at the mediation. Similarly, in a state court malpractice action, all evidence of what was said at the mediation would be excluded. In a third hypothetical, an insurance carrier, acting in "bad faith" and threatening to stop its defense, thereby forcing an insured to settle with its own money, could prevent the introduction of such evidence in a later action against the carrier. In another scenario, a mediator, ignoring the need to be neutral, bullies or coerces a settlement, gives manifestly incorrect legal advice, or drafts a wholly inadequate release containing a "standard" confidentiality provision without permitting the parties sufficient time to read it. In his article, Kichaven states that these complexities cannot be ignored and argues that future legislation must recognize this if mediation is to be effective.

The mediation confidentiality statute has been held to include communications made among mediation participants outside the presence of the mediator but during the mediation session. These communications are inadmissible "provided that these communications are materially related to the mediation." *Eisendrath v Superior Court* (2003) 109 CA4th 351, 134 CR2d 716. In this case the court also held that mediation communications cannot be disclosed as a result of a claim of implied waiver, that the mediator cannot be compelled to testify, and that the mediator is one of the persons who must give consent to disclosure. Evid C §§1118, 1122(a)(1).

The supreme court in *Simmons v Ghaderi* (2008) 44 C4th 570, 80 CR3d 83, approved the analysis in *Eisendrath* by holding that there is no implied waiver of mediation confidentiality. *Simmons* involved an oral settlement agreement reached in mediation between a plaintiff and a defendant's insurance carrier. The carrier had consent to settle the case, but the defendant revoked the consent before the agreement was reduced to writing. The court held that mediation

confidentiality would apply to bar the admission of evidence related to the oral agreement as no exception to confidentiality existed, even though the defendant did not raise the confidentiality issue until filing her trial brief 15 months after the mediation and after the plaintiff amended the complaint to assert a cause of action for breach of the same oral agreement.

For further discussion of mediation confidentiality, see §§14.32A-14.32B, 14.87. See also *Porter v Wyner* (2010) 183 CA4th 949, ___ CR3d ___ (containing vigorous dissenting opinion) and *Marriage of Kieturakis* (2006) 138 CA4th 56, 41 CR3d 119 for an exhaustive discussion of the conflicting public policies at work.

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B. Preliminary Considerations in Real Estate Cases

1. Ascertain How Parties Arrived at Mediation

§14.54 a. Is There a Contract? What Rules Apply?

First, find out whether there is a contract requiring mediation and which rules are to be followed in the course of the mediation. The following are some of the rules:

- American Arbitration Association (AAA) real estate industry rules, commercial rules, and construction industry rules. See http://www.adr.org, under "Rules Updates."
- Other private mediation organization rules, such as JAMS. See, *e.g.,* http://www.jamsadr.com under "Arbitration," "Arbitration rules."
- Party-prepared rules or procedures.

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§14.55 b. What Is Part of Contract and What Is Not?

Another important item to resolve is, if there is a contract, what is part of the contract and what is not. If a Real Estate Transfer Disclosure Statement (TDS) is involved, *e.g.*, the mediation clause in the contract may or may not cover a dispute over whether the seller complied with the TDS requirements. See §14.40A.

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§14.56 2. Effect of Party's Refusal to Mediate

When a statute requires that a dispute first be mediated, mediation is typically a condition precedent to an award of attorney fees in a subsequent arbitration or court action. Other sanctions are usually built into the statute, such as a stay of the lawsuit, court discretion to order payment of costs (with interest), or other additional remedies that the court may consider in the interest of justice. See, *e.g.,* statutes cited in §§14.3-14.4. Because of the nature of mediation (being a voluntary process), it is unlikely that a petition to compel mediation would be successful. See *Jeld-Wen, Inc. v Superior Court* (2007) 146 CA4th 536, 53 CR3d 115.

Similarly, when a contract requires that a dispute first be mediated, participation in mediation is nearly always a condition precedent to an award of attorney fees in a subsequent arbitration or court action. See *Leamon v Krajkiewcz* (2003) 107 CA4th 424, 132 CR2d 362, review denied May 14, 2003, in which the court denied attorney fees to a homeowner (who had prevailed in a quiet title action against the potential buyers of her single-family home by establishing that the written contract was invalid) because mediation did not precede the filing of the court action. Some situations, however, allow the plaintiff to file a lawsuit and proceed with ADR without waiving attorney fees. See, *e.g*., *Kahn v Chetcuti* (2002) 101 CA4th 61, 123 CR2d 606 (attorney fee award to plaintiff upheld because plaintiff filed court action only to preserve claim before statute of limitations expired).

The *Leamon* case does not state which version of a "standard residential purchase agreement" was involved in the action or whether it contained the typical CAR exclusions from the mediation and arbitration provision (see clause cited in §§14.11, 14.28, excepting from ADR actions such as foreclosure, unlawful detainer, probate, small claims, and bankruptcy, but allowing the filing of court actions involving a lis pendens or provisional remedies as long as the parties comply with ADR in conjunction with the action). Whether this case may be good law on the facts is hard to tell; at best it is factually driven by an unknown version of the contract. However, the buyers had first filed a small claims action against Leamon, the homeowner. Leamon filed her own superior court action seeking to quiet title and to recover damages, and sought to consolidate. There is no mention of whether a *lis pendens* was recorded on the quiet title claim, but it was only *after* the filing of the buyers' own claim and the filing of the superior court action that the buyers' counsel demanded mediation of *Leamon*. The cases were not consolidated because the small claims action was dismissed. Whether a case that has the typical CAR allowance for the filing of a court action to enable the recordation of a notice of pending action would have the same result is questionable.

PRACTICE TIP: Plaintiff: To avoid the problem of a claim of waiver of right to attorney fees by going to the courthouse first, send a demand letter with notice of intent to mediate the matter before or at the same time as your litigation filing under the exception in the relevant contract, stating that mediation will go forward and that the litigation filing is to protect the rights of your client under the applicable contract exception. If the contract contains an unconditional exception that applies, mediation is not required.

Failure to strictly comply with mandatory mediation provisions in contracts can produce severe consequences to disputants and high risk of malpractice to counsel. In *Frei v Davey* (2004) 124 CA4th 1506, 22 CR3d 429, the sellers of a home (defendants) submitted a counteroffer that was accepted by the buyers (plaintiffs). The sellers then refused to close escrow. The buyers sued for specific performance. Before doing so, however, the buyers' attorney wrote to the sellers demanding mediation pursuant to the mandatory mediation provision. No response was received. After service of the lawsuit, the buyers' attorney again wrote to the sellers requesting prompt agreement to mediate. At that point, the sellers retained counsel, who responded that his clients were not interested in mediation. Approximately 1 month later, sellers' counsel telephoned buyers' counsel to say that although he had recommended the mediation, he was unable to persuade the sellers. The parties unsuccessfully mediated the matter nearly a year later, and just 1 month before trial.

After judgment was entered for the sellers following an appeal, they filed two motions for attorney fees incurred on both the appeal and the underlying action. The trial court granted both motions, but the court of appeal reversed, finding that the sellers violated the mediation provision. The court rejected the sellers' argument that when the buyers filed suit to enable them to record a lis pendens against the property, they nullified the mediation provision. The

contract merely stated that the filing of a court action "to enable the recording of a notice of pending action … shall not constitute a violation of the mediation and arbitration provisions." 124 CA4th 1506, 1509. It did not exempt the parties from the mediation requirement.

The *Frei* court emphasized that the dispute over $18,540, which generated $130,500 in attorney fees to the sellers, would have been much easier to resolve if promptly mediated. Read strictly, a plaintiff waives its rights to attorney fees by filing suit even if, realizing the error, it then immediately agrees to mediate. Currently, there is not any law stating whether plaintiff may reclaim its right to attorney fees.

PRACTICE TIP: If a plaintiff agrees to mediate after filing an action but no exception under the contract excuses the filing, defense counsel should proceed, if at all, only after communicating the position that plaintiff may not reclaim its right to attorney fees. Although the plaintiff might claim that defendant has not suffered any harm due to the plaintiff's agreement to mediate and that the action can be resolved most efficiently if the parties are still bound by the mediation provision, the defendant should argue that it has been prejudiced by the plaintiff filing suit (*e.g.,* by being forced to answer the complaint or prepare the petition to compel arbitration, incurring attorneys fees, and losing the privacy available when handling disputes through mediation).

A prelitigation mediation requirement may not be strictly applied when the prevailing party who claims the attorney fees did not instigate the litigation. In *Van Slyke v Gibson* (2007) 146 CA4th 1296, 53 CR3d 491, the real estate purchase agreement provided that in any action between the parties, the prevailing party could recover attorney fees, unless that party brought the action without first attempting to mediate. Because the prevailing parties were the defendants, the court concluded that they were not obligated to seek mediation before defending the action.

PRACTICE TIP: Defendant: Despite the ruling in *Van Slyke*, and because language of prelitigation requirements may vary from contract to contract, it is good practice to send a written offer to mediate before or at the same time as responding to a complaint. If the plaintiff ultimately prevails after refusing to mediate, evidence of that offer and refusal will be available to defend against an attorney fee motion.

Disputes between buyers and sellers, or homeowners and condominium associations, often escalate so that by the time counsel is involved, parties may not even be willing to talk to each other. However, since mediation provisions are becoming more common in agreements, counsel must carefully review their specific language, urge clients to mediate early, and point out the potentially expensive consequences of failing to do so.

Many court-ordered programs provide for the penalty of monetary sanctions for refusal to participate. Some courts use stipulated court orders when sending cases to court-connected mediation programs such as Contra Costa County's EASE (Effective Assistance Settling Early) or SMART (Special Mediators Actively Reducing Trials) programs. After the parties have stipulated in the order to terms such as to have "trial counsel with full knowledge of the case" present, have carrier representatives with "full settlement authority and full knowledge of the insurance claim file" present, have clients present and prepared to discuss settlement, and have "completed sufficient investigation and discovery to have a meaningful" mediation, a court's general power to sanction for disobeying a court order is in place. But local rules authorizing such sanctions are subject to challenge. In *Jeld-Wen, Inc. v Superior Court* (2007) 146 CA4th 536, 541, 53 CR3d 115, *e.g*., the court held that trial courts do not have the authority to order parties to participate in and pay for *private* mediation. The court extended the principle expressed in Cal Rules of Ct 3.853(2), which allows parties to withdraw from *court-connected* mediation even if ordered to participate.

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§14.57 3. Voluntary Nature of Mediation

As discussed in §14.56, if the contract requires mediation and one party fails to mediate, a waiver of an attorney fee provision in the mediation clause is enforceable against the party who fails to mediate. *Johnson v Siegel* (2000) 84 CA4th 1087, 101 CR2d 412. If a party considers whether it should refuse to mediate because it disputes the validity of the underlying contract, it should proceed cautiously. Participation in mediation before litigation does not preclude a judgment invalidating the contract if the party states its position in the request for mediation that the contract is "voidable or invalid" and that mediation is sought to preserve a claim for attorney fees. *Leamon v Krajkiewcz* (2003) 107 CA4th 424, 433, 132 CR2d 362.

Other than sanctions, such as denying attorney fees to the party refusing to mediate (see §14.56), there is little that can be done to force an unwilling party to the table. See, *e.g*., *Jeld-Wen, Inc. v Superior Court* (2007) 146 CA4th 536, 53 CR3d 115, holding that trial courts do not have authority to order parties that have not previously agreed to mediate to participate in private mediation. Even if the parties have a predispute agreement to mediate, the reasoning in *Jeld-Wen* will probably prevail and the only remedy for refusing to mediate will be sanctions.

Because of the nature of mediation (as a voluntary process), an order compelling participation in mediation could be viewed in the same vein as a personal services contract, for which courts do not readily grant specific performance. See *Barndt v County of Los Angeles* (1989) 211 CA3d 397, 259 CR 372, citing *Poultry Producers v Barlow* (1922) 189 C 278, 208 P 93. The defaulting party might appear but not meaningfully participate. Examination of the statutes that mandate mediation (see §§14.3-14.4) reflect that monetary and other penalties are the remedy for noncompliance, not a court order to mediate. Note that a distinction must be drawn between refusing to attend mediation required by predispute contractual agreement or statute, for which monetary penalties may be imposed (*Johnson v Siegel, supra*) and refusing to attend private mediation ordered by the court but not required by predispute contractual agreement or statute, for which monetary penalties may not be imposed (*Jeld-Wen, Inc. v Superior Court, supra*). For further discussion of mediation mandated by agreement, see §§14.11-14.15.

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C. Winning at Mediation

1. Objective: Identify Reasons for Mediation

§14.58 a. Obtain Best Possible Result or Settlement

Each claimant's motivation is different, but it is a rare claimant who wishes to drag out a dispute through litigation and possibly appeal, expending personal funds to do so. Most claimants seek counsel who will get the matter resolved as rapidly and economically as possible.

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.59 b. Facilitate Communication Among Parties

§14.59 b. Facilitate Communication Among Parties

Giving the parties to a dispute an opportunity for direct involvement and empowering them with the ability to resolve their dispute leads to client satisfaction and success in mediation. Often the parties feel that they are not participating in their own case and that counsel have taken control over. Mediation is "the parties' process" because clearly a resolution cannot be reached without their consent.

PRACTICE TIP: In many residential real estate contract disputes, buyers and sellers have never met or spoken to each other. Neither side has a complete understanding of the other because both sides have dealt only through real estate professionals. Mediation can be the first time the parties ever meet and see what the other side looks like. A trained mediator can recognize whether there is a misunderstanding resulting from a communication problem or whether a true disagreement exists. If the latter, the mediator's skills can be used to uncover the real differences by working with the parties and other negotiators to an ultimate resolution.

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.60 c. Minimize Impairment of Ongoing Relationships

§14.60 c. Minimize Impairment of Ongoing Relationships

Often in real-estate-related and construction disputes, there are ongoing relationships that the parties wish to preserve. These can be partners in a real estate development project, landlord and tenant, contractor and owner, contractor and subcontractors, contractor and architect, family members owning property together, real estate licensees in the same office or company, homeowner and homeowners' association, neighbors, insurance coverage disputes between carriers, or shareholders in the same business. There are limitless possibilities in a real estate context in which people wish to maintain a good relationship and do not want to have it break down over a litigated dispute. These matters clearly point toward mediation as a resolution process.

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§14.61 d. Help Parties Evaluate Risk/Rewards of Litigating to Conclusion

Much time is spent in mediation to bring the parties and other negotiators through the evaluation process and to an understanding of each other's positions and claims. Because of this process, a higher level of client satisfaction, cooperation, and understanding is obtained in a negotiated result. Parties feel they have more control of the process than they would in litigation. Once the risks of litigation are acknowledged and the insights of the neutral mediator are applied to the claims and contentions of the parties, negotiation positions may soften, possibly leading to settlement.

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§14.62 e. Handle Client Expectations

Exercise caution in handling the client's expectations that resolution will occur, especially when the client wishes to have a particular problem solved right away (*e.g.,* client cannot afford repairs when there are two inches of water above the baseboards of the family room). If it seems that the client intends to use mediation as a free discovery tool, explain that resolution is not likely to occur at the session.

Advise the client not to expect the mediator to agree that the client should get 100 cents on the dollar. All parties in mediation must compromise to resolve the dispute.

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§14.63 f. Obtain Neutral Third Party Assessment

A neutral third party assessment of case arguments and positions is often helpful and can be accomplished through mediation. However, it may be better accomplished by the separate hiring of a neutral person ("neutral") to supply that assessment outside of mediation. The ADR programs of many courts, especially the federal courts, will assign a "neutral" under their "Early Neutral Evaluation" programs. In these situations, the "neutral" will meet with disputants and their counsel, review briefs and documents, invite oral presentations and "offers of proof," and then issue *only* to the parties and their counsel a report giving an evaluation of the strengths and weaknesses of the various parties. Typically, this evaluation does not find its way into the court's file. Some neutral evaluators will, if specifically requested, attempt to mediate, usually once the parties and counsel have had an opportunity to review the report.

A separate assessment using an experienced ADR neutral will eliminate the downside of (1) taking a client to mediation who expects resolution, or (2) alienating opposing counsel, parties, or claims adjusters who attend the mediation with dissimilar goals. The costs and benefits of a separate assessment must be carefully weighed, however, because it can greatly increase overall costs. Many experienced mediators utilize an "evaluative" approach to mediation, whereby they will ask questions, especially in the private caucuses, designed to suggest how the facts or law or both might be viewed by a judge, jury, or arbitrator should the matter fail to settle at mediation. Some mediators will go so far as to give an opinion. This style is in contrast to the more "facilitative" style of other mediators whose preference is to adopt a completely "hands-off" style.

Obtaining a neutral third party assessment may also be beneficial prior to a binding arbitration. Even though it may seem economical, it is impractical to have a neutral mediate a case and then use the same neutral to arbitrate it. The mediator is technically no longer neutral after mediation, because he or she has confidential information about the parties' claims and positions. Having this information does not ethically permit a mediator to be truly neutral as an arbitrator. See Evid C §§1118-1122; *Foxgate Homeowners Ass'n v Bramalea Cal., Inc.* (2001) 26 C4th 1, 108 CR2d 642 (discussed in §14.53). If a third party assessment is to be sought, separate the neutrals from each other to provide a more thorough and frank assessment. Some practitioners, however, believe that the *Foxgate* decision does not reach far enough to preclude the parties from stipulating to have the appointed mediator also conduct a binding arbitration.

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2. What Is "Winning"?

§14.64 a. Eliminate Exposure or Risk From Trial

Dispute situations do not improve when they are not resolved by mediation. Getting reasonable compensation and eliminating the costs of litigation, minimizing the risk of losing the case on disputed factual issues, together with resolving nonmonetary issues (see §14.65), is a "win" at mediation.

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§14.65 b. Resolve Issues That Might Not Be Determined at Trial

By settling at mediation, other issues can be resolved that would not be decided by a judgment after trial. Issues between the parties that may exist in other venues, potential future issues between the parties, confidentiality agreements with or without liquidated damages for breach, agreements between related parties for contribution or indemnity, coverage issues, and a CC §1542 waiver for claims not involved in the litigation itself can be decided in a settlement at mediation. If not resolved during mediation, these issues might continue to be costly, unresolved disputes.

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§14.66 c. Lessen Risk of Avoidance of Payment of Judgment

Proceeding to trial and obtaining judgment can be a hollow victory if the judgment debtor can discharge the debt in bankruptcy or otherwise avoid paying it. Obtaining a settlement in which it is agreed that reasonable compensation will be paid and no collection proceedings will be necessary is a significant benefit of mediation.

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§14.67 d. Satisfy Parties' Specific Needs

There are many specific needs of various parties that could be covered in a discussion on the topic of "winning" at mediation. Parties come to mediation with so many diverse cultural, ethnic, religious, gender, entity or personal, personality, racial, educational, and other needs and beliefs that no mediation can be exactly the same as another. Mediators must often deal with such cross-cultural disputes. Goals for a successful settlement will differ because values, traditions, and beliefs of other cultures and parties differ. A mediation will be more effective if the mediator knows something about the dynamics of cross-cultural disputes and unique cultural values, such as avoidance of conflict and preference for resolution, "saving face," or beliefs such as "sitting at a squared off table is bad form, round tables are better for problem solving," or other negotiating concepts (*e.g.,* in some countries a contract when formed is good for that day, but the parties' culture understands that they continue to negotiate and the contract is always changeable).

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3. Crucial Premediation Questions

§14.68 a. Who Should Be at the Table?

Determine which persons are in the best position to (1) understand that the mediation process best serves the party's objectives and goals; (2) objectively evaluate the facts to respond to issues; and (3) objectively stand back to see the whole picture of the dispute and make the necessary gestures or concessions to get the settlement process started, such as opening communication with opposing parties. These persons should be involved in the mediation. For discussion of binding third parties, see §14.50. Generally, no case may be settled without a party's consent. *Levy v Superior Court* (1995) 10 C4th 578, 41 CR2d 878. However, in *Fiege v Cooke* (2004) 125 CA4th 1350, 23 CR3d 496, the court granted a motion to compel settlement despite a defendant's lack of consent because all defendants were insured under policies that gave their insurers the right to settle without the defendants' consent. See also *Stewart v Preston Pipeline, Inc.* (2005) 134 CA4th 1565, 36 CR3d 901, discussed in §14.32.

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§14.69 b. What Are Appropriate Qualifications and Style of Mediator?

It is important to determine the appropriate qualifications and style of the mediator to best fit the case at hand.

Does the case call for a retired judge? Not every case calls for a retired member of the judiciary. Many do, however, and counsel should analyze the case to evaluate the type of mediator that is needed for the particular parties and issues. Counsel should ascertain whether the opposition or counsel's own client will not listen to someone who does not have the "black robe" of authority.

Does the case need an industry expert rather than a lawyer? Many do, and if so, it is more effective to hire an industry mediator (or an attorney mediator with special skills) to whom the parties will listen because of the mediator's expertise in the field.

What style will be most effective in the dispute? Mediator styles can be "facilitative," "evaluative," "arm-twister," "judicial" (*i.e.,* settlement conference oriented), or "therapist." Know the client, the other parties, and other counsel's feelings for the type of mediation and select a mediator to fit the needs of all participants. Often, a mediator may use all these styles. Interview or investigate the mediation style of the candidates for mediator. Call the mediator and ask questions if information about him or her cannot be obtained in another way. Mediators are usually open and willing to discuss these issues. If you cannot do it in advance of selection because of timing or other reasons, be sure to contact the mediator before the mediation to learn his or her style and method of mediation.

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§14.70 c. What Is the Neutral's Role?

Ascertain how the mediation process is typically conducted by the candidates for mediator. Advise the selected mediator of issues in the case or parties that may lead to an adjustment in the typical mediator's role. Some mediators stay in an open session (*i.e.*, present with parties, counsel, and other participating representatives, such as claims adjusters and experts) for the entire mediation. Examine the case and see whether the issues, the parties, and the emotions in the case will warrant such a role. If the mediator does not ask for input on the process, volunteer it either in a premediation telephone call or at the start of mediation.

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§14.70A d. Is the Mediator Truly Neutral?

Mediators do not usually provide legal advice, but their status may allow them to influence the positions taken by the mediating parties. One role of the mediator is to help each party understand the other's position and find a resolution acceptable to both. Consequently, many mediators will offer their opinions, and a party may give more weight to them if it believes that mediators are neutral rather than aligned with the interests of adversaries. Before an attorney agrees to serve for compensation as a mediator, therefore, the attorney must completely disclose all facts and circumstances that in the attorney's honest judgment may influence any party in choosing the attorney as a mediator. See *Furia v Helm* (2003) 111 CA4th 945, 4 CR3d 357. The *Furia* decision stated in dicta that without such disclosure, an attorney may be held civilly liable for the loss caused by the lack of disclosure.

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.71 e. Should There Be a Preliminary Information Exchange?

§14.71 e. Should There Be a Preliminary Information Exchange?

Ask the following question: Do all party advocates have sufficient information to adequately assess the settlement value of the case? Unlike litigation, full discovery is not necessary for mediation. Often the parties want to avoid that cost and get directly to mediation, or the contract requires mediation before discovery is possible. If counsel lack sufficient information, an exchange must be made before the session so that a settlement value can be discussed with the client. See §§14.74-14.75 for some tips. See also DeBene, *Getting Ready for Mediating Pre-Litigation Real Estate Cases Under CAR Form Contracts*, 19 Contra Costa Law 24 (May 2006).

PRACTICE TIP: If cooperation from the opposing party or counsel representatives is not forthcoming, contact the mediator, who may assist in obtaining the necessary items for a successful mediation.

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§14.72 f. Should You Prepare a Premediation Statement of Law and Fact?

Should you prepare a premediation statement of law and fact and other documents that support your claim or defense? The short answer is yes; prepare one and circulate it to the other parties. If counsel desires that certain information be presented as "confidential," prepare a second confidential brief on these points for the mediator only.

Mediation statements or briefs can be effective persuasive tools, which demonstrate to the mediator your side's strengths and the other's weaknesses and may convince the other side to reevaluate its position. If one side is wrong about the law applicable to the case, the mediation statements can underscore this more effectively than oral argument.

If there is a real estate contract at issue, or the claim is based on a purchase and sale, option, lease, or other written agreement, whether counsel believes the contract is crucial to the mediation or not, he or she should send it to the mediator. A portion of the role of a mediator is to obtain agreement of the parties. Doing so often requires risk assessment and proposing creative or unusual ideas for resolution. In many instances, the terms and conditions of the contract are helpful to the mediator. For example, attorney fee clauses are frequently different depending on the contract used, inspection contingency language may differ from contract to contract, or addendums to an original offer may eliminate or override contract language that a party contends is the basis of the claim.

Typically, both sides brief the mediator simultaneously. If counsel wishes that briefing should not be simultaneous, he or she should suggest the alternative to the mediator at the initial call setting up the mediation. If simultaneous briefing does occur, counsel should be prepared at the mediation to discuss the law that opposing counsel recite in their statement of law.

PRACTICE TIP: Attend the mediation prepared on issues of law that may not have been already addressed, rather than having to state to the mediator "I just learned of this and did not have time to research it." If a particularly crucial point of law is at stake, the client confidence level drops substantially, leading to difficulty in obtaining agreement on settlement proposals. Thorough preparation creates results.

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.73 g. Should a Premediation Conference Be Held?

§14.73 g. Should a Premediation Conference Be Held?

Whether there is a premediation conference will depend on the mediator, the parties, and the case. There are no hard and fast rules. Many mediators conduct premediation conferences as a rule; many do not. If there is a question about the procedure, ask the mediator about it at the initial contact. If an important item develops that the mediator should know, pass it along or suggest a premediation conference. If it is difficult to obtain attendance by a party, claims adjuster, witness, or noncontractually bound person, contact the mediator, who can either set up a conference call with those persons or call them directly to strongly encourage their participation.

If an insured is fully covered by insurance, the consent of the insured defendant may not always be required for settlement, unless the policy specifically provides for written consent. *Fiege v Cooke* (2004) 125 CA4th 1350, 23 CR3d 496. This case illustrates why it is often a good idea for the mediator to have a premediation conference with defense counsel representing a party under the terms of a liability policy.

Note that mediations differ from arbitrations or litigation in that the mediator can speak with each side without the others being present. Confidential communication is available. If there is a matter that counsel wishes the mediator to know, or on which counsel needs the assistance of the mediator prior to the session, contact with the mediator can be made with a suggestion that a premediation conference be held.

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D. Barriers to Effective Mediation

1. Lack of Preparation or Information

§14.74 a. Knowing the Law

From preparation comes strength in negotiation. For example, in a fraud/nondisclosure case, know the measure of damages and the limitations on it, and be prepared with proof to support the demand for settlement. It is embarrassing not only to present to a mediator the incorrect theory of law to support the case but also to present the improper basis of damages. In an arbitration, rather than mediation, failure in this area can be crucial to winning or losing the arbitration because the arbitrator cannot assist in presenting evidence to support a party's claims or case. In mediation, lack of knowledge of the law or of the basis for damages reduces the client's confidence and is a barrier to settlement.

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§14.75 b. Conducting Limited Discovery

Be prepared by having completed prior to mediation what is, for the type of case, efficient discovery. If this means propounding written discovery to ascertain insurance coverage of opposing parties, accomplish that work in advance of mediation.

Often, however, counsel or parties may wish to proceed to mediation to avoid the costs of litigation, or contract provisions may require mediation prior to litigation or arbitration. If so, informal discovery can be the most difficult aspect of premediation preparation. Each mediation has its own "life," and an important role of an advocate for a party entering mediation is to have enough information to be able to assess the case and make a settlement recommendation. Some often-overlooked tips for obtaining information without formal discovery are as follows:

- Ask the party or opposing counsel for voluntary discovery. If the goal is to reach resolution as economically as possible, a cooperative exchange of information will serve both sides. If there is reticence or reluctance to give up "free" discovery, ask the mediator to suggest it in a premediation conference call.
- Conduct informal interviews of witnesses and, if agreeable to opposing counsel, of opposing parties.
- If a site is involved in the dispute, make an inspection of it as early as possible. At a minimum, drive by the site and seek cooperation in obtaining an inspection of the property. If it is a case in which formal discovery is not possible, seeing the property, even in the presence of the opposing party and counsel, is preferable to not knowing the lay of the land.
- If an inspection is made, take photos or have the client take them. Even though the photos may not later be admissible because taken by counsel, they will be of benefit at a mediation to give the mediator an overview of the property and the alleged claims.
- If it may be helpful, call an expert and go over the claims. Attempt to bring the expert to the site inspection, but, if not economically possible, at least give the expert copies of the photos and obtain input that can be passed on to the mediator.
- Have the expert on phone standby in case the mediator wishes to discuss a point with him or her. A mediator, particularly an industry mediator, often has more knowledge than counsel about a damage claim or repair cost. If the mediator can reach a retained consultant or expert by telephone, delay in the mediation process can be minimized.

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.76 c. Preparing Client for Mediation

§14.76 c. Preparing Client for Mediation

Although the mediator will do some educating on how he or she will handle the session, even sophisticated business people may have only a rudimentary understanding of mediation. Persons who are in a hurry to complete mediation are typically dissatisfied with the process. The mediator has not been living with the case in dispute as counsel and the client have. The mediator needs time to work through the issues and the concerns of each party and to conduct the bargaining process.

PRACTICE TIP: The attorney must educate the client on the benefits of patience. Explain to the client the mediator's "down time," when they are not with the mediator. The mediator must take time to analyze more than just the client's positions and concerns.

Many nonlawyer or non-real-estate professionals who have not been at mediation before (and many who have) will want to be elsewhere making money or doing more forward-thinking work. Encourage the client to have a different perspective: patience in resolving this dispute and reaching settlement will free up an enormous amount of nonproductive time that they may otherwise have to spend in the litigation process. Although the process may not be as rapid as they would like, nothing is any faster than mediation.

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.77 d. Preparing Client to Compromise

§14.77 d. Preparing Client to Compromise

Preparing a client for a compromise can be started by having the client review any draft settlement agreement. Before arriving at the mediation, counsel should review with the client his or her demands and possible alternatives to getting everything he or she wants. Discuss nonmonetary settlement proposals with the client in advance of the session and be prepared to propose them again if the client is not satisfied by what is on the table. See also DeBene, *Getting Ready for Mediating Pre-Litigation Real Estate Cases Under CAR Form Contracts*, 19 Contra Costa Law 24 (May 2006).

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Source: Real Property/California Real Property Remedies and Damages/14 Alternative Dispute Resolution for Real Property Actions/§14.78 e. Preparing Client to Speak

§14.78 e. Preparing Client to Speak

Many mediators want to hear from the clients themselves, not just counsel. If counsel or the client is concerned about the client's speaking, remind the client about confidentiality, rehearse the client's presentation, and prepare a list of items that the client should not discuss.

PRACTICE TIP: Most people involved in real estate disputes (*e.g.,* buyers and sellers of residential property, landlord and tenant, neighbors, partners, family members) know about legal proceedings from television. It is unusual on television that the parties speak extensively; they often remain silent, allowing the stars of the show—lawyers, police, court personnel, or witnesses—to do all the talking. To develop the skills of the client for successful mediation, explain the process, explain confidentiality, encourage the client's participation, and prepare the client to take control of his or her dispute resolution.

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§14.79 2. Problems in Negotiation Process

Lack of good faith. Business practices of participants in a mediation setting can sabotage the mediation. For example, some attorneys or insurance carriers wish to use the process only for "free discovery" and not to resolve the case. Insurers or corporate representatives may intentionally attend a mediation without full settlement authority in order to make the other parties "move to" their numbers.

Other business practices of insurers can erode the integrity of the mediation as a resolution process, such as refusing to send to the mediation an adjuster with full settlement authority, "blackballing" mediators that do not accede to their practices, instructing defense counsel to oppose an open exchange of preliminary data under the confidentiality privilege of mediation, forcing the plaintiff and other parties to spend time and money arguing over the terms of pretrial orders or mediation agreements rather than providing their own defense counsel sufficient funds to prepare for the mediation session.

Puffing one's position. A party or its counsel may demonstrate that it has overestimated the justification for its own position by lack of attention to the believability that a mediator may see in the facts presented by the opposing party, by overly aggressive litigation tactics at the mediation, by lack of risk assessment on legal positions taken by the opposing side, or by posturing for client benefit.

Attorney fees that drive the settlement. Recall that a mediation is "the parties' process." Counsel's attorney fees should not control the settlement. Often, a mediator is likely to see a party nodding in agreement to a settlement figure "floated" or offered to them, while the attorney is expressing a verbal "no" to the same number, perhaps because of the inadequacy of the legal fees in the amount. A distinct ethical conflict arises in this situation. Remember that ethics require that the client's interests come first.

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§14.80 3. Emotions and Lack of Trust

Perceptions of opposing parties toward one another often frustrate hopes of settlement. Motivations of the players, not just the parties, in litigation (or in disputes prior to litigation) are varied and complicated. The court in a litigated case seeks mediation or arbitration as a method of case management. A party's reluctance to settle or participate in ADR may create an emotional and practical dichotomy vis-à-vis the court. Large corporations, insurance companies, or other institutional parties may have motivations to try a case, rather than settling it, in order to set legal principle or maintain a public image of not being a easy target for claims.

Because of the confidential aspects of mediation, the undisclosed emotions and motives of one party can lead to distrust by other parties. This lack of trust can quickly lead to accusations of lack of a good faith participation in the process. Unless the emotions and lack of trust are mitigated before or during the mediation process, continued frustration over alleged bad faith tactics, and waste of time and money issues, can destroy the hope of settlement. Counsel for the parties should discuss these issues with clients prior to the mediation. If it is possible to keep an open agenda policy, rather than harboring undisclosed motives or intent, the more likely it is that the parties will be able to communicate effectively with each other and the mediator.

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§14.81 4. Negotiating Representatives

From the mediator's perspective, the most damaging bar to successful resolution is not having the proper negotiator at the mediation. The most misunderstood procedural element of a mediation is the requirement of having negotiators *with full settlement authority present at the mediation session*. This point cannot be overstressed, and it does not mean sending someone with information on what has been discussed "in-house" prior to the mediation session. Having full authority at the mediation means designating a responsible negotiator to appear on behalf of a corporate party, another business entity, or the defending insurance carrier, who has the ability to assess the case on the spot and decide any and all settlement terms, without limitations. Such persons include not only the insurance adjusters or other claims personnel, if insurance money is to be contributed to the settlement, but also those parties whose interests are to be considered and whose rights are to be compromised.

As stated in §14.27, to be enforceable under CCP §664.6, a settlement must be in writing and signed by the litigants themselves, not merely by counsel. *Levy v Superior Court* (1995) 10 C4th 578, 41 CR2d 878. Compare *Levy* with *Stewart v Preston Pipeline, Inc.* (2005) 134 CA4th 1565, 36 CR3d 901, which holds that a settlement agreement may be enforced by a nonsigning party whose attorney signed the agreement. See discussion of *Stewart* in §14.32.

Notably, *Levy* did not involve an insurance-funded settlement. However, the situation is quite different when a defendant is fully covered by insurance and the settlement is to be funded, at least in part, by the carrier. Many professional liability policies require, as a term of the insuring contract itself, that the professional consent to settlement. Such policies may or may not contain "hammer" clauses, which provide that if the insured refuses to consent, the insurer will be liable to pay only that amount for which it could have settled the claim in the event of an adverse judgment in excess of that amount. When a defense is being provided without a reservation of rights by an insurance carrier and the settlement amount is within the policy limits, the actual consent of the insured defendant may not be necessary.

In *Fiege v Cooke* (2004) 125 CA4th 1350, 23 CR3d 496, the court distinguished *Levy* and, quoting extensively from *Robertson v Chen* (1996) 44 CA4th 1290, 1293, 52 CR2d 264, concluded that the insured's consent was not necessary when insurers fully cover a settlement. 125 CA4th at 1353. The court said *Levy* "was based upon the proposition that the Legislature intended to require the litigants' 'direct participation' [in the settlement]" because this promotes their mature reflection and deliberate assent in the settlement process. 125 CA4th at 1354.

PRACTICE TIP: Whenever possible, insured defendants' signatures should be obtained even in mediated settlements that are to be fully funded by insurance coverage. When insurance-defense counsel believes that the insured will balk at any settlement, the insured should be advised to seek independent advice or to contact the insurance company directly. Insurance-defense counsel should never get in the middle of what may be a "coverage dispute" concerning the nature and scope of insurer/insured's rights and obligations. Mediators should always inquire of defense counsel whether or not consent to settlement is likely to be an issue before the commencement of the mediation and, if necessary, should speak to adjusters or claims representatives in advance of the mediation session. See §14.73.

Every mediation has its own "life." The parties differ, the issues differ, the facts are peculiar to the parties and issues, counsel are not the same, and the mediator's style and role will be molded to fit the situation. Thus it is crucial for the parties to participate in the entirety of the mediation session. Particularities of mediation, especially facilitative or "true" mediations, permit the parties' expression of their goals, positions, and information about the case. At the same time, mediator reasoning, examination of factual and legal issues, assessments of best and worst case scenarios, and risk assessments require full participation by the fully authorized negotiators for each party with the ability to comprehend and calculate the reality of continuing without settling the case.

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§14.82 5. Lack of Settlement Plan

A significant impediment to successful mediation is the lack of a settlement plan in a complex case, but this impediment can even arise in a simple case with no monetary considerations. Bringing a draft of the settlement agreement to the mediation (with an outline for managing complex negotiations) provides premediation preparation for counsel and client discussion and aids counsel in getting the client to think about settlement.

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§14.83 6. Attorney-Client Issues

Attorney-client relationships also have a life of their own. Some of the most provocative barriers to a successful mediation are:

- Attorney fees are driving the settlement. See §14.79 on ethical issues raised with this issue.
- The attorney or the client is overestimating the justification for its position. See §14.79.
- The client is losing confidence in the attorney because of the attorney's lack of preparation. See §14.74.
- The attorney cannot persuade the client that a proposal is in the client's best interest; *i.e.*, the client has unrealistic expectations. Educating the client is the key to eliminating this barrier to settlement. Early, continuous, and thorough education on the issues; forwarding the contents of any proposed settlement agreement and any alternative proposal; explaining the options, costs, and benefits of each option; and advising the client on what is realistic to expect in the light of risks cannot be overemphasized. If, after all premediation education and preparation with the client is completed, counsel feels that this may still be an impediment to successful mediation, counsel may wish to notify the mediator. Often the mediator can aid counsel in removing a barrier that is standing in the way of successful negotiation, and having advance knowledge of the situation gives the mediator time to analyze and prepare prior to the actual session.

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§14.84 7. Disagreements About Likely Outcome

Spontaneity has no place in the mediation process. Mediation is "the parties' process," and without their mutual consent, a mediated settlement cannot occur. To reach a mediated settlement, counsel must prepare the client by learning about the client's expectations before the end of the mediation session, discussing with the client the possible outcomes of alternatives to a mediated settlement (trial or arbitration), advising about the costs of the alternatives to a mediated settlement (trial, arbitration, or dismissal of the claim), and fully analyzing and discussing with the client before the mediation session a strategy to reach the best settlement possible in light of the risks of the case. See also §§14.76-14.77, 14.82.

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§14.85 8. Linkage to Other Disputes

Disputes "within" a party. Many real estate mediations that concern sale of residential property involve sellers who sold their homes after or as a result of a marital dissolution. In settlement discussions, one or both divorced parties may not wish to discuss their financial ability or inability to pay the damages claimed in the dispute while the other divorced party is in the room. If one counsel is representing both parties, that counsel should be prepared to deal with these issues and be prepared for the mediator's questions on how settlement funds will be generated. Support for one divorced spouse, for example, may be tied to income that the other divorced spouse wishes to remain as low as possible. When the mediator inquires about settlement funding, counsel for the parties may find themselves in a conflict of interest between the confidences of one party over the other. This potential conflict should be discussed in advance and conflict waivers obtained prior to the mediation.

Insurance disputes. Within the mediation context, before it, or as a submediation, insurance disputes play a role, understanding and resolution of which is essential to an effective mediated settlement. See §§14.13-14.14, 14.85D.

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E. Special Challenges to Mediating Broker Cases

§14.85A 1. High-End Litigation

The skyrocketing price of homes is likely to spawn an increase in litigation against real estate brokers and inspectors who were involved in the transaction. Attorney fees and expert testimony make these cases very expensive to litigate. Many cases are susceptible to early mediation, but broker cases offer unique challenges to the mediator.

Mediators can assist the parties and counsel to explore a variety of workable solutions, some of which may even preserve relationships that have not been irreparably damaged. The decision of whether to pay or accept a given sum to settle the case or consider other less obvious solutions should ultimately be a business decision. Parties and counsel who agree that litigation is mostly a gamble will take advantage of the skilled mediator's experience and tact. For further discussion, see §§14.58, 14.60.

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§14.85B 2. Multiple Parties

Broker cases typically involve multiple parties. One of the biggest hurdles facing settlement is getting all the players to attend the mediation. Several forms of residential purchase agreements require buyers and sellers to mediate their disputes. Some listing agreements also mandate mediation between sellers and listing brokers. Selling brokers usually have no such obligations; nor do other potential defendants such as termite and home inspectors. When they are encouraged to participate, usually under the threat of being separately sued, the mediator is faced with reconciling differing factual scenarios, legal theories, and measures of damages. Thus, multiparty cases tend to be more time-consuming, often necessitating prolonged caucusing with the mediator. For further discussion, see §§14.59, 14.61.

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§14.85C 3. Emotional Issues

Because broker cases invariably involve allegations of professional negligence, or even fraud, emotions run deep. This often presents the biggest challenge to settlement. Buyers may allege that sellers deliberately concealed material defects and that brokers misrepresented or negligently failed to properly inspect and discover them. Professional inspectors may be labeled incompetent. Buyers may threaten to report professionals to their respective licensing authorities. Brokers often resent the challenge to their "professional integrity," deny that they did anything wrong, and may blame the sellers for not following their advice to disclose everything. Sellers usually doggedly defend their disclosures as truthful, argue ignorance of the need for permits when remodeling, and justify non-code-compliant work as safe. All defendants dismissively assert "buyer's remorse" and challenge overstated repair costs as a "shakedown" of them and their insurers. To be effective, the mediator must recognize that these cases engender significant emotional overlay and must be prepared for shifts among defendants who initially seemed to be unified but suddenly point fingers at one another. The parties should be encouraged to check their emotions at the door and acknowledge that settlement will ultimately involve making nonemotional business decisions that will allow them to move on with their lives and careers. For further discussion, see §14.80.

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§14.85D 4. Availability of Insurance Coverage

Insurance issues often permeate brokerage cases. Some claims may be covered, whereas others, such as fraud, may not be. Coverage may be denied to a broker or agent who has sold his or her own property through the brokerage. Financial elder abuse, increasingly associated with "creative" seller-financing, may generate reservation of rights by insurers. So, too, might lawsuits involving housing discrimination, because the various statutes under which they are brought allow fines, penalties, or multiple damages that are excluded from coverage under most error-and-omission insurance policies. These situations are particularly challenging even for experienced mediators and may generate "mini mediations" with insurers, their coverage attorneys, and *Cumis* counsel. Sometimes, the case may evolve into separate coverage litigation in different federal or state courts and require several mediation sessions if a global settlement is to be achieved. For further discussion, see §§14.13-14.14, 14.32A, 14.53, 14.56, 14.75, 14.79, 14.81.

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§14.85E 5. Difficult Settlement

In broker cases, the parties almost always seek inconsistent settlement outcomes. For example, a defrauded buyer may be unsatisfied with a monetary settlement and prefer to rescind the transaction and recoup the purchase price plus out-of-pocket costs, including mortgage payments, taxes, moving expenses, and redecorating expenses. The seller may be only too pleased to accept rescission, especially in a rising market, or may reject rescission if the sale proceeds have been spent on other acquisitions. Brokers will usually reject rescission, particularly if it means returning commissions or if it is clear that the seller, rather than the brokerage, was at fault. Sometimes, however, brokers will cooperate if they can be assured of the chance to re-list the property or are guaranteed to recoup lost commissions in other transactions. Similarly, intransigent insurers may be prevailed upon to contribute even if coverage is questionable in order to close the file and avoid the risk and the high cost of litigating through trial. The skillful mediator will help shape a solution that satisfies needs and interests leading the parties away from positional-based negotiating. For further discussion, see §§14.64-14.67.

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§14.85F 6. Taxation Issues

There may be tax consequences to settlements, which can be further complicated if the property involved was acquired in an IRC §1031 exchange. Before engaging in a mediation involving potential rescission, counsel should be familiar with the technicalities of "undoing" transactions and consult with the buyer's lender and tax advisor. Where warranted, CPAs, appraisers, and other relevant professionals should be asked for written opinions, expressly made subject to the mediation privilege, or even attend the mediation. The mediator must never be put in the position of giving legal advice on such critical issues or losing his or her neutrality.

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§14.85G 7. Attorney Fees

Mediators experienced in broker cases will know that only certain parties in the litigation, usually only the buyer and seller, will be entitled to "prevailing party" attorney fees. These cases tend to be driven by their costs. A buyer paying counsel on a contingency fee basis may consider "rolling the dice," believing that, if successful, his attorney fees will be paid by the seller, or borne by his own attorney if he loses. Sellers, evaluating the possibility of loss, might threaten bankruptcy as a bargaining ploy, in which case the outcome of the case becomes less relevant when compared to the seller's resources, the defense lawyer's likelihood of being paid, and the value placed on avoiding bankruptcy. The mediator should explore with brokers, who may not be exposed to attorney fees, the possibility that an adverse judgment might still affect their insurability or premium rates.

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§14.86 F. Keeping Negotiations Moving When Parties Are Ready to Quit

Being persistent and willing to stay with the process when a perceived impasse is raised by a party (or when the parties are ready to end the mediation) is an attribute of a good mediator that runs across case distinctions. Regardless of his or her knowledge of case-specific law, a persistent mediator can be effective by using facilitative and evaluative techniques or by suggesting nontraditional resolutions to bridge the dispute and reach resolution. See Cahill, *Judge's Perspective: Conducting Effective Settlement Conferences and Mediations*, 29 CEB Civ Litigation Rep 48 (April 2007).

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§14.87 G. Documenting the Settlement

After all of the time, expense, and emotion have been spent in achieving a mediated agreement, the last thing anyone wants is for the agreement to be unenforceable. In complex commercial cases or even in relatively simple residential disputes, the settlement terms may involve the parties' doing more than accepting or paying money. Sometimes rescission, requiring return of down payment, mortgage payments, or tax considerations, may be part of the mediated settlement. Vacating property or putting it on the market by critical dates may be an important term. Often, these "details" are negotiated late at night when parties, counsel, insurers, and the mediator are tired and perhaps frustrated. Nevertheless, no one should leave the mediation without all parties signing a writing that clearly states the key points of agreement and leaves nothing to future negotiation. When necessary, a party, such as a spouse signing on behalf of another spouse, should have the writing reflect that full authority exists.

The writing must clearly reflect that it is a settlement agreement and not simply a memorandum of terms for a future agreement. Before stating the terms of the agreement, the writing should directly state, clearly and unequivocally, that it constitutes a binding and enforceable agreement or words to that effect. This language satisfies the admissibility requirements of Evid C §1123(b) (see §14.32B) in the event that a party needs to bring an action or file a motion to enforce the agreement. See *Fair v Bakhtiari* (2006) 40 C4th 189, 199, 51 CR3d 871. Further, because most mediated agreements are entered into outside of court, language should be inserted that the agreement "is enforceable pursuant to CCP §664.6," so that a court can enter judgment based on the settlement agreement.

The agreement must be signed by all parties. *Levy v Superior Court* (1995) 10 C4th 578, 41 CR2d 878 (signatures of litigants, not of counsel, required for enforceability under CCP §664.6 because settlement affects substantive rights); *Harris v Rudin, Richman & Appel* (1999) 74 CA4th 299, 87 CR2d 822 (signatures of all parties required, not only of party to be charged). Compare these cases with *Stewart v Preston Pipeline, Inc.* (2005) 134 CA4th 1565, 36 CR3d 901, discussed in §§14.32A-14.32B (distinguishing *Levy v Superior Court, supra,* because *Levy* was decided under CCP §664.6 and not under "mediation statutes," Evid C §§1115-1128). See also *Simmons v Ghaderi* (2008) 44 C4th 570, 80 CR3d 83 (held that there is no implied waiver of mediation confidentiality); *Rael v Davis* (2008) 166 CA4th 1608, 83 CR3d 745 (held that to effectively waive confidentiality provisions of Evid C §1119, all parties must fully execute mediation agreement).

PRACTICE TIP: A waiver of confidentiality that applies to the agreement itself should always be considered. See *Stewart v Preston Pipeline, Inc.* (2005) 134 CA4th 1565, 36 CR3d 901, cited in §§14.32A-14.32B, which reviews how consent to a settlement should be memorialized and when settlements in mediation are (or are not) confidential for the purposes of enforceability under CCP §664.6 or a motion for summary judgment.

On consent requirements for settlement and confidentiality issues in enforcing postmediation settlements, see §§14.32A-14.32B, 14.53.

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15

Constructive Trusts, Resulting Trusts, and Equitable Liens

Florrie Young Roberts

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I. CONSTRUCTIVE TRUSTS

§15.1 A. Introduction; Purpose

A constructive trust can be an effective remedy for a plaintiff who wishes to obtain title to real property. Although constructive trusts are available in a wide variety of situations, in the real property context a plaintiff may utilize this remedy when a defendant holds *legal title* to certain property that it is *inequitable* for the defendant to enjoy as against the plaintiff. *Kraus v Willow Park Pub. Golf Course* (1977) 73 CA3d 354, 373, 140 CR 744. Through the vehicle of a constructive trust, the court will compel the transfer of the property from the defendant who is wrongfully holding it to the plaintiff who is the rightful owner. *Communist Party of the United States v Valencia, Inc.* (1995) 35 CA4th 980, 990, 41 CR2d 618.

The court effectuates this title transfer by creating a fictional or "constructive" trust. In so doing, the court recognizes the legal title that is held by the defendant to the subject property but decrees that the defendant holds that title as a trustee of a trust created for the benefit of the plaintiff, the beneficiary. A constructive trust is a remedy only and does not create a substantive trust relationship between the parties. *Haskel Engineering & Supply Co. v Hartford Acc. & Indem. Co.* (1978) 78 CA3d 371, 378, 144 CR 189. The defendant's only "duty" as trustee is to immediately turn the property over to the plaintiff. *Calistoga Civic Club v City of Calistoga* (1983) 143 CA3d 111, 117, 191 CR 571; See *Jones v Sacramento Sav. & Loan Ass'n* (1967) 248 CA2d 522, 56 CR 741. Therefore, a constructive trust is an involuntary equitable trust created by operation of law. *Millard v Hathaway* (1865) 27 C 119. It is not created by the intent of the parties.

By utilizing a constructive trust, the plaintiff obtains title to the property itself as opposed to a money judgment. Even though the defendant's conduct giving rise to the constructive trust would usually afford the plaintiff a claim for damages, under constructive trust theory the plaintiff is not relegated to a personal unsecured claim against the defendant. The plaintiff is given the right to the restoration of the property itself. *Bainbridge v Stoner* (1940) 16 C2d 423, 428, 106 P2d 423; *Monica v Pelicas* (1955) 131 CA2d 700, 704, 281 P2d 269.

A constructive trust is an equitable restitutionary remedy. As a restitutionary remedy, its purpose is the prevention of the unjust enrichment of the defendant. *Kraus v Willow Park Pub. Golf Course* (1977) 73 CA3d 354, 373, 140 CR 744. A constructive trust is imposed because the person holding title to the property would profit by a wrong or would be unjustly enriched if permitted to keep the property. *Monica v Pelicas* (1955) 131 CA2d 700, 704, 281 P2d 269. All that must be shown is that the defendant's acquisition of title to the property was wrongful (as that term is defined for purposes of imposing a constructive trust (see §§15.6-15.20) and that the defendant's keeping of the property would constitute unjust enrichment. *Martin v Kehl* (1983) 145 CA3d 228, 238, 193 CR 312.

A constructive trust may be imposed in many different types of cases in which the defendant has acquired or detained property to which the plaintiff is entitled. See *Weiss v Marcus* (1975) 51 CA3d 590, 600, 124 CR 297.

Although the primary focus of this chapter is on constructive trusts as they apply to real property, some discussion involves involuntary trusts over money obtained in real property transactions.

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§15.2 B. Statutory Basis for Remedy

Constructive trusts are specifically authorized by CC §§2223 and 2224. Under §2223, a person who wrongfully detains property "is an involuntary trustee thereof, for the benefit of the owner." Under §2224 a person who gains property "by fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act" is an involuntary trustee of the property for the benefit of the one who would otherwise have had it, unless that person has some other and better right to it.

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§15.3 C. Requirements for Imposition of Constructive Trust

Three conditions must be met for the court to impose a constructive trust: "(1) the existence of a *res* (property or some interest in property); (2) the *right* of a complaining party to that res; and (3) some *wrongful* acquisition or detention of the res by another party who is not entitled to it." *Communist Party of the United States v Valencia, Inc.* (1995) 35 CA4th 980, 990, 41 CR2d 618.

EXAMPLE: Defendants wrongfully came into possession of legal title to a golf course lease, and the court imposed a constructive trust in favor of plaintiffs. The *res* was the golf course lease, plaintiffs as investors in the golf course were found to have the *right* to that lease, and the lease was acquired *wrongfully* by the defendants through the mistaken belief that they possessed the right to convey the lease to themselves. See *Kraus v Willow Park Pub. Golf Course* (1977) 73 CA3d 354, 374, 140 CR 744.

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§15.4 1. Existence of Res

A res is an identifiable property or interest in property. *Communist Party of the United States v Valencia, Inc.* (1995) 35 CA4th 980, 990, 41 CR2d 618. If no res exists, there is nothing over which the plaintiff can obtain a constructive trust. For example, if the defendant acquires title to the plaintiff's real property through fraud or mistake and then sells the property to a bona fide purchaser and consumes the proceeds (see §15.29), a constructive trust is unavailable because there is no res in the hands of the defendant over which to impose the trust.

However, if the wrongfully acquired asset is *exchanged* for other property, the newly acquired property becomes the res. *Coppinger v Superior Court* (1982) 134 CA3d 883, 891, 185 CR 24. A constructive trust allows a claimant who has lost one asset, such as money, to trace that asset to its product, such as real property. Thus, if a defendant has taken a plaintiff's money or property, sells it and uses the proceeds to buy real property, the plaintiff may impose a constructive trust on the newly acquired property. *Church v Bailey* (1949) 90 CA2d 501, 504, 203 P2d 547. In this way, a plaintiff may establish a constructive trust over real property owned by the defendant even when that real property was not the property originally taken from the plaintiff. See §§15.22-15.23.

A constructive trust on real property extends to any increase in the property's value. *Haskel Eng'g & Supply Co. v Hartford Acc. & Indem. Co.* (1978) 78 CA3d 371, 144 CR 189 (refusing to allow embezzler to retain any interest in real property that had increased in value above amount of embezzled funds). Whether a constructive trust on real property also extends to cash income from the property, such as rents, is uncertain. See Block & Brumfiel, *Constructive Trusts: Can Income in the Hands of Third Parties Be Recovered?*, 28 Cal Real Prop J 41 (No.1, 2010).

A constructive trust may be established over money obtained in the sale of real property. In *Ward v Taggart* (1959) 51 C2d 736, 336 P2d 534, real property buyers successfully sued the seller's broker to establish a constructive trust over secret profits obtained by the broker. After purchasing the property, the buyers discovered the broker had misrepresented that he was the seller's agent, actually presented the buyers' original offer to the seller as his own, closed escrow using the buyers' money, and then resold the property to the buyers at a profit of $1000 per acre, representing his selling price to the buyers as the seller's counteroffer. The supreme court upheld the constructive trust and the order requiring the broker to disgorge the profits.

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§15.5 2. Plaintiff's Right to Res

While a res might exist in the form of real property owned by the defendant, a plaintiff may not impose a constructive trust over property in which he or she has no right. The res must in equity belong to the plaintiff.

For example, if the defendant owes the plaintiff an ordinary business debt, the plaintiff's remedy is to obtain a money judgment. The plaintiff may not attempt to impose a constructive trust over some real property belonging to the defendant for the purpose of securing that debt. *Deane v Superior Court* (1985) 164 CA3d 292, 297, 210 CR 406. Similarly, if the defendant through fraud acquires the plaintiff's shares of stock, the plaintiff may impose a constructive trust on the stock but may not instead choose to impose the trust on real property owned by the defendant. The realty is not the res in which the plaintiff has a right. See *Pacific Lumber Co. v Superior Court* (1990) 226 CA3d 371, 378, 276 CR 425.

Sections 15.6-15.20 illustrate common situations in which the defendant has wrongfully acquired the res from the plaintiff, thereby giving the plaintiff the right to obtain a constructive trust over the res.

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§15.6 3. Wrongful Acquisition of Res by Defendant

Civil Code §2224 sets forth the different types of conduct by the defendant that give rise to the imposition of a constructive trust: fraud, accident, mistake, undue influence, the violation of a trust, or other wrongful act. Although these are regarded as mere guidelines (*Martin v Kehl* (1983) 145 CA3d 228, 237, 193 CR 312), the courts in imposing constructive trusts usually refer to the statute and label the defendant's conduct according to one of the enumerated types.

NOTE: Even though the statutes and case law refer to "wrongful" acquisition or detention of an asset by the defendant, a constructive trust is not limited to those situations in which the defendant was wrongful in the sense of committing a tort. A constructive trust may also be imposed in situations of mistake and other unintentional conduct by which the defendant is unjustly enriched. See §15.8. Therefore, the term "wrongful" is used generally to describe any of the fact patterns in which a defendant acquires property under circumstances warranting the imposition of a constructive trust.

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§15.7 a. Fraud

Fraudulent conduct is involved in many constructive trust cases. A constructive trust may apply to secret profits obtained in the sale of real property. *Ward v Taggart* (1959) 51 C2d 736, 336 P2d 534. A constructive trust may be imposed on real property whenever title is obtained by means of chicanery, deceit, or other variety of fraud, actual or constructive. *Sanguinetti v Rossen* (1906) 12 CA 623, 628, 107 P 560. The instances are as various as the ways in which property can be wrongfully acquired. *Brazil v Silva* (1919) 181 C 490, 494, 185 P 174. Thus, if a transaction is induced by fraud, or is in some way deemed to be fraudulent, the party who is wrongfully holding title to the property becomes an involuntary trustee of that property for the benefit of the defrauded claimant.

A classic example of fraud occurs when a grantor is tricked into signing a document conveying property but thinks the document accomplishes something else. In *Nevarez v Nevarez* (1962) 202 CA2d 596, 21 CR 70, a son had his mother, who did not understand English, sign papers that he said conveyed title to her home to him to divide equally among all of her children if she did not recover from major surgery, but if she survived, title would remain in her name. Instead, the son had the mother sign a deed absolute that conveyed title to him as his sole property, reserving a life estate in the mother. The mother was able to regain the property through a constructive trust.

Another example of fraud for which a constructive trust remedy may apply is a fraudulent transfer of property under the Uniform Fraudulent Transfer Act (CC §§3439-3439.12). See *Kirkeby v Superior Court* (2004) 33 C4th 642, 648, 15 CR3d 805, acknowledging that the Act expressly permits avoidance of the transfer and other equitable remedies very similar to a constructive trust. See §15.45. An advantage of suing under the Act is that the plaintiff is entitled to a jury trial. See *Wisden v Superior Court* (2004) 124 CA4th 750, 21 CR3d 523.

An unusual method of fraud was involved in *Brazil v Silva* (1919) 181 C 490, 494, 185 P 174. The complaint alleged that the defendant tricked the decedent into thinking that his will devising property to the defendant had been revoked in accordance with his wishes. The defendant pretended to burn the decedent's will but instead burned an empty envelope in his presence that he thought contained his will. The court held that if proven, these facts would establish that the defendant's inheritance was procured by fraud and therefore a constructive trust over the property in favor of the plaintiff/heirs would be proper. This case was not a will contest but rather an attempt to recover the property after it had been distributed to the defendant. Therefore, a constructive trust was the appropriate remedy.

A fraud action may also be brought if a grantor conveys property in reliance on a fraudulent promise. For example, in *Strausburg v Connor* (1950) 96 CA2d 398, 215 P2d 509, the plaintiff/grantor, along with her co-owners, conveyed her interest in real property to the defendant/grantee on the grantee's promise to obtain a loan and pay the grantor. When no payment was made, the grantor sued. The court found that the grantee had acquired the property by fraud and therefore became a trustee for the benefit of the grantor. See also *Warren v Merrill* (2006) 143 CA4th 96, 49 CR3d 122. Older cases contain the language that a promise made without any intention of performing it is "a well-recognized species of fraud." *Brison v Brison* (1888) 75 C 525, 528, 17 P 689.

The defendant's fraud need not be accompanied by other conduct such as breach of a confidential relationship between the parties. *Brison v Brison* (1888) 75 C 525, 528, 17 P 689. However, the reported cases involving fraud often do evidence other wrongful conduct mentioned in CC §2224, such as a violation of trust (breach of a confidential relationship). See, *e.g.,* 75 C at 528. Even in cases of accident or mistake, the courts have hinted that the conduct may have in fact also been fraudulent. See, *e.g., Monica v Pelicas* (1955) 131 CA2d 700, 281 P2d 269.

NOTE: For the purpose of imposing a constructive trust, the mere breach of an oral agreement to convey property does not constitute fraud in obtaining title. *Mazzera v Wolf* (1947) 30 C2d 531, 537, 183 P2d 649. A confidential relationship between the parties would be necessary in that event. See §15.14.

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§15.8 b. Accident or Mistake

A constructive trust may be imposed on real property in the hands of a person who acquired the property by mistake. See *Teselle v McLoughlin* (2009) 173 CA4th 156, 177, 92 CR3d 696 (denied defendant's summary judgment motion on cause of action seeking to obtain constructive trust over sales proceeds from real property and bank account funds that were transferred to the defendant by mistake). If a transaction was accidentally or mistakenly entered into, in order to prevent unjust enrichment the court may equitably make the title holder a constructive trustee for the benefit of the party who mistakenly or accidentally transferred title or relinquished funds. See, *e.g., Kraus v Willow Park Pub. Golf Course* (1977) 73 CA3d 354, 373, 140 CR 744. In one instance, the court held that property purchased with a mistakenly issued escrow refund check from the bank was to be held in a constructive trust by the purchasers for the benefit of the bank. *Goldberg v Bank of Alex Brown (In re Goldberg)* (BAP 9th Cir 1994) 168 BR 382 (applying California law). In another case, a husband and wife used the plaintiff's funds, which the wife withdrew from the plaintiff's bank account, to purchase a house in both the husband's and wife's names as joint tenants, but the plaintiff had authorized only the husband to withdraw the money and purchase the house solely in the husband's name. The court considered at a minimum this was a mistake, if not fraud, and imposed a constructive trust on the property for the benefit of the plaintiff. *Monica v Pelicas* (1955) 131 CA2d 700, 281 P2d 269.

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§15.9 c. Undue Influence

Undue influence can take many forms, including physical duress. In *Clark v Pullins* (1959) 171 CA2d 703, 341 P2d 73, a plaintiff was forced to sign a deed by a defendant who beat her and threatened to kill her if she did not sign the deed. The court held that such conduct on the part of the defendant amounted to undue influence, duress, and a wrongful act justifying the imposition of a constructive trust.

Constructive trust cases involving undue influence or duress often also involve violation of a trust and fraud, usually between family members. For example, it has been held that when one spouse obtains an unfair advantage, the confidential nature of the relationship between a husband and wife raises the presumption that property has been obtained through undue influence. *Shotte v Shotte* (1962) 203 CA2d 28, 33, 21 CR 220. Similarly, a court cited undue influence by a decedent's niece in obtaining the decedent's real property as the basis for allowing a claim by the plaintiff, who had been promised the property by the decedent in exchange for valuable consideration. *West v Stainback* (1952) 108 CA2d 806, 240 P2d 366. Because of facts unrelated to the undue influence, the court in *West* actually imposed an equitable lien, but the nature of the defendant's wrongful act applies equally to constructive trusts. Because the decedent and the defendant were close family members, this case also exemplifies violation of a trust. See a further discussion of this case in §15.80.

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§15.10 d. Violation of Trust

Imposing a constructive trust based on a violation of trust requires a two-step analysis. First the court must find the existence of a confidential relationship. See §15.11. Once the confidential relationship is established, the court examines the conduct of the defendant to see if the trust was breached. See §§15.12-15.16.

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§15.11 (1) Existence of Confidential Relationship

For a defendant's conduct to constitute a violation of a trust, a confidential relationship must exist between the plaintiff and the defendant. The terms "confidential relationship" and "fiduciary relationship" are, in law, synonymous, and exist whenever trust and confidence is reposed by one person in the integrity and fidelity of another. *Adams v Young* (1967) 255 CA2d 145, 155, 62 CR 877.

For the purpose of imposing a constructive trust, confidential relationships can be found when the parties are in business together**.** For example, the requisite relationship exists when the plaintiff and the defendant are in the fiduciary relationship of agent and principal (see *Spector v Miller* (1962) 199 CA2d 87, 94, 18 CR 426) or are engaged in a partnership (see *Koyer v Willmon* (1907) 150 C 785, 90 P 135).

Violations of a trust frequently occur when the confidential relationship is between family members. The relationship of husband and wife is a confidential relationship for the purposes of imposing a constructive trust. *Huber v Huber* (1946) 27 C2d 784, 790, 167 P2d 708. See also presumptions in Fam C §721, discussed in §6.22. Courts have found a confidential relationship even if the marriage turns out to be void or invalid. See *Shotte v Shotte* (1962) 203 CA2d 28, 33, 21 CR 220, discussed in §15.14. In imposing a constructive trust, a court may also find significant a relationship between unmarried partners who resided together as husband and wife for a considerable time. See *Estrada v Garcia* (1955) 132 CA2d 545, 282 P2d 547, discussed in §15.18.

A confidential relationship has also been found between other family members. However, unlike the relationship of husband and wife, other familial relationships do not per se establish a confidential relationship. See *Briggs v Nilson* (1964) 226 CA2d 342, 346, 38 CR 68. Many cases involve a confidential relationship between a parent and an adult child. The court in *Briggs* found a fiduciary duty passing from a parent to a child on the basis of factors that establish a confidential relationship, including the daughter's obedient, dutiful, loving demeanor, her compliance with her mother's demands, her acquiescence to her mother's handling and management of her properties, and her blind trust in signing documents presented to her by her mother. *Briggs v Nilson* (1964) 226 CA2d 342, 346, 38 CR 68. Conversely, a constructive trust has been imposed on property held by an adult child who has violated the trust and confidence of a parent. *Androski v Thurber* (1955) 136 CA2d 471, 288 P2d 898. The court found a confidential relationship between an uncle and a nephew in *Steinberger v Steinberger* (1943) 60 CA2d 116, 123, 140 P2d 31. Factors that the court considered in establishing the confidential relationship included living in the same house, lending money to each other, and having a friendly, intimate relationship. Siblings have similarly been found to be in a confidential relationship. *Adams v Young* (1967) 255 CA2d 145, 62 CR 877.

Confidential relationships have likewise been found to exist between good friends, in *Adams v Talbott* (1943) 61 CA2d 315, 142 P2d 775, and between lenders and borrowers, in *Webb v Vercoe* (1927) 201 C 754, 258 P 1099.

Courts may use the nature of the transaction itself as evidence of the existence of a confidential relationship. Thus, in *Marshall v Marshall* (1965) 232 CA2d 232, 42 CR 686, the court noted that few cases will arise in which one person will convey property to another by absolute deed and be satisfied with the grantee's oral promise to reconvey the property, unless the grantor, in fact, has trust and confidence in the integrity and fidelity of the grantee.

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§15.12 (2) Examples: Conduct Constituting Violation of Trust

Constructive trusts arising by virtue of a defendant's violation of trust occur in varied situations. The categories set forth below are not exhaustive but serve as good illustrations of the types of cases in which courts have found that because of the existence of a confidential relationship, a defendant holds certain property as a constructive trustee because of a violation of trust.

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§15.13 (a) Fiduciary Buying Property for Self

A constructive trust may be imposed when an agent uses *his or her own funds* to purchase property that the agent should be acquiring on behalf of the principal. In this situation, the agent (fiduciary) will be deemed to hold the property in a constructive trust for the principal. *Spector v Miller* (1962) 199 CA2d 87, 94, 18 CR 426. In *Spector,* the defendant who was to act as an agent for a group of buyers breached his fiduciary duty when he bought property in his name but then refused to convey a portion of the land to one of the buyers and instead kept it for himself. 199 CA2d at 93. In a similar case, the court ordered that a real estate broker held property in a constructive trust for the plaintiff after the broker misrepresented that he was in the process of acquiring the property for the plaintiff, but instead purchased it for himself with his own funds. *Walter H. Leimert Co. v Woodson* (1954) 125 CA2d 186, 189, 270 P2d 95.

A similar result occurs when the confidential relationship is established by the parties' business dealings. In one case, the parties had orally agreed to buy certain waterfront properties for their joint use and benefit, with each party paying one-half the price. Several of the properties were acquired pursuant to the agreement and paid for by the parties before the lot in question, which was necessary for the venture, was bought by the defendant in his own name. The court held that because there was a sufficient showing of partnership and confidential relationship, the plaintiff had demonstrated a prima facie case for a constructive trust. *Koyer v Willmon* (1907) 150 C 785, 90 P 135.

A real estate broker is liable for actual and constructive fraud if the broker uses the client's funds to purchase a home in the broker's or another's name and refuses to convey title to the client as promised. The client may obtain an order quieting title against the broker, imposing a constructive trust, and awarding damages. *Warren v Merrill* (2006) 143 CA4th 96, 49 CR3d 122. See §§3.27, 7.21, 15.37.

However, in the absence of any confidential or fiduciary relationship, if one party agrees to purchase property on behalf of another but instead buys the property for himself with his own money, a constructive trust will not be imposed. This is nothing more than an unenforceable oral agreement to convey property. *Mazzera v Wolf* (1947) 30 C2d 531, 535, 183 P2d 649.

If the plaintiff provides the consideration for the purchase of the property, a resulting trust, not a constructive trust, is the appropriate remedy. See §§15.49-15.52.

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§15.14 (b) Breach of Oral Promise to Convey Property

Constructive trust cases involving violation of a trust have often involved the breach of an oral agreement to convey property. Without the existence of a confidential relationship or fraud, the breach of an oral agreement to convey real property that would be unenforceable under the statute of frauds is not a basis for imposing a constructive trust. *Elliott v Wood* (1949) 95 CA2d 314, 317, 212 P2d 906. When there is a fiduciary or confidential relationship, however, the repudiation of an oral promise to convey constitutes sufficient fraud to impose a constructive trust on the property. *Warren v Merrill* (2006) 143 CA4th 96, 49 CR3d 122; *Steinberger v Steinberger* (1943) 60 CA2d 116, 121, 140 P2d 31. See §15.33.

For example, in *Shotte v Shotte* (1962) 203 CA2d 28, 32, 21 CR 220, a wife owned a parcel of property and asked her husband to invest a substantial amount of his own money to build rental units on the property under the promise that she would give him a joint tenancy deed. The husband gave her the money and trusted that she would give him the deed in due time. The wife, however, instead filed for divorce and refused to transfer any interest in the property to the husband. The court imposed a constructive trust on the property in favor of the husband because of his reliance on her oral promise to convey to him an interest in the property and because the breach of her oral promise constituted a violation of the confidential relationship between them.

In another case, a mother had managed her daughter's property as a minor. When the daughter later decided to get married, the mother convinced the daughter to make the mother a joint tenant in the property under the promise that the mother would reconvey the properties to the daughter at her request. The mother and daughter had a falling out, and when the daughter requested the reconveyance of the property, the mother refused. The court imposed a constructive trust on the property in favor of the daughter because of the confidential relationship between the parties. *Briggs v Nilson* (1964) 226 CA2d 342, 346, 38 CR 68.

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§15.15 (c) Title Contrary to Parties' Intent

When the record title of real property does not reflect the intention of the parties who are in a confidential relationship, the court may impose a constructive trust. In *Huber v Huber* (1946) 27 C2d 784, 790, 167 P2d 708, the husband purchased property with his own funds after he and his wife were married, and had the deed issued to his wife and himself as joint tenants. The husband, however, did not intend to give the wife any current beneficial interest in the property but only to give her a survivorship right if they were married on his death, and he and his wife had an oral agreement to that effect. Thus, when the wife filed for divorce, the court imposed a constructive trust on the share of the property standing in her name, declaring that the wife was the trustee for the benefit of the husband. The court held that because of the confidential relationship between husband and wife, an oral agreement between the spouses in connection with a conveyance of real property between them or by a third person to one of them may be enforced by making the grantee spouse a constructive trustee for the other spouse if the grantee attempts to violate the oral agreement.

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§15.16 (d) Property Conveyed for Benefit of Another

Courts have also imposed a constructive trust when a grantor who is in a confidential relationship with a grantee conveys property to the grantee for the benefit of another. *Adams v Young* (1967) 255 CA2d 145, 153, 62 CR 877. For example, in *Androski v Thurber* (1955) 136 CA2d 471, 288 P2d 898, a suit was brought to enforce a constructive trust with respect to a tract of land that a father had deeded to the defendant, one of his children. The plaintiffs were the grantor's other children. They alleged that the defendant orally promised his father to hold the land in trust for all of the children in equal shares and that the father executed the deed because of the trust and confidence he reposed in the defendant. The court affirmed a decree that the defendant held title to the property in trust for himself and the plaintiffs in equal shares.

Similarly, in *Adams v Young* (1967) 255 CA2d 145, 62 CR 877, a deceased mother had intended to convey property to her two daughters in equal shares, but title was put in only one daughter's name. When the other daughter died, the daughter who held title refused to convey her deceased sister's interest in the property to her sister's heirs. The court found evidence of the confidential relationship not only between the sisters, but also between the grantor/mother and the grantee/daughter and imposed a constructive trust on the property for the benefit of the deceased sister's heirs.

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§15.17 e. Other Wrongful Acts

The situations giving rise to a constructive trust are not limited to fraud, mistake, or breach of a confidential relationship. Civil Code §2224 also specifies "other wrongful act[s]." While many cases citing this language involve facts that can also be labeled as fraud or breach of confidential relationship (see *Rankin v Satir* (1946) 75 CA2d 691, 171 P2d 78; *Estrada v Garcia* (1955) 132 CA2d 545, 282 P2d 547), a finding of fraud or breach of duty is not necessary.

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§15.18 (1) Inequitable Conduct

A court may impose a constructive trust any time it feels it would be equitable to do so within the statutory criteria. The language of CC §§2223 and 2224 is meant to give the courts flexibility to apply equitable doctrine to individual cases. *Martin v Kehl* (1983) 145 CA3d 228, 237, 193 CR 312. These sections state general principles for a court's guidance rather than restrictive rules. 145 CA3d at 237. Thus, "a constructive trust may be imposed in practically any case where there is a wrongful acquisition or detention of property to which another is entitled." 145 CA3d at 238.

For example, in *Estrada v Garcia* (1955) 132 CA2d 545, 282 P2d 547, the defendant was the father of the plaintiff's child. He promised to marry the plaintiff and purchase a house that would be owned by both of them. The plaintiff agreed that the house payments would satisfy his child support obligations. The defendant did purchase a house with his own funds but took title in his name alone. The defendant married someone else and sought to evict the plaintiff and the child from the home. It is not clear whether the court thought the defendant's conduct constituted fraud, breach of trust, "other wrongful act," or a combination thereof, but the court imposed a constructive trust on the house, saying it would be unconscionable for a court of equity to refuse relief to the plaintiff because part of the consideration for the defendant's promise to purchase the house for the plaintiff was the assumption by her of the defendant's duty to support their child.

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§15.19 (2) Criminal or Tortious Conduct

Examples of "other wrongful acts" that have invoked the imposition of a constructive trust include embezzlement, conversion, and misappropriation of funds. A plaintiff whose funds are wrongfully taken is allowed to trace those funds and impose a constructive trust on real property purchased with the funds, as long as the property is not held by a bona fide purchaser for value without notice of the plaintiff's interest. *Church v Bailey* (1949) 90 CA2d 501, 504, 203 P2d 547. See §15.29. In the *Church* case, the court imposed a constructive trust on real property an employee had purchased with funds that he embezzled from his employer. In another case, the court imposed an equitable lien (although a constructive trust would have also been proper) on real property that was purchased with the misappropriated funds of an incompetent that were wrongfully acquired by his attorney. *Rivero v Thomas* (1948) 86 CA2d 225, 194 P2d 533. This case not only exemplifies misappropriation as wrongful conduct but also is an example of breach of fiduciary duty and fraud.

Another type of wrongful conduct occurs when someone acquires an interest in real property through the commission of a crime. Examples include a surviving joint tenant holding legal title after killing the other joint tenant. Most courts hold that the surviving joint tenant holds the property in constructive trust for the heirs or legatees of the deceased joint tenant. See *Saltares v Kristovich* (1970) 6 CA3d 504, 517, 85 CR 866. Whether the constructive trust should be imposed on the entire property or half of the property was discussed in *Johansen v Pelton* (1970) 8 CA3d 625, 630, 87 CR 784, which ruled that the joint tenancy was severed by the unlawful slaying, and impressed a constructive trust on one-half of the property held by the surviving slayer.

Forgery may also be the basis for a constructive trust. Forgery of a land sale contract was the wrongful act giving rise to a constructive trust in *Burns v Ross* (1923) 190 C 269, 275, 212 P 17. The plaintiff signed a contract for the purchase of property from a land company and entrusted the contract to a third person, who, without the plaintiff's knowledge or authority, forged her name to an assignment of the contract to himself and then assigned the contract from himself to the defendants, who paid the balance of the price and received the deed. The court found that the plaintiff had stated a cause of action for a constructive trust on the real property against the defendants upon tender to them of the amount paid by them under the contract. On forged instruments and purchasers without notice, see §15.29.

In an unusual case granting a constructive trust on funds traced to a wrongful acquisition of a real property interest, the court found the wrongful conduct to be a trespass. *Santa Clarita Water Co. v Lyons* (1984) 161 CA3d 450, 207 CR 698. A water company had without permission installed a pipeline on a landowner's property, removed subsurface water from the property, and sold it to its customers. The court held that the water taken was real property constituting the res, that the water company had wrongfully acquired it, and that the landowner could impose a constructive trust on the assets acquired in exchange for the real property taken, namely, the proceeds of sale. See §15.22. The court stated that if one trespasses upon the land of another and removes something of value from it, a constructive trust may be imposed on the proceeds of the trespass. 161 CA3d at 462.

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§15.20 (3) Breach of Promise to Devise Property

Another type of conduct warranting the imposition of a constructive trust occurs when a decedent has breached a promise to leave real property to the plaintiff in a will and that promise was made in exchange for the plaintiff's care, support, or rendition of services. The court enforces such a contract to make a will, even if oral, not by ordering a will to be made, but by impressing a constructive trust in the plaintiff's favor on the property in the hands of whoever acquires the legal title, such as heirs or devisees. *Estate of Brenzikofer* (1996) 49 CA4th 1461, 1467, 57 CR2d 401. These actions are often called actions for "quasi-specific performance" (see *Porporato v Devincenzi* (1968) 261 CA2d 670, 68 CR 210) and are specifically authorized by the Probate Code (now §21700). The theory for the imposition of the trust is that the devisee or heir to whom the property has passed would be unjustly enriched if permitted to keep the property and is therefore deemed to be a constructive trustee for the benefit of the plaintiff. For example, in *Porporato v Devincenzi* (1968) 261 CA2d 670, 679, 68 CR 210, the court found that the plaintiff had stated a cause of action for a constructive trust over property in the hands of a decedent's devisee when the plaintiff alleged that the decedent had promised to leave her his real property at his death in exchange for her moving across the country to live and raise her son near the decedent. In *Estate of Brenzikofer* (1996) 49 CA4th 1461, 1468, 57 CR2d 401, the plaintiff received the property through a constructive trust because he had lived in decedent's rental house and cared for her and her cats for 26 years in exchange for the decedent's promise.

When a testator agrees to leave to the plaintiff whatever property the testator owns at the time of death, but the testator has not yet died, an action to enforce the contract does not support a constructive trust remedy against specific property owned or possessed by the testator. *Westbrook v Superior Court* (1986) 176 CA3d 703, 222 CR 317. The court reasoned that (1) while living, the testator had the right to consume or dispose of the property in good faith for reasonably necessary living expenses; and (2) the specific property in which the plaintiff tried to claim an interest under the contract could not be identified until the testator's death.

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D. Property Over Which Constructive Trust May Be Obtained

§15.21 1. Property Wrongfully Taken From Plaintiff

In the most common situation, a plaintiff is able to impose a constructive trust over the very property that was wrongfully taken from the plaintiff. See, *e.g., Nevarez v Nevarez* (1962) 202 CA2d 596, 21 CR 70.

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2. Property Acquired in Exchange for Wrongfully Taken Property

§15.22 a. Tracing Requirement

A plaintiff may impose a constructive trust over real property owned by the defendant when that real property was not the property taken from the plaintiff if the plaintiff can *trace* (or follow) the taken property to that new asset. A constructive trust extends to property acquired *in exchange* for property wrongfully taken. *Haskel Engineering & Supply Co. v Hartford Acc. & Indem. Co.* (1978) 78 CA3d 371, 375, 144 CR 189. For example, if the defendant wrongfully acquires Blackacre from the plaintiff and trades Blackacre for Whiteacre, the plaintiff is entitled to a constructive trust on Whiteacre. See *Marshall v Marshall* (1965) 232 CA2d 232, 42 CR 686.

The tracing concept similarly applies if the asset wrongfully taken from the plaintiff is money. In *Church v Bailey* (1949) 90 CA2d 501, 504, 203 P2d 547, a defendant embezzled funds from the plaintiff and then used those funds to purchase real property. The court traced the funds and impressed a constructive trust over the real property. In a similar case, a bank mistakenly issued a refund check to the defendant, who used those funds to purchase a residence; consequently, the court imposed a constructive trust on the residence in favor of the bank. *Goldberg v Bank of Alex Brown (In re Goldberg)* (BAP 9th Cir 1994) 168 BR 382.

The principle of tracing can be used in the reverse situation in which the interest wrongfully taken is a real property interest that the defendant sells and converts into cash. The plaintiff may obtain a constructive trust over the cash. This applies even to the proceeds of sale of property, such as water, taken as the result of a trespass. *Santa Clarita Water Co. v Lyons* (1984) 161 CA3d 450, 207 CR 698. See §15.19.

PRACTICE TIP: This ability to trace property or funds to its product, including real property, makes a constructive trust and an equitable lien (see §§15.60-15.85) unique and important remedies for a plaintiff. Not only should a plaintiff whose specific real property was wrongfully taken seriously consider pursuing these remedies when attempting to recover the property, but a plaintiff should also think about these remedies when the defendant wrongfully acquired assets of the plaintiff that are not real property. If the assets can be traced to real property, the plaintiff may obtain a constructive trust or equitable lien over that realty and procure the significant advantages of these equitable remedies. See §§15.28-15.31.

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§15.23 b. Presumptions When Tracing Funds

Although a plaintiff may impose a constructive trust on property purchased with funds misappropriated from the plaintiff, actually proving that the property was purchased with the plaintiff's funds may be difficult. A common problematic situation occurs when the plaintiff's funds are commingled with the defendant's funds in a bank account before the defendant purchases real property. The court must determine whether the money taken from the account to purchase the realty was the plaintiff's money (in which case the plaintiff's funds can be traced to the real property) or the defendant's money (in which case the realty belongs to the defendant). For example, in *Goldberg v Bank of Alex Brown (In re Goldberg)* (BAP 9th Cir 1994) 168 BR 382, the defendant commingled the plaintiff's funds with defendant's existing bank account funds and later withdrew $15,000 to make a down payment on a new residence. The remainder of the money in the accounts was then dissipated by the defendant for personal uses. The court did not accept the defendant's assertion that he bought the residence with his own funds while dissipating the plaintiff's funds. The court, therefore, imposed a constructive trust on the residence for the benefit of the plaintiff despite the defendant's objections that the plaintiff could not prove that the property was actually purchased with the plaintiff's money.

A similar result was reached in *Mitchell v Dunn* (1930) 211 C 129, 134, 294 P 386, which addressed evidentiary presumptions involved in tracing. The defendant purchased certain real property in her own name with a check drawn on her bank account into which she had placed the plaintiff's money. Later she replaced the sum taken and subsequently dissipated the entire estate. The court rejected the ordinary presumption that a defendant acts lawfully, withdrawing his own money first and leaving the trust funds intact, because in this situation it would deprive the plaintiff of the real property purchased with the money originally withdrawn. The court allowed the plaintiff to trace her funds from the account to the real property and take the real property under a constructive trust.

Furthermore, if the defendant places funds wrongfully taken from the plaintiff in an account, partially dissipates the account, and then deposits defendant's own money into the depleted account, there is a strong presumption that it was the defendant's intention in making such deposits to restore to the account the funds taken from the plaintiff. Therefore, real property purchased with the funds from that account are traceable from the plaintiff, and the plaintiff may impose a constructive trust on the real property purchased by the defendant with those funds. *Church v Bailey* (1949) 90 CA2d 501, 504, 203 P2d 547.

These liberal tracing rules do not apply when a plaintiff seeks to impose a constructive trust against the property of an insolvent debtor. Then, strict tracing is required. The purpose of this rule is to treat all creditors equally. See *Toys "R" Us, Inc. v Esgro, Inc. (In re Esgro, Inc.)* (9th Cir 1981) 645 F2d 794, 798. However, liberal tracing is proper when no creditors will be harmed. *Goldberg v Bank of Alex Brown (In re Goldberg)* (BAP 9th Cir 1994) 168 BR 382; *Rivero v Thomas* (1948) 86 CA2d 225, 238, 194 P2d 533.

Even when liberal tracing is allowed, in some situations, a plaintiff may not be able to adequately trace the funds. For example, when a wife gave her husband some money that he used to purchase real property, and then with her consent sold that property and bought and sold other property, commingling her funds with his own, the court held that the wife's original funds could not be definitely traced and segregated, so no constructive trust could be established on any real property of the deceased husband. *In re Am's Estate* (1921) 186 C 554, 561, 199 P 1053.

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§15.24 c. Propriety of Lis Pendens

Several cases expunging a lis pendens in actions seeking a constructive trust on realty purchased with funds allegedly taken from the plaintiff contain unfortunate language that may seem to undercut the tracing principle. One such case states that the fact that someone buys property with stolen money does not make the victim the owner of that property as a matter of real property law. *Lewis v Superior Court* (1994) 30 CA4th 1850, 1863, 37 CR2d 63. However, the court is confusing the tracing concept with the issue of whether, on its facts, the plaintiff's constructive trust action is a "real property claim" so as to support a lis pendens. See also *La Paglia v Superior Court* (1989) 215 CA3d 1322, 1327, 264 CR 63. To the extent that these cases cast doubt on the propriety of tracing wrongfully acquired funds into real property acquired with those funds as a matter of constructive trust law, they are against the weight of authority. For a full discussion on the use of a lis pendens in constructive trust actions, see §§15.40-15.46.

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§15.25 E. Mechanics of Constructive Trust

The purpose of a constructive trust on real property ultimately is to transfer title to the property from the defendant to the plaintiff. The court accomplishes this by decreeing that the defendant is the constructive trustee of the property for the benefit of the plaintiff. See *Martin v Kehl* (1983) 145 CA3d 228, 237, 193 CR 312. This order in effect accomplishes the transfer, although the court may also specify in the decree that the defendant convey the property to the plaintiff. See *Calistoga Civic Club v City of Calistoga* (1983) 143 CA3d 111, 117, 191 CR 571. See also alternatives in §§5.49, 6.43, 7.55-7.60.

If a plaintiff obtains a constructive trust against the defendant's real property, the plaintiff cannot also obtain a money judgment against the defendant for the value of the property taken. *Title Ins. & Trust Co. v Ingersoll* (1910) 158 C 474, 481, 111 P 360; *Jud Whitehead Heater Co. v Obler* (1952) 111 CA2d 861, 870, 245 P2d 608. Similarly, if the defendant embezzles funds from the plaintiff and uses those funds to buy a parcel of real property, the plaintiff cannot obtain both a constructive trust over the real property and a money judgment for the converted funds used to purchase the property. On election of remedies, see §1.29.

PRACTICE TIP: If the value of the real property has depreciated below the value of the property originally taken from the plaintiff, the plaintiff should not seek a constructive trust but should instead seek an equitable lien combined with a money judgment. See §15.76.

In contrast, if the defendant uses only a portion of property or funds wrongfully taken from the plaintiff to buy property, the plaintiff may impose a constructive trust over the realty and obtain a money judgment for the funds taken that cannot be traced. For example, if the defendant embezzles $100,000 from the plaintiff and uses $40,000 to buy realty and dissipates $60,000, the plaintiff may impose a constructive trust over the realty and obtain a money judgment for $60,000. The plaintiff may seek both remedies in the same action. *Title Ins. & Trust Co. v Ingersoll* (1910) 158 C 474, 481, 111 P 360.

When a defendant uses both the plaintiff's funds and the defendant's own assets to purchase real property, the issue arises whether the plaintiff is entitled to a "pro rata" constructive trust on the property acquired, or whether the plaintiff may obtain only an equitable lien. This issue is discussed in §15.78.

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§15.26 F. Advantages of Constructive Trust Over Damages Remedy

In many situations in which a plaintiff is entitled to impose a constructive trust on real property, the plaintiff could instead have chosen to obtain a judgment for damages against the defendant. In other cases, such as mistake, a plaintiff could obtain a money judgment for restitution under a quasi-contract cause of action. However, the constructive trust remedy has significant advantages over a damages remedy or any other type of judgment for money against the defendant. See §§15.27-15.31.

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§15.27 1. Recovery of Specific Property

One advantage of imposing a constructive trust on real property is that the plaintiff can recover the specific property rather than a mere money judgment. See §§15.1-15.2. This is advantageous to the plaintiff if the defendant is judgment-proof or has other creditors, or if the plaintiff has a personal desire to own the particular property in dispute.

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§15.28 2. Benefit of Appreciated Value

A corollary to the tracing principle (see §§15.22-15.23) is that the plaintiff may end up with title to real property worth more than the assets originally wrongfully taken from the plaintiff. If the value of the property acquired with funds traceable to the plaintiff increases, the plaintiff is entitled to a constructive trust on the appreciated property. *Haskel Engineering & Supply Co. v Hartford Acc. & Indem. Co.* (1978) 78 CA3d 371, 378, 144 CR 189; Restatement (First) of Restitution §205 (1937).

EXAMPLE: Defendant embezzles $100,000 from plaintiff and uses it to purchase real property that increases in value to $150,000; plaintiff may, through the vehicle of a constructive trust, obtain full title to the real property. With a constructive trust, the plaintiff obtains *the property* (that fortuitously has increased in value to $150,000.) (see §15.27). The property is *not* merely serving as security for a debt of $100,000.

Of course, the result is that the plaintiff obtains more than the amount he or she lost and is put in a better position than if no wrong had been done. However, this is irrelevant because a constructive trust action is a suit for restitution, which looks to the amount of a defendant's unjust enrichment, rather than a suit for damages, which looks to the amount of a plaintiff's loss. A plaintiff who becomes the beneficiary of a constructive trust is entitled to enhancement in the value of the trust property not because he or she has a substantive right to it but rather to prevent unjust enrichment of the wrongdoer/constructive trustee. *Haskel Engineering & Supply Co. v Hartford Acc. & Indem. Co.* (1978) 78 CA3d 371, 378, 144 CR 189. If the wrongdoer were permitted to keep the profit, there would be an incentive to wrongdoing, which is removed if the court compels a surrender of the profit. Restatement of Restitution §202.

PRACTICE TIP: Even if the defendant has assets sufficient to enable the plaintiff to collect a money judgment, the plaintiff should consider seeking a constructive trust over an asset that has appreciated in value. The damages remedy would be limited to what the plaintiff lost. By obtaining a constructive trust over an appreciated asset, the plaintiff will recover more than he or she lost. Note the higher burden of proof required in constructive trust actions. See §15.39.

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§15.29 3. Recovery of Property Conveyed to Third Party

Under certain circumstances a plaintiff may obtain a constructive trust on real property even though it has been transferred to a third party. The test is whether the third-party transferee is a subsequent purchaser for value without notice of the plaintiff's interest, *i.e.,* a bona fide purchaser (BFP). If the transferee is a BFP, the plaintiff is unable to impose a constructive trust over the property. *Church v Bailey* (1949) 90 CA2d 501, 504, 203 P2d 547. Therefore, if the defendant acquires real property under circumstances that would allow the plaintiff to impose a constructive trust, and then sells the property to a BFP, the plaintiff may obtain a constructive trust over the proceeds of sale but not over the property. See *Johnson v Clark* (1936) 7 C2d 529, 536, 61 P2d 767.

However, if the transferee does not meet the requirements of a BFP, then a constructive trust over the property is appropriate. Accordingly, when a third party has at least constructive notice of the true ownership of the property, the third party's rights "are no greater than were those of his grantor" and the court may impose a constructive trust. *McGuiness v Lester* (1927) 86 CA 454, 458. 260 P 925. Similarly, if the third party is a donee, the property can be reached by a constructive trust. *Pellerito v Dragna* (1940) 41 CA2d 85, 105 P2d 1011. Thus, in *Nevarez v Nevarez* (1962) 202 CA2d 596, 21 CR 70, a mother had been tricked by her son into signing a deed conveying her property to him. The son then conveyed the property to his wife. The mother was able to impose a constructive trust over the property in the hands of the wife because she was not a BFP. Likewise, heirs, devisees, or decedent's representatives who acquire legal title to property on the death of someone who would be found to be a constructive trustee are considered to be donees and not BFPs. *Johansen v Pelton* (1970) 8 CA3d 625, 632, 87 CR 784.

An exception to the rule regarding BFPs applies if the property over which the constructive trust is imposed was acquired by virtue of a *forged* instrument. In one case a wrongdoer forged the plaintiff's name to a document assigning to him the right to purchase property from a seller. The wrongdoer then sold his interest to the defendants, who knew nothing of his wrongdoing and who then purchased the property from the seller and received a deed. The court stated that because the original assignment was forged, no title to the contract passed and the rights of the plaintiff under it could not be defeated. Therefore, even though the defendants were not guilty of any wrongful act and were BFPs, they held the property as constructive trustees for the benefit of the plaintiff. *Burns v Ross* (1923) 190 C 269, 275, 212 P 17.

PRACTICE TIP: The ability to follow property into the hands of a transferee is a significant advantage if the person who has originally acquired the plaintiff's property under circumstances warranting a constructive trust no longer has the property or has dissipated the assets from which a damages judgment could be collected. Consider pursuing a constructive trust action against a transferee who obtained the property and who is not a BFP. The potential defendant need not be a wrongdoer. The defendant may be an innocent donee or heir, or someone on notice of the circumstances giving rise to the constructive trust.

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§15.30 4. Priority Over Other Creditors

Another important benefit of obtaining a constructive trust over specific property instead of a money judgment against the defendant is that the plaintiff does not have to share the asset with certain other creditors of the defendant, even if the other creditors obtained judgment or attachment liens before the imposition of the constructive trust. This is because the property is considered to have always equitably belonged to the plaintiff even though title was in the defendant. A judgment lien does not attach to a naked title, but only to the judgment debtor's interest in the real estate. *Wheeler v Trefftzs* (1964) 228 CA2d 271, 274, 39 CR 507. Therefore, regardless of when the constructive trust was obtained, any judgment lien filed by the defendant's creditors does not attach to the property, because the defendant never had any equitable interest in the property. Another way courts have reached this result is to say that an attaching creditor or judgment creditor is in the position of a purchaser with notice (see *Kinnison v Guaranty Liquidating Corp.* (1941) 18 C2d 256, 263, 115 P2d 450) or does not have the status of a bona fide purchaser (see *Bernstein v Pavich (In re Pavich)* (Bankr ED Cal 1996) 191 BR 838) as to the prior equitable interest of the plaintiff who is entitled to a constructive trust. *Wheeler v Trefftzs* (1964) 228 CA2d 271, 39 CR 507.

In contrast, the plaintiff does not have priority over bona fide encumbrancers for value. See *Schut v Doyle* (1959) 168 CA2d 698, 701, 336 P2d 567. Thus, if a defendant takes out a mortgage on the wrongfully acquired property of the plaintiff, and the lender lacks notice of the plaintiff's equitable claim, the lender is a bona fide encumbrancer for value and the property remains subject to the lien.

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§15.31 5. Ease of Enforcing Judgment

A constructive trust may be much easier to enforce than a judgment for damages. As part of the judgment for a constructive trust, the court will order the defendant/trustee to convey the property to the plaintiff. See §15.25. Alternatively, the court may quiet title in the plaintiff. See chap 7. In either event, the transfer of title is in most cases easier to accomplish than collecting a money judgment.

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G. Litigation Concerns

§15.32 1. Adequate Legal Remedy

A constructive trust is an equitable remedy. Therefore, an issue is whether the plaintiff must establish as a prerequisite that the plaintiff's remedy at law, such as damages, is inadequate. The general and better reasoned rule in California is that considerations of adequacy of legal remedy should not prevent the imposition of a constructive trust over real property. See, *e.g.,* authorities discussed in *Heckmann v Ahmanson* (1985) 168 CA3d 119, 134, 214 CR 177.

First of all, an action to impose a trust, including a constructive trust, is an action that was historically under the exclusive jurisdiction of the courts of equity. In such cases there is no requirement that the legal remedy be inadequate. *Bacon v Grosse* (1913) 165 C 481, 492, 132 P 1027. Some courts follow this line of reasoning and state, "In California, as in most jurisdictions, an action in equity to establish a constructive trust does not depend on the absence of an adequate legal remedy." *Heckmann v Ahmanson, supra* (dealing with stock).

In unusual situations when there is no adequate legal remedy, a court may award "damages" under the equitable theory of unjust enrichment and then impose a constructive trust on specific funds held by the defendant. See, *e.g., Ward v Taggart* (1959) 51 C2d 736, 336 P2d 534 (concluding defendant was involuntary trustee for benefit of plaintiffs on secret profits he obtained in real property sale because CC §3334 did not provide adequate remedy at law).

A few decisions do inquire into the adequacy of the legal remedy. These cases are limited to fact patterns involving a plaintiff seeking a constructive trust over real property that allegedly a decedent promised to devise to the plaintiff in a will in exchange for plaintiff's services. Courts analyze these cases as being for "quasi specific performance." In one such case, the court stated, "As in all cases which invoke equitable powers, the plaintiff must show that her remedy at law is inadequate." See *Porporato v Devincenzi* (1968) 261 CA2d 670, 674, 68 CR 210. However, the court concluded that a constructive trust over real property should not be barred by the adequacy of the legal remedy because the real property was unique and the services rendered to the decedent were difficult to value. See 261 CA2d at 677. See also §5.6.

In another case in which the plaintiffs sought a constructive trust over real property that the decedent allegedly promised to leave them in her will, the court reached the opposite result. As one of many reasons for denying a constructive trust, the court focused on the services rendered by the plaintiffs and said they were not impossible to value so the plaintiffs had an adequate legal remedy. *Shive v Barrow* (1948) 88 CA2d 838, 843, 199 P2d 693. However, the court failed to consider whether the land was unique.

PRACTICE TIP: Include a separate cause of action for each theory supporting the constructive trust remedy. To avoid having to prove the inadequacy of a remedy at law, make sure the prayer for a constructive trust is based on a theory other than specific performance of a contract. Note that in the "contract to make a will" cases such as *Shive v Barrow, supra* (also cited in §15.33), in which the courts inquired into the adequacy of the legal remedy, the courts analyzed the actions as ones for "quasi-specific performance," even though the remedy sought was a constructive trust.

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§15.33 2. Statute of Frauds

The statute of frauds does not prevent the imposition of a constructive trust, because a constructive trust arises by operation of law, not by agreement. *Stromerson v Averill* (1943) 22 C2d 808, 815, 141 P2d 732. This rule applies even if the constructive trust remedy would have the effect of enforcing an oral agreement to convey or buy property that would otherwise be unenforceable because of the statute of frauds. *Warren v Merrill* (2006) 143 CA4th 96, 113, 49 CR3d 122; *Walter H. Leimert Co. v Woodson* (1954) 125 CA2d 186, 191, 270 P2d 95. See §15.14. If the legal grounds for the constructive trust are established by the facts, the trust will be imposed even if the effect is to enforce an oral agreement. The plaintiff must, therefore, prove that the oral promise or its breach was accompanied by fraud, duress, undue influence, breach of a confidential relationship, or other grounds for imposition of a constructive trust. *Quezada v Hart* (1977) 67 CA3d 754, 759, 136 CR 815; Restatement (First) of Restitution §§182, 183 (1937). For example, in *Quezada,* a son had been given money by his mother to purchase real property on his oral promise to convey the property to his younger brothers and sisters on her death. The court stated that because a confidential relationship existed between the mother and son, the son's oral promise to convey the real property to his brothers and sisters would be enforced pursuant to a constructive trust. 67 CA3d at 760.

On the other hand, a mere breach of an oral contract concerning land is not, in and of itself, grounds for the imposition of a constructive trust. See, *e.g., Elliott v Wood* (1949) 95 CA2d 314, 317, 212 P2d 906, cited in §§15.14, 15.52. For example, if a party orally promised to buy land for another and thereafter bought it for himself with his own money, that promise remains unenforceable under the statute of frauds. 95 CA2d at 317; *Mazzera v Wolf* (1947) 30 C2d 531, 535, 183 P2d 649. However, if those parties were in a fiduciary or confidential relationship, or if the plaintiff had been induced by the defendant's fraud not to purchase the property for himself, a constructive trust would be appropriate, and the promise would be enforced despite the statute of frauds. See *Warren v Merrill* (2006) 143 CA4th 96, 49 CR3d 122; *Steinberger v Steinberger* (1943) 60 CA2d 116, 121, 140 P2d 31, cited in §§15.11, 15.14.

In constructive trust cases dealing with contracts to make a will, the courts are split. The court in *Estate of Brenzikofer* (1996) 49 CA4th 1461, 1469, 57 CR2d 401, held that the statute of frauds does not apply. The court in *Shive v Barrow* (1948) 88 CA2d 838, 843, 199 P2d 693, denied a constructive trust because the consideration given—payment of money and rendition of services—was not sufficient part-performance to take the oral agreement to devise property out of the statute of frauds.

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3. Statute of Limitations

§15.34 a. Applicable Statute of Limitations

Different statutes of limitations have been used by courts in actions to impose a constructive trust on real property. Some courts treat such actions as actions for the recovery of real property within the meaning of CCP §318, which prescribes a 5-year limitations period. *Marshall v Marshall* (1965) 232 CA2d 232, 250, 42 CR 686. Interestingly, the court in *Marshall* discussed "constructive fraud" as well as a confidential relationship but did not refer to the 3-year statute of limitations in CCP §338 for fraud. Several courts have used the fact that an action to impose a constructive trust on real property is an action for the recovery of real property within the meaning of CCP §318 as part of an analysis of whether such an action is one affecting title to or possession of real property for the purpose of filing a lis pendens. *Coppinger v Superior Court* (1982) 134 CA3d 883, 185 CR 24.

Other courts reject §318 as the applicable statute of limitations and instead look to the grounds on which the constructive trust is being sought. If the constructive trust arises because of fraud, undue influence, or mistake, it is governed by the 3-year statute of limitations of CCP §338(d). *Hatch v Collins* (1990) 225 CA3d 1104, 1110, 275 CR 476; *Nevarez v Nevarez* (1962) 202 CA2d 596, 21 CR 70. In specifically rejecting the use of the 5-year statute of limitations for the recovery of real property and instead adopting the 3-year statute for fraud, the court in *Neet v Holmes* (1944) 25 C2d 447, 466, 154 P2d 854, stated that the requested relief must depend on the facts tending to establish a constructive trust (in that case, fraud), and not on any prior seisin or possession.

In actions for a constructive trust not arising from fraud or mistake, some courts have applied the 4-year statute of limitations of CCP §343 (for actions not otherwise provided for) because the action is based in equity. See, *e.g., Spector v Miller* (1962) 199 CA2d 87, 96, 18 CR 426; *Nelson v Nevel* (1984) 154 CA3d 132, 140, 201 CR 93. *Nelson* involved an action by a woman against a man seeking to obtain a share of certain real property acquired by the parties while they were living together, and held in the man's name. Similarly, the 4-year statute of limitations was used in an action to impose a constructive trust based on an agreement by a decedent to devise property to the plaintiff in decedent's will. *Estate of Brenzikofer* (1996) 49 CA4th 1461, 1468, 57 CR2d 401.

Although sometimes urged by defendants or adopted by trial courts for a constructive trust action involving the breach of an oral promise to transfer property, the 2-year limitations period of CCP §339, which is applicable to an action on a contract not founded on an instrument of writing, is rejected by appellate courts. See, *e.g., Nelson v Nevel* (1984) 154 CA3d 132, 140, 201 CR 93.

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§15.35 b. Accrual of Cause of Action

The statute of limitations for a constructive trust action runs from the time the beneficiary has notice or should know of the wrongful holding of the property. *Martin v Kehl* (1983) 145 CA3d 228, 240, 193 CR 312. For example, if there is no claim of wrongdoing in the original placing of title in the defendant's name, the cause of action for a constructive trust does not arise until the transferee repudiates the oral promise or in some other way indicates the transferee is holding the property adversely to the plaintiff in violation of duty. 145 CA3d at 240. Thus, if the plaintiff is seeking a constructive trust to enforce an oral promise to reconvey property, the statute of limitations does not begin to run until the transferee repudiates the oral promise or dies. *Marshall v Marshall* (1965) 232 CA2d 232, 42 CR 686; see also *Adams v Young* (1967) 255 CA2d 145, 160, 62 CR 877. Those courts applying the 3-year fraud statute of limitations hold that the statute does not commence until the plaintiff discovers, or should have discovered, the facts constituting the fraud or mistake. *Nevarez v Nevarez* (1962) 202 CA2d 596, 21 CR 70. On asserting the doctrine of equitable estoppel to extend the statute of limitations, see §12.79.

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§15.36 4. Equitable Defenses

Because a constructive trust is an equitable remedy, the defendant may raise the equitable defenses of unclean hands and laches. See §§15.37-15.38. See also §§2.38, 5.38-5.40, 7.46-7.48.

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§15.37 a. Unclean Hands

The defense of unclean hands may be raised if the plaintiff and the defendant were together engaged in some type of wrongful conduct. This defense arises because a court will not aid the commission of fraud by enforcing a contract nor relieve one of the parties to a fraud from its consequences when both are in pari delicto. *Taylor v Fields* (1986) 178 CA3d 653, 666, 224 CR 186. The act upon which equity may refuse relief to a plaintiff must prejudicially affect the rights of the defendant so that it would be inequitable to grant such relief. *Martin v Kehl* (1983) 145 CA3d 228, 239, 193 CR 312. In *Martin,* this requirement was not met. Although the plaintiff's conduct in allowing the defendant to take title to jointly purchased property in her sole name for the purpose of obtaining the maximum loan may have been wrongful, that did not render inequitable his obtaining relief against the defendant. The defendant was fully aware that the plaintiff was using this device to obtain the maximum loan and did not suffer prejudice. 145 CA3d at 239. See also *Warren v Merrill* (2006) 143 CA4th 96, 49 CR3d 122 (rejected unclean hands defense; although both plaintiff and defendant planned to obtain loan for purchase of real property by making misrepresentations to lender, defendant's conduct as plaintiff's fiduciary in defrauding plaintiff out of title and his down payment was more culpable).

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§15.38 b. Laches

Even if the plaintiff has filed suit within the period of the applicable statute of limitations, the doctrine of laches may bar relief. *Martin v Kehl* (1983) 145 CA3d 228, 241, 193 CR 312. Laches is an unreasonable delay in asserting a right that causes such prejudice to an adverse party as to render the granting of relief inequitable. *Adams v Young* (1967) 255 CA2d 145, 160, 62 CR 877.

Two components comprise the laches defense. The first is that the plaintiff unreasonably delayed in bringing suit. The period of delay taken into account for laches does not commence until the defendant begins to act in hostility to the defendant's continuing obligation and this repudiation of the trust has been brought home to the plaintiff. *Adams v Young* (1967) 255 CA2d 145, 160, 62 CR 877. Therefore, the beneficiary of a constructive trust will not be barred by laches even though he or she knows of the circumstances giving rise to the trust if the beneficiary has no reason to believe that the constructive trustee is holding the property adversely. *Martin v Kehl* (1983) 145 CA3d 228, 240, 193 CR 312.

The doctrine of laches does not rest upon the mere lapse of time. The second component of the laches defense is that the lapse of time must have resulted in some prejudice to the defendant. *Nevarez v Nevarez* (1962) 202 CA2d 596, 603, 21 CR 70. Prejudice is never presumed. It must be affirmatively demonstrated by the defendant in order to sustain the burden of proof and the production of evidence on the issue. *Martin v Kehl* (1983) 145 CA3d 228, 240, 193 CR 312.

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§15.39 5. Burden of Proof

The party seeking a constructive trust remedy has the burden of showing by clear and convincing evidence entitlement to the relief sought. *Goldberg v Bank of Alex Brown (In re Goldberg)* (BAP 9th Cir 1994) 168 BR 382, 384; *Cameron v Crocker-Citizens Nat'l Bank* (1971) 19 CA3d 940, 943, 97 CR 269. Evidence Code §662 provides that "[the] owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing proof." A lower standard of proof is not applicable even if the parties are in a confidential relationship. *Toney v Nolder* (1985) 173 CA3d 791, 796, 219 CR 497.

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§15.40 6. Lis Pendens

A plaintiff suing to impose a constructive trust on real property should consider the recordation of a lis pendens on the property to prevent a subsequent purchaser from buying the property without notice of the plaintiff's claim. See §§13.4-13.5. A lis pendens gives constructive notice that an action has been filed affecting title or right to possession of the real property so that any person who subsequently acquires an interest in that property takes that interest subject to the outcome of the litigation. *La Paglia v Superior Court* (1989) 215 CA3d 1322, 1326, 264 CR 63.

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§15.41 a. Real Property Claim Required

A plaintiff's entitlement to a constructive trust over real property is not determinative of whether the plaintiff may maintain a lis pendens. *Burger v Superior Court* (1984) 151 CA3d 1013, 1018, 199 CR 227. Even if the plaintiff could obtain a constructive trust on proof of the facts alleged in the complaint, the plaintiff cannot properly file a lis pendens unless the complaint asserts a "real property claim." See CCP §§405.20, 405.31; *Hunting World, Inc. v Superior Court* (1994) 22 CA4th 67, 70, 26 CR2d 923. A "real property claim" is one in which the causes of action in the pleading would, if meritorious, affect title to or the right to possession of specific real property. CCP §405.4. For further discussion, see chap 13.

In the simple case in which a plaintiff sues to impose a constructive trust because the defendant allegedly acquired real property owned by the plaintiff by fraud, mistake, violation of trust, or other wrongful act, a court would probably allow the plaintiff to record a lis pendens against the property. See, *e.g.,* authorities discussed in §§13.59, 13.66, 13.82.

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§15.42 b. When Tracing Involved or Money Damages Sought

California courts of appeal have grappled with the propriety of a lis pendens in more-complicated constructive trust cases in which the plaintiff traces funds wrongfully taken from the plaintiff to real property purchased with those funds, or in which plaintiff seeks damages in addition to a constructive trust. See §15.24. The supreme court did not address this issue when it decided that fraudulent conveyance claims clearly support the recordation of a lis pendens. See *Kirkeby v Superior Court* (2004) 33 C4th 642, 650 n7, 15 CR3d 805, cited in §§13.59, 13.71, 15.45-15.46. Decisions from the courts of appeal have reached contradictory results (see §§15.43-15.44), and the 1992 revisions of the lis pendens statutes did not resolve the conflict in the courts on this issue. For further discussion of 1992 revisions, see §§13.1-13.3.

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§15.43 (1) Cases Permitting Lis Pendens

Some courts have held that a plaintiff's cause of action seeking a constructive trust on specific real property clearly affects title to or the right to possession of the property and therefore supports a lis pendens, even if the plaintiff is also seeking damages. See, *e.g., Coppinger v Superior Court* (1982) 134 CA3d 883, 890, 185 CR 24 (purchaser of house infested with termites sought damages, rescission of purchase, and constructive trust on seller's *new* property). See also *Okuda v Superior Court* (1983) 144 CA3d 135, 141, 192 CR 388 (cited in §15.85; purchaser who improved property (and then discovered seller had failed to convey title) sought damages and equitable lien for cost of good faith improvements).

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§15.44 (2) Cases Expunging Lis Pendens

In contrast to authorities cited in §15.43, other courts have held that a cause of action for a constructive trust does not automatically affect title to real property as required by CCP §§405.20, 405.31. See CCP §405.4. Rather, each case must be considered on its own facts. In determining whether the claims in the pleading affect title to or possession of specific real property, the court must look to the substance of the dispute. *Urez Corp. v Superior Court* (1987) 190 CA3d 1141, 1149, 235 CR 837.

If the plaintiff's claim in the subject property is *primarily* for the purpose of securing a claim for money damages, a lis pendens is improper. *Campbell v Superior Court* (2005) 132 CA4th 904, 918, 34 CR3d 68 (action to recover money obtained by undue influence and used for remodeling defendant's house). For example, in *La Paglia v Superior Court* (1989) 215 CA3d 1322, 264 CR 63, funds wrongfully withheld from the plaintiff's predecessor were used to buy real property. The court expunged the lis pendens because it concluded that the plaintiff did not claim any present right to title or possession of the property on which it sought to impose the trust, but instead claimed only an interest to the extent the wrongfully obtained funds had been invested in it. 215 CA3d at 1327. The court reached this result even though the plaintiff could properly trace the funds wrongfully taken from him to the real property and could impose a constructive trust.

Similarly, in another case of direct tracing, the wrongdoer used misappropriated funds to buy the property. The court expunged the lis pendens, saying, the plaintiff had a claim for damages against the thief but did not have a "real property claim." The court stated that if someone buys property with stolen money, that fact "does not make the victim the owner of that property as a matter of real property law." *Lewis v Superior Court* (1994) 30 CA4th 1850, 1863, 37 CR2d 63. In the author's opinion, this is a misstatement of law and confuses the issue of tracing with the issue of whether a lis pendens is proper. It ignores the tracing function of constructive trusts. See §15.22.

In another reported decision, the court held a constructive trust would be proper yet expunged a lis pendens when plaintiffs sought a constructive trust over the very property that was the subject of the wrongful conduct (as opposed to property to which stolen funds had been traced). The plaintiffs and defendants were involved in a joint venture, and the defendants used joint venture funds to purchase real property. Title to the property was to be held in the name of the joint enterprise, but the defendants wrongfully took title in their names alone. Even though the court acknowledged that the plaintiffs did not seek a constructive trust remedy solely as collateral for money damages, the court expunged the lis pendens on the grounds that the constructive trust claim did not seem to be the primary claim of the complaint, because nine out of eleven of the causes of action sought money damages. *BGJ Assocs., LLC v Superior Court* (1999) 75 CA4th 952, 971, 89 CR2d 693.

PRACTICE TIP: In these situations, requesting relief in the form of a temporary restraining order and preliminary injunction under CCP §§525-534 at the beginning of the action in lieu of a lis pendens is the safer alternative, particularly when the equities of the case favor the plaintiff. See §§13.6-13.6A.

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§15.45 (3) Actions Under Uniform Fraudulent Transfer Act

In 2004 the supreme court ruled that a complaint combining causes of action for monetary damages with one to set aside a fraudulent conveyance of property (purchased with money wrongfully diverted from a family corporation) under the Uniform Fraudulent Transfer Act (CC §§3439-3439.12) clearly affects title to or the right to possession of real property and therefore supports a lis pendens. *Kirkeby v Superior Court* (2004) 33 C4th 642, 15 CR3d 805. On lis pendens procedures, see chap 13.

In 1994, a court of appeal upheld the recordation of a lis pendens in a case involving the transfer of real property in violation of the Act, acknowledging that a "real property claim" described in CCP §405.4 "covers a claim to set aside a conveyance of real property." *Hunting World, Inc. v Superior Court* (1994) 22 CA4th 67, 73, 26 CR2d 923. The court distinguished cases such as *Urez Corp. v Superior Court* (1987) 190 CA3d 1141, 235 CR 837, and *La Paglia v Superior Court* (1989) 215 CA3d 1322, 264 CR 63, cited in §15.44, in which "constructive trust or equitable lien causes of action were *appended* to lawsuits centering on money damages." The lis pendens was proper in the particular action to set aside the fraudulent conveyance brought by the plaintiff because the plaintiff's suit "*affects only title to real property*." *Hunting World, Inc. v Superior Court* (1994) 22 CA4th 67, 74, 26 CR2d 923.

For further discussion of the Uniform Fraudulent Transfer Act, see Debt Collection Practice in California §§12.66, 13.32 (2d ed Cal CEB 1999).

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§15.46 c. Policy Concerns

Those courts that have severely limited the use of a lis pendens in constructive trust cases have done so because of strong policy concerns favoring a restrictive application of lis pendens. See *BGJ Assocs., LLC v Superior Court* (1999) 75 CA4th 952, 967, 89 CR2d 693. "[B]ecause the recording of a lis pendens place[s] a cloud upon the title of real property until the pending action [is] ultimately resolved …, the lis pendens procedure [is] susceptible to serious abuse, providing unscrupulous plaintiffs with a powerful lever to force the settlement of groundless or malicious suits." 75 CA4th at 969. These courts have eschewed an approach that would transform a lis pendens "into a money-collection remedy without any of the protections of the attachment statutes." *Lewis v Superior Court* (1994) 30 CA4th 1850, 1864, 37 CR2d 63.

However, unless other devices are available to a plaintiff, this approach severely undermines the constructive trust remedy. If a plaintiff cannot record a lis pendens against property over which the plaintiff seeks a constructive trust, the defendant can sell the property during the pendency of the lawsuit to a bona fide purchaser for value and thereby cut off the plaintiff's ability to obtain the property. In its report proposing the new lis pendens legislation, the State Bar Real Property Law Section predicted that this problem could be solved with the availability of injunctions (see §13.6A), attachments, and other relief that would reduce the perceived need for notices of lis pendens in constructive trust or equitable lien cases. See *Hunting World, Inc. v Superior Court* (1994) 22 CA4th 67, 71, 26 CR2d 923, citing Real Property Law Section of State Bar, *Proposed New Lis Pendens Law With Cal. Code Comments* (Sept. 1991, p 8).

The supreme court in *Kirkeby v Superior Court* (2004) 33 C4th 642, 651, 15 CR3d 805, commented on the potential for abusing the lis pendens procedure, but noted that there are many grounds for seeking expungement of a lis pendens in an action of questionable merit. They are summarized in §13.56 and detailed in §§13.57-13.91.

PRACTICE TIP: Even though a constructive trust would be proper on the basis of tracing funds to real property, courts seem to be willing to expunge a lis pendens filed in such a lawsuit if it appears that the primary claim is for money. Additionally, even if tracing is not involved, some courts will not allow a lis pendens if a constructive trust claim seems to be merely "appended" to other claims in order to tie up the defendant's property. Therefore, in evaluating what causes of action to plead, keep in mind that a lis pendens is more likely to be maintained if the constructive trust is the primary remedy.

For further discussion and other views regarding lis pendens procedures in constructive trust actions, see §§13.67, 13.71.

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II. RESULTING TRUSTS

A. Introduction

§15.47 1. Purpose

A resulting trust can be an effective remedy for a plaintiff who wishes to obtain title to real property when the circumstances show that the parties did not intend for the transferee to take the beneficial interest in the property. See *Martin v Kehl* (1983) 145 CA3d 228, 238, 193 CR 312. A constructive trust usually occurs when the plaintiff has given the consideration for the purchase of real property, but title is taken in the name of the defendant. The fundamental purpose of a resulting trust is to carry out the intention of the parties. *Bainbridge v Stoner* (1940) 16 C2d 423, 428, 106 P2d 423.

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§15.48 2. Distinguished From Constructive Trust

A resulting trust is like a constructive trust in several important respects: It is an equitable remedy; it is a trust imposed by operation of law whereby the holder of record title to property is deemed to hold the property as a trustee for the plaintiff/beneficiary; and the only obligation of the trustee is to convey title to the property to the plaintiff. See *Bainbridge v Stoner* (1940) 16 C2d 423, 428, 106 P2d 423; *Seabury v Costello* (1962) 209 CA2d 640, 646, 26 CR 248.

A resulting trust differs from a constructive trust in that "[t]he resulting trust carries out the inferred intent of the parties; the constructive trust defeats or prevents the wrongful act of one of them." *Martin v Kehl* (1983) 145 CA3d 228, 238, 193 CR 312. Therefore, a resulting trust has been termed an "intention-enforcing" trust to distinguish it from a constructive trust, which is a "fraud-rectifying" trust. 145 CA3d at 238. See also *Sampson v Bruder* (1941) 47 CA2d 431, 118 P2d 28.

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B. Examples: Resulting Trust Imposed

§15.49 1. When Consideration Given by Plaintiff and Title Acquired by Defendant

A resulting trust is a remedy for disputes concerning real property when title to property is taken in the name of one person but the consideration is given by another. *Mazzera v Wolf* (1947) 30 C2d 531, 537, 183 P2d 649.

A resulting trust was awarded in *Seabury v Costello* (1962) 209 CA2d 640, 26 CR 248, in which the plaintiff and the defendant, who were sisters, took title to real property as joint tenants. The trial court determined that the entire consideration was furnished by the plaintiff and that the sisters orally agreed that no beneficial interest was intended to be conferred on the defendant. Accordingly, the court decreed a resulting trust and quieted title to the land in the plaintiff. Similarly, in *Johnson v Johnson* (1987) 192 CA3d 551, 237 CR 644, the plaintiffs provided the consideration for the purchase of a home but placed the title in their son's name so they could obtain a GI loan for which he was eligible. Because it was fully understood by the defendant and his parents that the latter would be the actual and beneficial owners of the property, the court declared that the son held the property in a resulting trust for the benefit of the parents.

Under former CC §853 (repealed by Stats 1986, ch 820, §5), when a transfer of real property was made to one person and the consideration for it was paid by or for another, a trust was presumed to result in favor of the latter person. The legislature repealed the statute because it was "an incomplete and inadequate statement of the common law purchase money resulting trust." See 18 Cal L Rev'n Comm'n Reports 1483 (1986).

PRACTICE TIP: Despite this repeal, the resulting trust remedy is still viable and may be applied under existing and developing common law principles. See Prob C §§15002-15003.

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§15.50 a. Intent Requirement

A resulting trust is not founded on the simple fact that money or property of one party has been used by another to purchase property. It is founded on a relationship between the two, on the fact that as between them, *consciously and intentionally,* one party has advanced the consideration to make a purchase in the name of the other. The trust arises because it is the natural presumption in such a case that it was their intention that the ostensible purchaser should acquire and hold the property for the one who gave the consideration. *Majewsky v Empire Constr. Co., Ltd*. (1970) 2 C3d 478, 485, 85 CR 819. Some courts express this requirement as one of good faith on the part of the defendant acquiring the property. *Bainbridge v Stoner* (1940) 16 C2d 423, 428, 106 P2d 423.

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§15.51 b. Types of Consideration

For a resulting trust to arise, all or part of the consideration must have been given by the plaintiff. See §15.49. If *no* part of the consideration has been given by the plaintiff, a resulting trust is not proper. *Mazzera v Wolf* (1947) 30 C2d 531, 537, 183 P2d 649.

The consideration need not be money. In an early case, the plaintiff discovered a mine but did not perfect a claim under the mining laws. He disclosed the location to the defendant on the understanding that the defendant would acquire the mine in their joint names. The defendant took title to the mine in his name alone. The court held that the plaintiff's efforts in discovering the mine constituted the consideration for an interest in the mine and decreed that the defendant held a one-half interest in a resulting trust for the benefit of the plaintiff. *Stewart v Douglass* (1906) 148 C 511, 83 P 699.

An agreement by the plaintiff to repay a loan from the defendant is sufficient consideration to support a resulting trust. *Viner v Untrecht* (1945) 26 C2d 261, 269, 158 P2d 3. In *Viner,* the defendant/purchaser expressly agreed to lend money to the plaintiff for the purchase of property and to hold the property in trust. Because the plaintiff was actually obligated to repay the money, the funds were considered to be the plaintiff's, and therefore a resulting trust was proper. However, absent evidence that a loan was intended, the plaintiff cannot obtain a resulting trust by merely asserting that the defendant's money used for the purchase was a loan to the plaintiff. See *Mazzera v Wolf* (1947) 30 C2d 531, 537, 183 P2d 649.

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§15.52 c. Consideration Given at Time of Purchase

The plaintiff claiming the benefit of the trust must show that the consideration was given before or at the time of the execution of the conveyance and as part of the original transaction. *Elliott v Wood* (1949) 95 CA2d 314, 318, 212 P2d 906. If the plaintiff only contributed funds after the defendant's purchase to enable the defendant to complete installment payments on the purchase price, a resulting trust is not warranted. Also, a resulting trust does not arise by virtue of the fact that the plaintiff made, or advanced funds to make, improvements to the property after its purchase. 95 CA2d at 318.

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§15.53 2. When Resulting Trust Arises From Express Trust

A resulting trust may arise in the context of an express trust, such as when an express trust fails or property remains in the hands of a trustee after an express trust is fully performed. *Bainbridge v Stoner* (1940) 16 C2d 423, 428, 106 P2d 423. On other equitable remedies available in express trust disputes, see California Trust and Probate Litigation, chap 20 (Cal CEB 1999).

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§15.54 C. Advantages of Resulting Trust

A resulting trust has the same advantages over a money judgment as does a constructive trust. See §§15.26-15.31. The plaintiff can trace to property acquired in exchange for the property purchased, and has priority over purchasers with notice, donees, and certain other creditors. See *Stewart v Douglass* (1906) 148 C 511, 83 P 699.

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D. Litigation Concerns

§15.55 1. Statute of Frauds

Even though a resulting trust is based on the intention of the parties, it arises by operation of law and not by agreement between the parties. Therefore, a resulting trust is not subject to the statute of frauds and need not be evidenced by a writing. *Seabury v Costello* (1962) 209 CA2d 640, 645, 26 CR 248.

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§15.56 2. Statute of Limitations

The applicable statute of limitations for a suit to impose a resulting trust is the 4-year period of CCP §343 (statute of limitations for actions not otherwise provided for) because the action is based in equity. *Spector v Miller* (1962) 199 CA2d 87, 96, 18 CR 426. The cause of action accrues when a breach of trust occurs, such as when the plaintiff makes a demand for a conveyance from the defendant that is refused. *Berniker v Berniker* (1947) 30 C2d 439, 448, 182 P2d 557; *Seabury v Costello* (1962) 209 CA2d 640, 646, 26 CR 248. Therefore, to enforce a resulting trust, the action must be commenced within 4 years after repudiation of the trust. *Spector v Miller* (1962) 199 CA2d 87, 96, 18 CR 426.

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§15.57 3. Burden of Proof

Clear and convincing evidence is required to support a declaration that a resulting trust exists. *G.R. Holcomb Estate Co v Burke* (1935) 4 C2d 289, 299, 48 P2d 669; *Johnson v Johnson* (1987) 192 CA3d 551, 556, 237 CR 644.

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§15.58 4. Equitable Defenses

Because a resulting trust is an equitable remedy, the equitable defenses of laches and unclean hands are available. The defense of laches applies if the plaintiff has delayed unreasonably in bringing suit and the delay has prejudiced the defendant. See *Berniker v Berniker* (1947) 30 C2d 439, 448, 182 P2d 557. Some courts construe this defense quite strictly in the case of a resulting trust, emphasizing that laches "is never permitted to be invoked merely to aid a faithless trustee in consummating his wrong." 30 C2d at 449.

As to the defense of unclean hands, the courts weigh the conduct of the plaintiff against the conduct of the defendant (the concept of in pari delicto). In *Johnson v Johnson* (1987) 192 CA3d 551, 557, 237 CR 644, the court looked to four factors to determine if the doctrine should be used to defeat the plaintiff's claim. "Where, by applying the rule, the public cannot be protected because the transaction has been completed, where no serious moral turpitude is involved, where the defendant is the one guilty of the greatest moral fault, and where to apply the rule will be to permit the defendant to be unjustly enriched at the expense of the plaintiff, the rule should not be applied." *Johnson v Johnson* (1987) 192 CA3d 551, 237 CR 644, citing *Norwood v Judd* (1949) 93 CA2d 276, 288, 209 P2d 24. Applying these factors, the court in *Johnson* imposed a resulting trust even though the plaintiffs purchased property in their son's name for the illegal purpose of obtaining a GI loan.

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§15.59 5. Lis Pendens

Because of the similarity between the remedy of quieting title and that of a resulting trust, it is arguable that a cause of action for a resulting trust would qualify as a "real property claim" within the definition in CCP §405.4 and would therefore support a lis pendens. See CCP §§405.20, 405.31. See also §§7.26, 13.80, 15.40-15.46.

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III. EQUITABLE LIENS

§15.60 A. Introduction

An equitable lien is created by operation of law as a charge against specific property belonging to the defendant. As with any other type of lien, an equitable lien gives the plaintiff/lienholder the right to foreclose on, or in some way utilize, the subject property as payment for an amount owed to the plaintiff by the defendant. *Farmers Ins. Exch. v Zerin* (1997) 53 CA4th 445, 453, 61 CR2d 707. Because it is an equitable remedy, an equitable lien is imposed when and under whatever conditions a court finds necessary to accomplish substantial justice. See *Grappo v Coventry Fin. Corp.* (1991) 235 CA3d 496, 509, 286 CR 714.

Courts impose equitable liens in seemingly diverse situations that are related by the concepts of equity and the prevention of unjust enrichment. Thus, equitable liens are created both when the parties *intend* to create a lien or make real property security for an obligation, and when the parties *do not intend* to create a security interest but an equitable lien is necessary to prevent the unjust enrichment of the defendant. See, *e.g., Grappo v Coventry Fin. Corp., supra; Jones v Sacramento Sav. & Loan Ass'n* (1967) 248 CA2d 522, 529, 56 CR 741. This second type of equitable lien is closely related to a constructive trust. See §§15.1-15.24.

Equitable liens are based on common law principles and have been incorporated into statutory law. *Holder v Williams* (1959) 167 CA2d 313, 316, 334 P2d 291; CC §2881 (stating that liens can be created either by contract of the parties (nonequitable liens) or by operation of law (equitable liens)).

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B. Benefits of Equitable Lien Over Money Judgment

§15.61 1. Secured Creditor Status

An equitable lien is used to secure the plaintiff's claim against the defendant. It gives the plaintiff an equitable interest in specific real property owned by the defendant and allows the plaintiff to exhaust the property in satisfaction of the judgment. Thus, the plaintiff obtains the advantage of being a secured rather than an unsecured creditor. It also gives the plaintiff priority over the interests of subsequent creditors of the defendant. See §15.62.

EXAMPLE: Defendant is indebted to plaintiff for $100,000 under circumstances in which plaintiff would be entitled to restitution. See §§15.3-15.20. Plaintiff could obtain a money judgment against defendant and collect it from any assets belonging to defendant that plaintiff could find, including real property. However, if plaintiff could establish that defendant used that $100,000 to help purchase or improve the defendant's real property, the plaintiff could obtain an equitable lien in the amount of $100,000 on that property. The lien entitles the plaintiff to force a sale of that property to collect the $100,000.

An equitable lien is extremely beneficial in facilitating payment of the plaintiff's claim, especially if the defendant does not have other easily obtainable assets. Moreover, if the defendant files a bankruptcy petition after the equitable lien is awarded, the plaintiff as a secured creditor enjoys many advantages over defendant's unsecured creditors in collecting its claim from the bankruptcy estate. California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 11 (4th ed Cal CEB 2009).

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§15.62 2. Priority Over Other Creditors

If a plaintiff obtains an unsecured money judgment against a defendant and attempts to satisfy that judgment by attaching the defendant's real property, the plaintiff's priority over other attaching creditors will be determined by the principle of "first in time." Other things being equal, different liens on the same property have priority according to the time of their creation. CC §2897. However, a prior recorded lien takes precedence over a subsequently recorded one. See CC §1214. See California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 9 (4th ed Cal CEB 2009)

In contrast, the holder of an equitable lien may obtain priority over certain other liens that were recorded before the equitable lien. Although an equitable lien is not judicially recognized until a judgment is rendered declaring its existence, an equitable lien relates back to the time it was created by the conduct of the parties. *Holder v Williams* (1959) 167 CA2d 313, 317, 334 P2d 291. Therefore, a judgment lien or other interest in the property, such as a homestead, filed before the judicial recognition of the equitable lien does not take precedence over an equitable lien that was earlier created by the intent or conduct of the parties. 167 CA2d at 317.

Furthermore, even though an equitable lien is not recorded at the time of creation, the plaintiff does not lose priority over subsequent attaching creditors or judgment creditors of the defendant/owner of the property under the recording acts, because these creditors are not bona fide purchasers. *Burns v Peters* (1936) 5 C2d 619, 625, 55 P2d 1182; Restatement (First) of Restitution §161 (1937). In *Burns,* the court noted the priority of the holder of the equitable lien over other creditors: "This instrument [creating the equitable lien] took precedence over a subsequent attachment. An attaching creditor is not a bona fide purchaser and when attaching property subject to a mortgage, whether recorded or not, he takes only the interest the mortgagor had at the time of the levy." 5 C2d at 625.

Bona fide encumbrancers for value without notice, however, do take priority over unrecorded equitable lien holders. *Caito v United Cal. Bank* (1978) 20 C3d 694, 702, 144 CR 751; *Schut v Doyle* (1959) 168 CA2d 698, 701, 336 P2d 567. Therefore, a lis pendens is frequently recorded when the equitable lien action is filed. See §15.85.

For discussion of similar effects of a constructive trust on priority of interests, see §15.30.

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§15.63 3. Recovery of Property Transferred to Third Party

Another benefit of an equitable lien is that a plaintiff may enforce the lien against a transferee of the subject property who either has notice of the lien or has not paid value for the property, *i.e.,* a non-bona fide purchaser (non-BFP; see §15.29). *Jud Whitehead Heater Co. v Obler* (1952) 111 CA2d 861, 873, 245 P2d 608; *West v Stainback* (1952) 108 CA2d 806, 819, 240 P2d 366. In this way, the plaintiff can reach property in the hands of donees, devisees, or heirs.

EXAMPLE: In *Jud Whitehead Heater Co. v Obler* (1952) 111 CA2d 861, 245 P2d 608, a man embezzled funds from his employer and used those funds as partial consideration for the purchase of real property that he put in the name of his wife. Even though she had no knowledge of her husband's wrongdoing, the court enforced the equitable lien against the property in the hands of the wife because she was a donee.

Equitable liens are not enforceable against subsequent BFPs who acquired the property for value and without notice of the equitable lien. See *Schut v Doyle* (1959) 168 CA2d 698, 701, 336 P2d 567; *Jud Whitehead Heater Co. v Obler* (1952) 111 CA2d 861, 873, 245 P2d 608.

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§15.64 C. How Equitable Liens Are Enforced

In the decree establishing the equitable lien, the court defines the scope and other particulars of its enforcement. The character of the relief depends on the circumstances of the particular case. Restatement (First) of Restitution §161, Comment b (1937). An equitable lien is a flexible remedy allowing the court to establish whatever terms are necessary in order to do justice.

PRACTICE TIP: Whether you represent the plaintiff or the defendant, the enforcement terms of the decree may be as important as whether the equitable lien is established. Remember that the court has wide discretion in setting terms; therefore, frame your arguments and prepare a proposed form of judgment that will achieve the most equitable result for all parties.

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1. Enforcement Through Foreclosure

§15.65 a. Sale if Defendant Does Not Pay Amount Due

An equitable lien usually operates like any other lien in that if the defendant does not pay the amount due, the plaintiff as lienholder may foreclose on the property standing as security for the debt. *Kaiser Indus. Corp. v Taylor* (1971) 17 CA3d 346, 94 CR 773. The defendant has the option of preventing the sale of the property by paying the amount owing to the plaintiff.

EXAMPLE: In a typical equitable lien judgment, the court decrees that the plaintiff has an equitable lien on certain property of the defendant in a specified amount. That judgment usually states that unless the sum secured by the lien is paid to the plaintiff by the defendant within a certain period, a commissioner will be appointed to sell the property in the usual manner as on execution, and from the proceeds of the sale will deliver to the plaintiff the amount owing and to the defendant the balance of the proceeds after payment of costs and expenses of the sale. See *West v Stainback* (1952) 108 CA2d 806, 816, 240 P2d 366; Restatement (First) of Restitution §161 (1937).

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§15.66 b. Timing of Foreclosure Sale

The time given to the defendant to pay what is owing to the plaintiff before the property is sold is within the discretion of the court. In *West v Stainback* (1952) 108 CA2d 806, 240 P2d 366 (see §15.65), the time allowed was 90 days. In *Warner Bros. Co. v Freud* (1903) 138 C 651, 656, 72 P 345, the court of appeal directed the trial court to set a reasonable time.

On other occasions, the court does not give the defendant time to pay, but instead orders that the property be sold immediately with the proceeds to be applied in satisfaction of the judgment. See *Reid v Gillespie* (1948) 87 CA2d 769, 771, 197 P2d 566 (judgment reversed because no grounds for equitable lien). In contrast, the court may impose a lien but order that a sale not take place unless a specified event occurs, such as the plaintiff's being forced to pay money to a third party. See *Beckman v Mayhew* (1975) 49 CA3d 529, 122 CR 604, discussed in §15.81.

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§15.67 2. Enforcement on Voluntary Sale

The court may decide that a fairer result to the defendant is not to order an immediate, involuntary sale, but instead have the plaintiff wait to collect until the property is sold in the defendant's usual course of business. See *Jones v Sacramento Sav. & Loan Ass'n* (1967) 248 CA2d 522, 531, 56 CR 741. A delayed sale might be especially appropriate if the defendant is not a conscious wrongdoer and an immediate sale would cause undue hardship to the defendant. Restatement (First) of Restitution §161 (1937).

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§15.68 3. Other Methods of Enforcement

The Restatement suggests other possible methods of enforcement the court might impose, such as directing that the defendant obtain a loan on the property and reimburse the plaintiff from the proceeds. Alternatively, the court might permit the plaintiff restitution from rentals from the property. Restatement (First) of Restitution §161 (1937).

If an equitable lien is imposed because the parties intended, but failed, to perfect a written security interest, it seems logical that the court would probably enforce whatever terms of repayment had been agreed to by the parties. See authorities discussed in §15.72.

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§15.69 4. Deficiency Judgment

An equally important issue is whether the defendant will be liable for a deficiency if the proceeds of sale of the property are insufficient to pay off the lien. Absent a court order to the contrary, the plaintiff may hold the defendant personally liable for the balance of the claim. *Jud Whitehead Heater Co. v Obler* (1952) 111 CA2d 861, 870, 245 P2d 608; Restatement (First) of Restitution §202 (1937). This characteristic of an equitable lien is one of its benefits as a remedy. See §15.76. Courts may, but need not, provide for a deficiency judgment by coupling the decree establishing the lien with a money judgment against the defendant, such judgment to be utilized only in the event there is a deficiency after the lien is foreclosed. See *Jud Whitehead Heater Co. v Obler* (1952) 111 CA2d 861, 870, 245 P2d 608. See also California Mortgages, Deeds of Trust, and Foreclosure Litigation, chap 3 (4th ed Cal CEB 2009). As to defendants who are innocent donees of property on which an equitable lien is imposed, it is usual for the court to order that no deficiency may be obtained if the foreclosure of the lien fails to produce the entire amount due. See *Jud Whitehead Heater Co. v Obler* (1952) 111 CA2d 861, 870, 245 P2d 608.

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§15.70 D. Necessity of Res

Equitable liens may be imposed only if the plaintiff can point to actual property that is subject to the lien. If the plaintiff attempts to establish an equitable lien on real property on the basis of the intention of the parties (see §15.73), the plaintiff must show that the parties intended to make some particular property the security for a debt or other obligation before an equitable lien can attach to that property. *Holder v Williams* (1959) 167 CA2d 313, 316, 334 P2d 291. See also *Coast Bank v Minderhout* (1964) 61 C2d 311, 315, 38 CR 505, overruled on other grounds in *Wellenkamp v Bank of America* (1978) 21 C3d 943, 953, 148 CR 379.

If the equitable lien is sought to prevent the unjust enrichment of the defendant, the plaintiff must make the same showing that must be made with a constructive trust, *i.e.,* that the plaintiff's property was obtained by the defendant under circumstances that constitute unjust enrichment (see §15.75), and that the plaintiff seeks an equitable lien against that property.

Furthermore, the tracing rules applicable to constructive trusts (see §§15.21-15.24) also apply to equitable liens. Therefore, the plaintiff may impose an equitable lien on real property owned by the defendant when that real property was not the property taken from the plaintiff if the plaintiff can *trace* (or follow) the property to that new asset.

EXAMPLE: Defendant embezzles funds from plaintiff and uses those funds as part consideration for the purchase of real property acquired in defendant's name. Plaintiff is entitled to an equitable lien on that property because the funds can be traced to it. *Jud Whitehead Heater Co. v Obler* (1952) 111 CA2d 861, 245 P2d 608; Restatement (First) of Restitution §202 (1937).

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§15.71 E. Examples: Equitable Lien Imposed

Although courts have expressed in various words the categories of cases in which equitable liens are proper (see *Grappo v Coventry Fin. Corp.* (1991) 235 CA3d 496, 509, 286 CR 714; *Jones v Sacramento Sav. & Loan Ass'n* (1967) 248 CA2d 522, 529, 56 CR 741), generally equitable liens are imposed when:

- The parties erroneously created a defective security agreement in consideration of a loan (see §15.72);
- Despite the lack of any formal mortgage or deed of trust, it is apparent that the parties intended to create a security interest in property or intended to make real property security for an obligation (see §15.73); and
- Absent any agreement, it is necessary to prevent unjust enrichment (see §15.75).

In the first two situations, the parties intended to create a lien. In the third situation, the parties did not intend to create a lien.

Although the intent of the parties may differ, the three situations often occur together. For example, an equitable lien imposed because a lender advanced money on the basis of a defectively created written security instrument may be viewed as a specific application of the general doctrine of equity that permits imposition of an equitable lien when the claimant's expenditure has benefited another's property under circumstances entitling the claimant to restitution. *Jones v Sacramento Sav. & Loan Ass'n* (1967) 248 CA2d 522, 529, 56 CR 741.

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§15.72 1. Defectively Created Security Interest

The court may impose an equitable lien on property when the parties have attempted, but failed, to create a security interest by an express security agreement in writing, such as a mortgage or deed of trust. *Burns v Peters* (1936) 5 C2d 619, 55 P2d 1182. See *Kaiser Indus. Corp. v Taylor* (1971) 17 CA3d 346, 94 CR 773. In this situation, the parties intend that the property stand as security for a debt or obligation, but the security agreement is defective and not legally enforceable. The court impresses the equitable lien to carry out the intent of the parties.

The controlling factual question, therefore, is whether or not the parties intended to make the property security for the indebtedness. 17 CA3d at 351. Sometimes the intent is clear. For example, in *Burns v Peters, supra,* a lender and borrower executed and recorded a deed of trust that may have been irregular in certain respects. The parties to the instrument treated it as valid as between themselves. Because of this intent, the court rejected a claim by a subsequent attaching creditor seeking to invalidate the instrument, and held that even if the instrument was not construed to be sufficient as a deed of trust, an equitable lien was created.

One factor that the courts may use to determine intent is the relationship of the parties. If the parties are sophisticated drafters of loans and mortgages and are familiar with the methods of creating a legal security interest yet fail to do so, the court will not be as willing to impose an equitable lien as in cases with inexperienced parties attempting to draft homemade security instruments that fall short of the legal requirements. See *Kaiser Indus. Corp. v Taylor* (1971) 17 CA3d 346, 351, 94 CR 773.

EXAMPLE: In *Tahoe Nat'l Bank v Phillips* (1971) 4 C3d 11, 92 CR 704, the court refused to grant an equitable lien in favor of a bank that deliberately chose to use a standardized form requiring the assignment of rents and a covenant against conveyances rather than a properly executed mortgage agreement. Given the bank's experience in mortgages and the fact that it chose not to utilize a standard form, the court did not believe the bank's later claim that it intended the document actually used to create a security interest.

In *Kaiser Indus. Corp. v Taylor, supra,* however, the court stressed the relationship of the parties as a private creditor and debtor as distinguished from an experienced lending institution and its borrower, and imposed an equitable lien because the parties intended the debt to be secured but failed to meet the required formalities. For further discussion of real property security agreements and their creation and enforcement, see California Real Estate Finance Practice: Strategies and Forms (Cal CEB 2000); California Mortgages, Deeds of Trust, and Foreclosure Litigation (4th ed Cal CEB 2009).

Improperly prepared mortgages and deeds of trust are not the only types of ineffective security agreements that may give rise to an equitable lien. For example, a court based an equitable lien on a debtor's letter instructing a title company not to transfer or encumber the debtor's interest in certain real property (that was subject to a holding agreement) without the creditor's consent until the promissory note was paid in full. *Kaiser Indus. Corp. v Taylor* (1971) 17 CA3d 346, 94 CR 773. In another case, the court awarded an equitable lien giving priority to a bank's construction loan that failed to achieve priority under a subordination agreement contained in a prior purchase money trust deed. *Jones v Sacramento Sav. & Loan Ass'n* (1967) 248 CA2d 522, 56 CR 741.

It is not necessary that the instrument purporting to create a security interest state that it is doing so, as long as the instrument sufficiently implies that it is intended to be a security agreement. *Kaiser Indus. Corp. v Taylor* (1971) 17 CA3d 346, 351, 94 CR 773. Also, the actual property subject to the security agreement need not be described in the agreement, as long as it is sufficiently referenced by the parties. *Higgins v Manson* (1899) 126 C 467, 58 P 907 (security agreement referenced a government patent number and date). (But to establish lien priority through recordation, the property should be sufficiently described in the recorded document. See Real Estate Finance §4.7)

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2. Intent to Secure Obligation With Property Interest

§15.73 a. Evidence of Intent Required

Even if the parties did not attempt to formally document a security interest in writing (see §15.72), an equitable lien may be imposed on specific property for the benefit of the claimant if the parties intended that the property stand as security for a debt or obligation. See cases cited in *Grappo v Coventry Fin. Corp.* (1991) 235 CA3d 496, 509, 286 CR 714; Restatement of Restitution §161 (1937).

The crucial factor is that the parties intend that the debt be secured by the specific property. *Lentz v Lentz* (1968) 267 CA2d 891, 894, 73 CR 686. This may occur in a wide variety of situations.

EXAMPLE: In *Lentz,* the plaintiff/second wife alleged that the husband and first wife had intended their real property to stand as primary security for a loan obtained from a life insurance company. On dissolution of their marriage, the first wife obtained title to the property. On the husband's death, the insurance company deducted the balance due on the loan from insurance proceeds owing to the second wife. The court held that the second wife had a triable claim for the imposition of an equitable lien on the property to the extent of the amount deducted. See also *Dodd v Cantwell* (1960) 179 CA2d 727, 4 CR 113, discussed in §15.74.

Absent an intent to use the subject property as security for an obligation, an equitable lien will not be imposed. Thus, when one person buys or improves property with funds loaned by another, the lender is not entitled to an equitable lien on the property unless there is an agreement between the lender and the transferee that a lien exists. *Hicks v Bridges* (1957) 152 CA2d 146, 148, 313 P2d 15. For example, in *Grappo v Coventry Fin. Corp.* (1991) 235 CA3d 496, 510, 286 CR 714, a husband loaned his estranged wife money to build a residence on her separate real property. Afterward, the husband repeatedly asked the wife for a deed of trust as security for the loan, but she refused. A mortgage company to whom the wife had later given a security interest foreclosed. The husband's claim to a prior equitable lien was denied because there was no intent by the wife to create a security interest in the property for his benefit. (Note: The court also considered whether an equitable lien should be imposed on the grounds of prevention of the unjust enrichment of the wife (see §15.75) and rejected it.)

Similarly, the court refused to impose an equitable lien when the plaintiffs loaned money to the defendants to enable them to purchase an interest in real property and the defendants agreed to repay the loan if and when a separate parcel of property owned by the defendants was sold. *Reid v Gillespie* (1948) 87 CA2d 769, 197 P2d 566. When the plaintiffs brought an action to recover the debt and to impose a lien on the newly purchased property, the court held that a money judgment against the defendants was appropriate, but not the imposition of an equitable lien, because there was no evidence that the parties intended to create such a lien on that property.

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§15.74 b. Payment of Debt From Sale Proceeds

When a debtor intends to pay a debt from the *sale* of real property and the court finds that the parties intended that the property be used as security for the debt, the claimant may obtain an equitable lien on the property even if the property was not sold. Thus, in *Dodd v Cantwell* (1960) 179 CA2d 727, 4 CR 113, the court found that the parties intended that a ranch secure an obligation to pay wages to plaintiffs, who worked for the owners for over 30 years without pay in reliance on the promise by the owners that the plaintiffs would be paid when the ranch was sold. The owners never sold the ranch, but instead gave it to their niece, who thereafter discharged the plaintiffs without paying them their owed wages. The court imposed an equitable lien on the property for the value of the services rendered because it was the express intent of the parties that the ranch be security for the debt. In reaching its decision, the court found that a confidential relationship existed between the plaintiffs and the owners and that the plaintiffs relied on the owners' promise.

In contrast, a promise to pay a debt out of a particular fund, without more, will not create an equitable lien on that fund (*Farmers Ins. Exch. v Zerin* (1997) 53 CA4th 445, 455, 61 CR2d 707), nor on the property itself before sale. *Morrison v Havens* (1938) 24 CA2d 504, 75 P2d 515. In *Morrison,* the plaintiff's assignor performed construction work on real property owned by the defendant's deceased father, who had left a handwritten memo indicating his intent that the work be paid for out of proceeds from the sale of the property. While the plaintiff could have presented a creditor's claim for money against the estate, the court refused to impose an equitable lien on the real property or the proceeds of sale. The court said that an agreement to pay a debt out of a particular fund such as sales proceeds does not create a lien upon the realty or upon such fund when the intention of the obligor appears to be merely to acknowledge a personal obligation rather than to have the property stand as security for the debt.

However, a mere promise to pay from a specific fund may suffice to create an equitable lien if considerations of detrimental reliance or unjust enrichment are implicated. *Farmers Ins. Exch. v Zerin* (1997) 53 CA4th 445, 455, 61 CR2d 707. Both of these factors were present in *Dodd v Cantwell* (1960) 179 CA2d 727, 4 CR 113, discussed above. On equitable liens created to prevent unjust enrichment, see §15.75.

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§15.75 3. To Prevent Unjust Enrichment

Equitable liens are not confined to situations involving attempts to create security interests. In many cases, courts impose liens even if it is clear that the parties did not intend to make the property security for an obligation. See, *e.g., Jones v Sacramento Sav. & Loan Ass'n* (1967) 248 CA2d 522, 529, 56 CR 741. An equitable lien will arise any time a court, exercising its equitable powers, determines that it is appropriate for property of the defendant to be used as security for a claim by the plaintiff on the ground that otherwise the defendant would be unjustly enriched. 248 CA2d at 529; Restatement (First) of Restitution §161 (1937).

This type of equitable lien is analogous to a constructive trust. It is a way for the plaintiff to reach property in which the defendant has legal title but the plaintiff has an equitable interest. As with a constructive trust, the object of the lien is to prevent the unjust enrichment of the defendant. Restatement (First) of Restitution §161 (1937). See, *e.g., Rivero v Thomas* (1948) 86 CA2d 225, 237, 194 P2d 533.

The grounds for imposition of an equitable lien to prevent unjust enrichment are the same as for imposing a constructive trust. See §§15.6-15.20, 15.76. If a constructive trust would be proper, so would an equitable lien. However, the reverse is not true. An equitable lien may be the proper remedy when a constructive trust would not be appropriate, such as when the court does not want to give the plaintiff the entire property. See §§15.77-15.80. A court may also use an equitable lien to fashion a fair remedy that specifies the timing or conditions of collection of the judgment. See §§15.64-15.69, 15.81.

Trial courts have great flexibility in creating equitable liens. They are imposed in a wide variety of situations to do justice and prevent unjust enrichment, and the courts can tailor the lien to achieve an equitable result for the parties. See *Rivero v Thomas* (1948) 86 CA2d 225, 238, 194 P2d 533. Although certainly not an exhaustive list, the situations described in §§15.76-15.81 illustrate the types of cases where courts have imposed equitable liens. It is of course assumed in all cited examples that the plaintiff's assets were used by the defendant under circumstances entitling the plaintiff to restitution, and that the plaintiff can trace assets to the property on which the plaintiff seeks to impose the equitable lien.

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§15.76 a. If Constructive Trust Would Also Be Proper

A court may grant an equitable lien if a constructive trust would also be a proper remedy. *Rivero v Thomas* (1948) 86 CA2d 225, 238, 194 P2d 533; *Jud Whitehead Heater Co. v Obler* (1952) 111 CA2d 861, 873, 245 P2d 608. The choice of which remedy to give is within the discretion of the court. In *Rivero v Thomas* (1948) 86 CA2d 225, 194 P2d 533, the defendant, who was in a confidential relationship with the plaintiff, had wrongfully used the plaintiff's funds to purchase the real property in question. The court could have imposed a constructive trust declaring that the defendant held title to the property in trust for the plaintiff. See §§15.11, 15.19. Instead, the trial court imposed a lien on the property to secure a judgment for the amount of money misappropriated, plus interest. The appellate court held it was proper for the court to decree an equitable lien instead of a constructive trust because the trial court has wide discretionary power over the type of equitable relief awarded. *Rivero v Thomas* (1948) 86 CA2d 225, 238, 194 P2d 533. The court in dicta in *Jud Whitehead Heater Co. v Obler* (1952) 111 CA2d 861, 873, 245 P2d 608, spoke of the choice of remedy being at the plaintiff's option.

NOTE: Whether the court imposes a constructive trust or an equitable lien is significant. Under a constructive trust, the plaintiff obtains the property itself; *i.e.,* the plaintiff ultimately becomes the legal owner. The property is the plaintiff's sole remedy. See §15.27. In contrast, after an equitable lien is imposed on the property, the plaintiff may foreclose on the property. If the proceeds of the foreclosure sale exceed the amount of the debt, the excess proceeds will go to the defendant. If the proceeds of the sale do not satisfy the debt, in most cases the judgment will have provided for an unsecured deficiency judgment against the defendant personally. See §15.69.

Therefore, in choosing the remedy, the plaintiff should look at the value of the real property at the time of the lawsuit and the amount of the potential equitable lien. An equitable lien is usually granted to secure the amount the plaintiff lost (phrased in terms of the amount of the defendant's unjust enrichment). If the property has appreciated in value to more than the amount of the potential equitable lien, the plaintiff should consider seeking a constructive trust. In this way the plaintiff will reap one of the benefits of a constructive trust—the ability to obtain an asset that is worth more than what the plaintiff lost. See §15.28.

However, if the property has decreased in value to less than the amount of the potential equitable lien, the plaintiff probably will not want a constructive trust. An equitable lien would be more advantageous, because even if the proceeds of the foreclosure sale do not satisfy the debt, the plaintiff may obtain a deficiency judgment that the plaintiff can attempt to collect as an unsecured judgment creditor from other assets owned presently or in the future by the defendant.

PRACTICE TIP: In the event that property values are unknown when the complaint is filed, the complaint may plead for alternative relief (*i.e.,* request both a constructive trust and an equitable lien in separate causes of action). Before trial, the plaintiff will have done enough investigation to decide which one will be more suitable to pursue.

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§15.77 b. If Constructive Trust Would Not Be Proper

An equitable lien may be awarded in situations in which it would be inequitable to require the defendant to transfer the entire property to the plaintiff as is done with a constructive trust. See §§15.78-15.80.

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§15.78 (1) Property Not Acquired Solely With Plaintiff's Assets

A constructive trust will not be imposed on an entire parcel of property if that property was acquired only partly with assets or funds traceable to the plaintiff. The flexibility of equitable remedies allows the trial court to use different approaches in this situation. Some courts impose an equitable lien on the property to secure the amount taken from the plaintiff. See *Jud Whitehead Heater Co. v Obler* (1952) 111 CA2d 861, 869, 245 P2d 608.

Other courts impose a "pro rata" constructive trust. For example, in *Monica v Pelicas* (1955) 131 CA2d 700, 704, 281 P2d 269, defendants wrongfully used $6448 of the plaintiff's money to purchase property having a total purchase price of $15,125. The court did not give the plaintiff an equitable lien but, rather, declared that the plaintiff was and had been since the date of purchase the equitable owner of an *undivided fractional interest* in the property, measured by the ratio between the amount of the plaintiff's money used ($6448) and the amount of the entire purchase price ($15,125). See also *Title Ins. & Trust Co. v Ingersoll* (1910) 158 C 474, 481, 111 P 360.

According to the Restatement, if the defendant acquired the plaintiff's funds that went into the purchase innocently, then an equitable lien is the appropriate remedy. If the defendant is a conscious wrongdoer, then the plaintiff may choose whether to impose a "pro rata" constructive trust or an equitable lien. Restatement (First) of Restitution §210 (1937). In *Monica v Pelicas, supra,* the court did not base the awarded remedy on this distinction.

PRACTICE TIP: If the property has increased in value, the plaintiff is better off getting a constructive trust over a fractional share of the property. If the property has decreased in value, the plaintiff will prefer an equitable lien for the full amount taken.

EXAMPLE: Assume property is purchased by defendant for $100,000 using $50,000 of defendant's own money and $50,000 misappropriated from plaintiff. If at the time of the lawsuit the property has increased in value to $120,000, plaintiff will prefer getting a constructive trust over an undivided half interest in the property because that is worth $60,000. An equitable lien for the amount taken would give plaintiff only $50,000. However, if the property had decreased in value to $80,000, the equitable lien would still be in the amount of $50,000, but a constructive trust over an undivided half interest in the property would give plaintiff an asset worth only $40,000.

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§15.79 (2) Improvements Made to Defendant's Property

Another application of the equitable lien remedy is to prevent unjust enrichment when improvements are made to the defendant's real property with the plaintiff's assets or money. *Jones v Sacramento Sav. & Loan Ass'n* (1967) 248 CA2d 522, 530, 56 CR 741. A constructive trust compelling the defendant to transfer the land to the plaintiff is not proper in this situation, because the total value of the defendant's real property is not traceable to the plaintiff's funds. The defendant's unjust enrichment is only for the value of the improvements, not the value of the entire property already owned by the defendant. Therefore, an equitable lien is the appropriate remedy. Restatement (First) of Restitution §§161, 206 (1937).

According to the Restatement, the amount of the lien is dependent on how the defendant obtained the plaintiff's assets used to make the improvements. If the defendant used fraud, duress, or undue influence, the plaintiff is entitled to a lien for the amount of the value of his services or expenditures even if the value of the defendant's property has not increased by this amount. When, however, the improvements or the funds are procured by mistake and the defendant is not at fault, the plaintiff is entitled only to an equitable lien in the amount by which the value of the property is enhanced. Restatement (First) of Restitution §170, Comment b (1937).

PRACTICE TIP: When goods or services obtained by fraudulent conduct are used to improve defendant's real property and the resulting increase in the property's value is greater than the value of plaintiff's goods or services, the plaintiff might try obtaining a "pro rata" constructive trust by analogy to the cases awarding this remedy when property is purchased only partly with plaintiff's funds. Although no cases have considered this issue, plaintiff could argue that this remedy is necessary to avoid unjust enrichment to the defendant. See Practice Tip in §15.78.

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§15.80 (3) Other Situations Not Justifying Constructive Trust

Courts exercise their discretionary power and choose to impose equitable liens rather than constructive trusts in many situations that do not in equity justify a constructive trust. For example, in *West v Stainback* (1952) 108 CA2d 806, 818, 240 P2d 366, the court indicated that the plaintiff was entitled to an equitable restitutionary remedy, but did not think the plaintiff was entitled to the entire property through a constructive trust. In that case, a woman had promised her son-in-law, the plaintiff, that she would leave him in her will the equivalent of what she received from the estate of her daughter. Later she promised the son-in-law that she would carry out this first promise by purchasing property that she would leave to him on her death. She purchased property with a down payment of $30,000, which the court found to be the equivalent amount of the daughter's estate, and later used other funds to pay the remainder of the purchase price. Before the woman died, her niece, the defendant, used undue influence to procure the property for herself. The plaintiff wanted a constructive trust imposed on the property. Instead, the court imposed an equitable lien in the amount of $30,000, even though no money belonging to the woman went towards the purchase price. The court reasoned that the woman's promise was to leave the plaintiff the equivalent of the funds received from the estate of her daughter ($30,000). He was entitled to nothing more. Thus, the plaintiff was given an equitable lien for $30,000 secured by the property, not a constructive trust on the entire property, which was now worth more than $30,000.

The Restatement sets forth other circumstances under which an equitable lien but not a constructive trust would be proper because the defendant should not have to give up any profit made on real property that has appreciated in value. For example, the defendant may innocently acquire the plaintiff's property under circumstances warranting restitution and then, still having no notice, exchange it for real property. Restatement (First) of Restitution §203 (1937). Another example is the situation in which the defendant is an innocent donee who has been transferred property in which the plaintiff has an equitable interest and who has then innocently exchanged that property for other real property. Restatement (First) of Restitution §204 (1937). There are no reported California real property cases dealing with these situations.

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§15.81 F. Equitable Lien May Be Imposed With Conditions

An equitable lien is often awarded because its flexibility allows the court to specifically tailor the terms of the lien to balance the equities under the facts of the case. For example, in *Beckman v Mayhew* (1975) 49 CA3d 529, 534, 122 CR 604, the court granted an equitable lien that could be foreclosed only if a specified event occurred. In *Beckman,* the plaintiff cosigned a note with the defendant for money lent to improve real property owned by the defendant where they lived together. The defendant did not intend for the plaintiff to assume personal liability but only asked her to sign the note as protection for the lender in case the defendant died before repayment and the plaintiff inherited the property. Because the plaintiff acquired no part of the real property when the parties' relationship ended, the court awarded the plaintiff an equitable lien on the property to protect her in the event that she might be called upon to pay any part of the debt in the future.

On other possible terms and conditions of foreclosure under equitable lien judgments, see §§15.64-15.69.

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G. Litigation Concerns

§15.82 1. Statute of Frauds

Because an equitable lien is created by operation of law, arguably the statute of frauds is not an appropriate defense. See §§15.33, 15.55.

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§15.83 2. Statute of Limitations

By analogy to the equitable remedies of a constructive trust and a resulting trust, probably in most cases the applicable statute of limitations for a suit to impose an equitable lien is the 4-year period set forth in CCP §343 for "actions not otherwise provided for." However, as with some constructive trust cases, the court might look to the underlying claim for relief and apply the 3-year statute of CCP §338(d) if the case involves fraud. See §15.34. In *Dodd v Cantwell* (1960) 179 CA2d 727, 735, 4 CR 113, the defendant pleaded the 2-year statute of CCP §339, but the court held that period had been met without deciding whether that was the appropriate statute of limitations.

If a suit for an equitable lien is brought on grounds for which a constructive trust could be imposed, the cause of action will accrue in the same fashion. See §15.35. In cases in which an equitable lien is imposed because of the claimant's reliance on the intention of the other party to promise property as security for a debt or obligation, the statute of limitations does not begin to run until there has been a repudiation of that promise. For example, the suit in *Dodd v Cantwell* (1960) 179 CA2d at 735, in which the court imposed an equitable lien on a ranch that was promised as security for the wages due to ranch hands over a 30-year period, was not barred by the statute of limitations, because the statute did not begin to run until there was a repudiation of the trust, which did not occur until the ranch was transferred to the owners' niece.

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§15.84 3. Equitable Defenses

A lawsuit to impress an equitable lien is subject to the defenses applicable to all suits seeking an equitable remedy, such as unclean hands and laches. See *Jones v Sacramento Sav. & Loan Ass'n* (1967) 248 CA2d 522, 528, 56 CR 741. See also §§15.36-15.38. On arguments for burden of proof in equitable lien actions, see §§15.39, 15.57.

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§15.85 4. Lis Pendens

A plaintiff seeking to impose an equitable lien on real property may want to record a lis pendens to give notice to subsequent purchasers. The law regarding the propriety of a lis pendens in constructive trust cases is equally applicable to cases in which the plaintiff is seeking an equitable lien. *Okuda v Superior Court* (1983) 144 CA3d 135, 141, 192 CR 388. The court in Okuda said that an action to establish or foreclose an equitable lien is clearly one that affects the title to or the right to possession of real property. 144 CA3d at 141. For a complete discussion and contrary views, see §§13.67, 13.69, 15.40-15.46.

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Prentice v North Am. Title Guar. Corp. (1963) 59 C2d 618, 30 CR 821: §§3.86, 4.49D, 5.30
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Preston v Ferrer (2008) 552 US 346, 169 L Ed 2d 917, 128 S Ct 978: §14.38D
Preston v Goldman (1986) 42 C3d 108, 227 CR 817: §§3.53, 11.50, 12.33, 12.57
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Prima Paint Corp. v Flood & Conklin Mfg. Co. (1967) 388 US 395, 18 L Ed 2d 1270, 87 S Ct 1801: §14.42C
Prince v PG&E (2009) 45 C4th 1151, 90 CR3d 732: §§3.89C-3.89D
Private Investors, Inc. v Homestake Mining Co. (1936) 11 CA2d 488, 54 P2d 535: §5.50
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Razzano v Kent (1947) 78 CA2d 254, 177 P2d 612: §§11.26, 12.85-12.86
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Reveles v Toyota by the Bay (1997) 57 CA4th 1139, 67 CR2d 543, disapproved on other grounds in Snukal v Flightways Mfg., Inc. (2000) 23 C4th 754, 98 CR2d 1: §1.12
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Ring, People v (1937) 26 CA2d Supp 768, 70 P2d 281: §4.25
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Robinson Helicopter Co. v Dana Corp. (2004) 34 C4th 979, 22 CR3d 352: §§3.8, 3.55, 12.36, 12.87
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Table of References

Advising California Common Interest Communities (Cal CEB 2003): §§12.3A, 12.10, 12.22A, 14.3-14.4
California Administrative Hearing Practice (2d ed Cal CEB 1997): §14.6
California Attorney Fee Awards (3d ed Cal CEB 2010): §§1.46, 1.49, 1.57, 2.11, 2.46, 3.56, 4.49, 4.49B, 4.49D, 5.30, 7.41, 11.32, 11.49, 12.71
California Attorney's Guide to Damages (2d ed Cal CEB 2004): §§ 6.34, 11.1, 11.28-11.30, 11.32, 11.50
California Civil Appellate Practice (3d ed Cal CEB 1996): §§5.50, 8.90
California Civil Discovery Practice (4th ed Cal CEB 2006): §13.106
California Civil Litigation Forms Manual. 2 vols (Cal CEB 1980): §§8.51-8.52, 8.59
California Civil Procedure Before Trial. 3 vols (4th ed Cal CEB 2004): §§1.39-1.41, 1.45, 2.5, 2.13-2.14, 2.17, 2.32, 2.46, 3.10, 3.36, 3.88A, 3.91-3.92, 4.36-4.37, 4.91, 5.5, 5.23-5.26, 5.34, 5.39, 5.47, 6.29, 6.34, 7.11, 7.14, 7.18, 7.25, 7.35, 7.38, 7.41-7.42, 7.49, 7.51, 8.5, 8.21-8.23, 8.32, 8.36-8.37, 8.39, 8.49, 8.51-8.52, 8.54-8.55, 8.59, 8.61, 8.63-8.64, 8.78, 9.19-9.20, 10.7, 10.12, 10.20, 10.22-10.26, 10.31, 10.34, 11.45, 11.51, 13.6, 13.23, 13.26, 13.31, 13.34, 13.52, 13.88, 13.90, 13.92, 13.107, 13.112, 13.116, 14.30, 14.41
California Civil Writ Practice. 2 vols (4th ed Cal CEB 2008): §§5.50, 13.106
California Construction Contracts, Defects, and Litigation (Cal CEB 2008): §§3.89, 11.4, 11.40A, 12.2-12.3A, 12.9A-12.10, 12.12-12.13, 12.15, 12.22A-12.23, 12.26-12.27, 12.37, 12.50, 14.4, 14.4B, 14.11-14.13, 14.22, 14.26, 14.30, 14.39-14.40, 14.42D, 14.43, 14.50, 14.52
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California Elder Law Litigation: An Advocate's Guide (Cal CEB 2003): §§1.8B, 1.15, 6.9, 6.19, 6.22, 6.28, 6.41
California Elder Law Resources, Benefits, and Planning: An Advocate's Guide (Cal CEB 2003): §1.15
California Eviction Defense Manual. 2 vols (2d ed Cal CEB 1993): §§5.3, 10.4, 11.50
California Expert Witness Guide. 4 vols (2d ed Cal CEB 1991): §12.2
California Government Tort Liability Practice (4th ed Cal CEB 1999): §12.3
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California Law of Contracts (Cal CEB 2007): §§1.54A, 3.19, 4.1, 4.3, 4.24, 4.52
California Liability Insurance Practice: Claims & Litigation. 2 vols (Cal CEB 1991): §§1.3, 1.55, 2.8, 3.4, 11.1, 12.2, 14.13
California Mechanics' Liens and Related Construction Remedies (3d ed Cal CEB 1998): §§9.15, 12.37-12.38, 13.76, 14.13, 14.26, 14.50
California Mortgages, Deeds of Trust, and Foreclosure Litigation (4th ed Cal CEB 2009): §§1.7, 1.8A-1.8B, 1.28, 1.54A, 3.33B, 3.67, 3.74-3.75, 3.88, 4.1, 4.26, 4.64, 4.81, 4.83-4.85, 4.89-4.90, 4.90A, 4.92, 5.5, 5.41, 6.9, 6.11A, 8.5, 10.4, 10.37, 11.50, 12.55, 13.5, 13.10, 13.73, 13.84, 15.61-15.62, 15.69, 15.72
California Real Estate Brokers: Law and Litigation (Cal CEB 2009): §§3.7A, 3.15, 3.17, 3.21, 3.27, 3.30, 3.32, 3.32A, 3.32C, 3.32E-3.32F, 3.33, 3.35, 3.57A, 3.72, 3.90, 12.34, 12.46
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California Real Property Practice Forms Manual (Cal CEB 1988): §§14.16-14.17
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California Subdivision Map Act and the Development Process (2d ed Cal CEB 2001): §§4.3, 8.18
California Title Insurance Practice (2d ed Cal CEB 1997): §§1.3, 1.5, 1.28-1.29, 1.44, 1.55, 2.8, 3.75, 5.9, 5.27, 5.30, 5.49, 7.10, 7.24, 7.51, 8.20, 9.1, 9.4, 9.5-9.6, 9.16, 9.18-9.19, 9.21, 9.23, 10.25, 10.42, 13.27, 13.33, 13.40, 14.13, 14.23, 14.26, 14.40, 14.42D, 14.43, 14.50
California Tort Damages (2d ed Cal CEB 2002): §§3.53, 11.30, 11.50, 12.56, 12.68, 12.87
California Tort Guide (3d ed Cal CEB 1996): §§3.35, 12.83, 12.9A
California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995): §§1.57, 2.41, 3.10, 6.42, 8.69, 10.44, 13.90
California Trust and Probate Litigation (Cal CEB 1999): §15.53
Condemnation Practice in California (3d ed Cal CEB 2005): §§11.16A, 12.3, 13.20
Debt Collection Practice in California Practice (2d ed Cal CEB 1999): §§10.45, 15.45
Fee Agreement Forms Manual (2d ed Cal CEB 2007): §13.64
Forming California Common Interest Developments (Cal CEB 2004): §§1.25, 8.16
Handling Mold Litigation in California (Cal CEB Action Guide September 2009): §§3.31, 11.4
Handling Real Property Sales Transactions (Cal CEB Action Guide March 2009): §§4.1, 3.15, 3.30-3.32, 3.33A, 11.25, 11.50, 12.43
Jefferson, Bernard. Jefferson's California Evidence Benchbook. 2 vols (4th ed CJA-CEB 2009): §1.13

Lincoln, Abraham. Notes for a Law Lecture, Abraham Lincoln Online, Speeches and Writings (1850), Source: The Collected Works of Abraham Lincoln, Vol. 2, Basler, ed. Springfield, Ill., The Abraham Lincoln Association: §14.1
Office Leasing: Drafting and Negotiating the Lease. 2 vols (Cal CEB 1996): §§14.19
Powell, Richard R., The Law of Real Property. New York, Matthew Bender, 1971: §12.76
Practice Under the California Family Code: Dissolution, Legal Separation, Nullity (Cal CEB Annual): §8.13
Schwartz, Victor E. Comparative Negligence. Charlottesville, Va., Michie, 4th ed 2002: §§12.56, 12.83
Secured Transactions in California Commercial Law Practice (2d ed Cal CEB 2001): §1.54A
Smith, Robert M. ADR for Financial Institutions. Deerfield, Ill., Clark Boardman Callaghan, 2d ed 1998: §14.15
Weinman, Lynne Ann. Agency Ethics, Trust Funds and Fair Housing: Continuing Education in Real Estate. Chicago, Dearborn Financial, 1997: §14.38A
West Group. Restatement (Second) of Contracts. Eagan, Minn., 1981: §4.23
———. Restatement (First) of Restitution. Eagan, Minn., 1937: §§15.28, 15.33, 15.62, 15.64-15.65, 15.67-15.70, 15.73, 15.75, 15.78-15.80
———. Restatement (Second) of Torts. Eagan, Minn., 1965: §§11.17, 12.10
———. Restatement (Second) of Torts. Eagan, Minn., 1977: §§3.8, 9.1, 11.50, 12.77, 12.82
———. Restatement (Second) of Torts. Eagan, Minn., 1979: §§11.1, 11.6-11.7, 11.26, 11.36, 12.31, 12.76, 12.86
Witkin, Bernard E. California Procedure. Multivolume. San Francisco, Bancroft-Whitney, 4th ed 1997: §§1.40, 9.14
———. Summary of California Law, Multivolume. San Francisco, Bancroft-Whitney, 10th ed 2005-: §§1.6, 5.43, 11.1, 11.6, 11.17, 11.21, 11.28-11.29, 11.34, 11.43, 11.45, 12.56, 12.76, 13.13

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